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NEW

Abridgement of the Law.

BY MATTHEW BACON,

OF THE MIDDLE TEMPLE, ESQ.

THE SEVENTH EDITION, CORRECTED;

WITH LARGE ADDITIONS, INCLUDING THE LATEST STATUTES AND AUTHORITIES.

VOLUMES II. III. AND IV. (EXCEPT THE ADDENDA,)

By SIR HENRY GWILLIM,

OF THE MIDDLE TEMPLE, KNIGHT;

LATE ONE OF THE JUDGES OF HIS MAJESTY'S SUPREME COURT
AT MADRAS.

VOLUMES I. V. VI. VII. AND VIII. AND THE ADDENDA TO THE
OTHER VOLUMES,

By CHARLES EDWARD DODD,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

IN EIGHT VOLUMES.

VOL. II.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. AND W. T. CLARKE; LONGMAN, REES, ORME, BROWN, AND GREEN;
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1832.

25-5-454
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CARRIERS.

- (A) What Persons come under the Denomination of Carriers.
- (B) In what Cases a Carrier is chargeable for a Failure in his Duty.
- (C) Of his Interest in the Things delivered to his Charge.
- (D) Of the Regulations Carriers are under by Acts of Parliament, with respect to their Carriages, and the Prices they are to take.

(A) What Persons come under the Denomination of Carriers.

ALL persons carrying goods for hire, as (a) masters and owners of ships, lightermen, stage-coachmen, &c. come under the denomination of common carriers, and are chargeable on the (b) general custom of the realm, for their faults and mis-carriages.

Co. Lit. 89.
Roll. Abr. 2.
338. (a) For
this vide head
of Merchant
and Merchan-
chandize, and

Master and Servant. (b) And though a declaration against a carrier may be good without reciting the general custom, yet the best and most usual way is to bring a special action on the case, and declare *quod secundum legem & consuetudinem Angliæ, &c.* Sid. 245. Hard. 485. 486. This custom is not confined to a particular place, but extends to all the king's people. 3 Mod. 227. And therefore, in truth, it is the common law. Hob. 18. [And being so, it is at least unnecessary, if not improper, to recite it in the declaration. 1 Wils. 281.] || The declaration on the custom of the realm is the same in effect with the declaration in *assumpsit*, equally *ex contractu*; the custom is a part of the contract; the law alike raises in it the promise to carry safely; and the action is alike abateable, if all the partners are not sued. Dale v. Hall, 1 Wils. 281. Buddle v. Wilson, 6 T. Rep. 309. || Carriers are liable in respect of the reward, and not of the hundred's being answerable over to them. Salk. 17. pl. 8. 143. Ld. Raym. 646. 5 Mod. 455. Carth. 487. Comyns, 100. [The true ground of their liability is, the public employment they exercise. 2 Ld. Raym. 917. 12 Mod. 487.]

(a) If he be a common carrier, though there be no agreement or

promise of payment, he shall recover his hire on a *quantum meruit*; and therefore liable. Also, a private person undertaking, without any reward, to carry my goods, shall answer for his own neglect; for, by taking the trust on himself, he is obliged to execute it; but, if the goods are misused by another, he is not liable. *Per Holt* Ch. Just. in *Cogg's* and *Barnard's* case, *Salk.* 26. pl. 12. 2 *Ld. Raym.* 909. 3 *Salk.* 11. *Vide* his argument at large, head of *Bailment, ante.*

Upshare v. Aidae, Comyns, 25. pl. 16. *Skin.* 625. *S. C.*

(b) But, if he carries goods as well as passengers for hire, then he is a common carrier, and shall be liable. *Lovett v. Hobbs.* 2 *Show. Rep.* 128. *Middleton v. Fowler,* *Salk.* 282. pl. 11. *S. P. per Holt.* (c) Ruled by *Holt* on evidence, and the plaintiff nonsuited. *Salk.* 282. pl. 11.

But the master of a stage-coach who (b) only carries passengers for hire, shall not be liable for the goods of his passengers that are lost; and therefore (c) where *A.* delivered a trunk to the driver or servant, who lost it out of his possession, it was holden, that the master was not liable in an action upon the case on the custom of the realm; for though the servant received money for it, yet that was but a gratuity; and the master shall not be chargeable with the acts of his servant, otherwise than as he acts in execution of the authority given him.

Lane v. Cotton, 1 *Ld. Raym.* 646. *Carth.* 487. 12 *Mod.* 482. *Whitfield v. Ld. Le Despencer,* *Cowp.* 754.

See *Law of Bailments*, 109, 110.

[The post-master general doth not come under the denomination of a carrier: he hath no hire; enters into no contract. The post-office is a branch of revenue, and a branch of police, created by act of parliament. The salary annexed to the office of post-master is for no other consideration, than the trouble of executing it. He is, therefore, not liable for any constructive negligence.]

(B) In what Cases Carrier chargeable for a Failure in his Duty.

Roll. Abr. 2. *Hob.* 17. *Cro. Ja.* 262.

(d) Though no common

carrier, yet, if he takes hire, he may be charged upon his special *assumpsit*. *Cro. Ja.* 262. *Sid.* 245. *Keb.* 852. (e) So, if damaged; and the declaration shall be good, though not particularly alleged how they were so. *Palm.* 523. *Herne's Plead.* 76, 77.

IF a man delivers goods to a (d) common carrier, to carry them to a certain place; if he (e) loses them, an action upon the case lies against him; for, by the common custom of the realm, he ought to carry them safely.

2 *Show. Rep.* 327.

(f) That an action will lie against a com-

mon ferryman, who refuses to carry passengers, *Hard.* 163. *sed arguendo.* *Vide Rob. Ent.* 103. a special declaration against a letter-carrier, for the non-delivery of a letter delivered out to him at the general post-office. (g) But, if the porter puts up the box of a passenger behind a stage-coach, and the master, as soon as he knows of it, says that he is already full, and refuses to take the charge of it, the master shall not be liable; ruled upon evidence. 2 *Show. Rep.* 128.

Also, if a (f) common carrier, who is offered his hire, and who hath (g) convenience; refuses to carry goods, he is liable to an action in the same manner as an inn-keeper who refuseth to entertain a guest, or a smith who refuseth to shoe a horse.

128. For this is the same case with an host who refuses his guest, his house being full, and yet the party says he will shift, &c. if he be robbed, the host is discharged; for which *vide* head of *Inns and Innkeepers*.

If a man delivers goods to a common (a) hoyman, who is a common carrier of goods, to carry them to a certain place, and pays him according to the custom for the carriage of them, and after for default of good keeping they are lost; an action upon the case lies against the hoyman; for by the common custom of the realm he ought to have kept and carried them safely.

Cro. Ja. 330.
Hob. 17. S. C.
adjudged.

(a) When goods of value are put into a lighter to be conveyed from

the ship to the quay, it is usual for the master to send a competent number of his men to look to the merchandize, so that if any of the goods are lost or embezzled, the master is answerable, and not the wharfinger; but, if such goods are sent aboard a ship, the wharfinger, at his peril, must take care to preserve them. Molloy, 212. Said to be ruled at *Guildhall*, per Holt Ch. Just. So, if he does not pay him, or make any agreement; for the carrier may have his *quantum meruit*. Cro. Jac. 263. Sid. 36. Bro. *Action on the Case*, 78. 2 Show. 81. 129:

If a man delivers goods to such common hoyman, to carry to a place, and after delivers them (being of good value) to another to keep safely in the boat, and does not discharge the hoyman, and after, they are lost through negligence, an action on the case lies against him.

Roll. Abr. 2.
Hob. 17. Cro.
Ja. 330. S. C. :

If *A.* delivers goods at *York* to *B.* (who is a water-carrier between *Hull* and *London*) to carry them from *Hull* to *London*; though the agreement is to carry the goods from *Hull* to *London*, and no mention is made of the carriage to *Hull*, yet if the goods are lost, *B.* shall answer for them; for upon his general receipt of them at *York*, he is liable.

Sid. 36.

[But, if *A.* delivers goods to *B.* (who is a common carrier between *C.* and *D.*) to be carried from *C.* to *D.*, and then forwarded to *E.*, and *B.* carries them to *D.*, and there puts them in his warehouse, in which they are destroyed by an accidental fire, before he hath an opportunity of forwarding them, *B.* shall not be liable.

Gartside v.
The Proprietors of the
Trent Navigation,
4 T. Rep.
581.

If *A.* delivers goods to *B.* to be carried from *C.* to *D.*, and *B.* charges and receives cartage of them to the consignee's house at *D.* from a warehouse there where they are usually unloaded, but which doth not belong to him; *B.* must answer for the goods if destroyed in the warehouse by an accidental fire. Nor will it vary the case at all, that he allows all the profits of the cartage to another person, and that that circumstance is known to the consignee.]

Hyde v. Trent
and Mersey
Navigation
Company, 5
T. Rep. 389.

If a merchant lades goods aboard a ship, to be transported at a reasonable reward of freight to be paid to the owners, and in the night-time, while the ship rides in the river *Thames*, notwithstanding a competent number of men are left aboard for the guard of the ship and goods, several persons, under the pretence of pressing seamen, seize on the men aboard, and take away the goods; an action will lie against the master; for, in effect, he is paid by the merchant; for the merchant pays the owners, and the owners pay the master; so that the money of the merchant is but handed over by them to the master. Adjudged and said, that though by the admiralty law, the master is

Vent. 190.
233. Mors
and Sluca, ad-
judged upon a
special verdict,
per totam Cur-
iam. Raym.
220. S. C.
3 Keb. 72. 112.
135. S. C.
Mod. 85. S. C.
ill reported.
2 Lev. 69. S. C.
1 Ld. Raym.

918. and 3 not chargeable *pro damno fatali*, as in the case of pirates, storm, Lev. 259. S.C. &c., where there is no negligence in him; yet, because the ship cited, and was *infra corpus comitatûs* (a), this case must not be measured Holt Ch. Just. by the rules of that law.

ter is chargeable in respect of his wages, and the proprietors in respect of the freight. Molloy, Bk. 2. c. 2. § 2. S.C. For he must see all things forth-coming which are delivered to him, let what will happen; the act of God, or an enemy, perils, and dangers of the sea only excepted; but for fire, thieves, &c. he must answer. [And the act of God, in this case, means such act as could not happen by the intervention of man, as lightning and tempests. Inevitable accident, happening by any human means; irresistible force, if not occasioned by the king's enemies, will not excuse; for the carrier is in the nature of an insurer. Therefore, where a fire, not occasioned by lightning, began at another booth in a fair, than that wherein the goods were placed, and afterwards spread thither, and consumed the goods, the carrier was holden liable, though actual negligence was expressly negatived by the jury. Forward v. Pittard, 1 T. Rep. 27. So, it was holden to be no excuse, that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water had gushed. Dale v. Hall, 1 Wils. 281. But, where a hoy, in good condition, shooting a bridge, at a proper time, was driven against a pier by a sudden breeze, and overset by the violence of the shock, the hoyman was holden not to be answerable, the accident being occasioned by the act of God. Amies v. Stephens, 1 Str. 128. With respect to water-carriage, it is enacted by stat. 7 G. 2. c. 15., "That no owner of any ship or vessel shall be liable to make good any loss or damage by reason of any embezzlement, secreting, or making away with by the master, or mariners, or any of them, of any goods or merchandise put on board, beyond the value of the ship and freight." If one of the mariners be accessory to a robbery by giving intelligence, the owner is within the protection of this act, and answerable no farther than to the extent of the value of the ship and freight. Sutton v. Mitchell, 1 T. Rep. 18.] (a) In an action against a common hoyman from Walton to London, the defendant pleads, that the boat and goods *supra Thamesim* were sunk and lost; *absque hoc*, that they were lost *pro defectu bonæ custodiæ*, and issue thereupon joined.

2 Bulst. 280. If A. and several others take their passage in a ferry-boat, and being upon the water a tempest arises, so that they are in much danger of being drowned; upon which, to preserve their lives, several of the goods are cast over-board, among which, a pack of goods of A.'s of great value is thrown over; (b) A. shall have no (c) action against the bargemen.

Rep. 79. S.C. (b) But when, and how, by the marine law, he shall have average, &c. *vide* Molloy, Bk. 2. c. 6. § 13., and the head of *Merchants and Merchandize*. (c) So, if any passenger, *ex necessitate*, for the safeguard of his life, throws it overboard, no action lies against the bargeman. 12 Co. 62. But it seems settled, notwithstanding these cases, that a ferryman who carries goods for hire, shall answer for the goods, though robbed of them, or though he throws them overboard to save the lives of the men in the boat, because for his hire he runs the venture of the voyage. *Vide* Allen, 93. Law of Bailments, 108.

Co. Litt. 89. It is clearly resolved, that if a carrier be robbed he shall answer the value of the goods; for he hath his hire, which implies an undertaking for the safe custody and delivery of them, which charges him at all events. And this political institution was introduced, the better to secure people in their dealings, and to prevent carriers, who are often entrusted with things of the greatest value, from confederating with robbers, &c.

Allen, 93. So, if A. delivers a box to a carrier to carry, and he asks what is in it, and A. tells him a book and tobacco, and in truth there is 100*l.* besides, yet, if the carrier is robbed, he shall answer for the money; for A. was not bound to tell him all the particulars in the box, and it was the business of the carrier to make a special

4 Co. 84.
Owen, 57.
2 Ld. Raym.
918.

Allen, 93.
Kenrig and
Eccleston.

a special acceptance (a). Ruled by *Roll* at *nisi prius* at *Guildhall*; but, in regard of the intended cleat to the carrier, he told the jury, they might consider of it in damages; but yet the jury gave the plaintiff 97*l.* damages, abating 3*l.* only for carriage; *quod durum videbatur circumstantibus*. ¶ Now I own (b), said Lord *Mansfield*, that I should have thought this a fraud, and I should have agreed in opinion with the *circumstantibus*; which seems to have been also the opinion of the reporter.¶

(a) The practice of making special acceptances, though contrary to the policy of the common law, liable to abuse, and productive of inconvenience,

would seem to have obtained too long and too generally to be now questioned. The courts of justice have repeatedly allowed it; the legislature itself hath sanctioned it by considering the carrier as competent to limit his responsibility in all cases by special contract, and therefore refusing to pass an act to narrow it in certain cases; and the books afford not one case in which the right to make such acceptances hath ever been denied by express decision. 5 *East*, 513. 6 *T. Rep.* 17. 2 *Selw. & Maule*, 1.¶ (b) 4 *Burr.* 2301.

But, if *A.*, being a common carrier, receives by his book-keeper from the servant of *B.* two bags of money sealed up, containing, as was told him, 200*l.*, and the book-keeper gives a receipt for his master to this effect: *Received of, &c. two bags of money sealed up, said to contain 200*l.*, which I promise to deliver on such a day at Exeter, unto —, he to pay 10*s.* per cent. for carriage and risk*; though the bags contain 450*l.*, and the carrier is robbed, he shall be answerable only for 200*l.*, for this is a particular undertaking; and as it is by reason of the reward that the carrier is liable, if the plaintiff endeavours to defraud him of it, it is but reasonable he should be barred of that remedy which is founded only on the reward.

Carth. 485. Sir Joseph Tyle and Morrice. And the like point said to have been so ruled between others and the same plaintiff.

¶ If a box is delivered generally to a carrier, and he accepts it, he is answerable, though the party did not tell him there was money in it. But, if the carrier asks, and the other says, no; or, if he accepts it conditionally, provided there is no money in it; in either of these cases the carrier is not liable. Per *King C. J.*

Titchbourne v. White. 1 *Str.* 145.

Where money was sent in an old nail-bag, and under concealment of its being money, and the carrier had given public notice that *he would not be answerable for money unless entered as such*, and also that a greater rate of carriage would be demanded, (of which it was evident that the party sending it was apprized;) the carrier was holden not to be liable for the loss, by reason of the fraud.

Gibbon v. Paynton. 4 *Burr.* 2298.

Where a carrier had given notice that he would not be answerable for certain valuable articles, if lost, *of more than the value of a specified sum*, unless entered and paid for as such; and articles of that description were delivered to him by a person, who knew the conditions, but concealed the value, paying no more than the ordinary price of carriage and booking; on a loss, it was holden, that the carrier was neither liable to the extent of the sum specified, nor to return the price actually paid for the carriage or booking.

Clay v. Willan 1. *H. Bl.* 298. So, *Izett v. Mountain*, 4 *East*, 371. and *Nicholson v. Willan*, 5 *East*, 507. upon the like notices the carrier holden to be entirely

discharged. *Clarke v. Hutchins*, 14 *East*, 475. *S. P.* But, where the notice is, that *no more than a given sum shall be accounted for, unless the goods are entered and paid for accordingly*, such a provision does not, like that in the former notice, amount to a qualification of the contract itself, but only to a limitation of the damages. Assumpsit therefore may be maintained in this case in the common form of declaring for the loss of goods which were above the given sum, and

not paid for accordingly, and the plaintiff shall recover to that amount. *Clarke v. Gray*, 6 East, 564. Whence it would follow (though the contrary hath been adjudged, *Yate v. Willan*, 2 East, 128) that if the defendant pay money into court (as he may do in a case of this sort to protect himself from costs, *Hutton v. Bolton*, 1 H. Bl. 299.) upon a count so stating the contract, he does not thereby estop himself from taking the benefit of the restrictive provision; for though the payment is an admission of the contract stated, yet that contract is quite consistent with the contract having such a provision; and the reason why the plaintiff need not state the provision in the declaration is, that it goes in reduction of damages, and is therefore matter proper to be given in evidence to the Jury, and not necessary to be shewn to the court in the first instance upon the record.

Ellis v. Turner, 8 T. Rep. 531. But, where a water-carrier had given notice that he would not be answerable for losses in any case, except where occasioned by the want of care in the master, nor even in that case beyond 10*l.* per cent., unless extra freight were paid; it was holden that he was nevertheless responsible for the whole loss of goods, which the master had carried beyond the place to which they were consigned.

Beck v. Evans, 16 East, 244. So, where the notice was that the carrier would not be answerable for certain specified articles or any other goods of what nature or kind soever above the value of 5*l.* if lost, stolen, or damaged, unless a special agreement was made, and a premium paid, such value to be entered at the time of delivery; the court inclined to think that it did not extend to goods not falling within any of the specified articles, and which from their bulk and quality, communicated to the carrier at the time of the delivery, must be known to him to exceed the value of 5*l.*; but that in all events it would not exempt him from being liable for damage arising from gross

negligence.
Dr. and Student Dial. ii.
93. c. Noy's Max. 92.

Robinson v. Dunmore, 2 Bos. & Pull. 416. The case of the East India Company v. Pullen, 1 Str. 690. where it was holden that the lighterman was not liable, proceeded upon its being the usage of the Company never to entrust him with their goods, but to give the whole charge of the property to one of their servants, who is called a guardian.

Golden v. Manning, 3 Wils. 429. 2 Bl. Rep. 916. S. C. In Owen 57. It is said by *Poph.* that carriers are bound to deliver as well as to carry; but whether bound by the general law to deliver or not, they are bound to give notice of the arrival of

Where it appeared that a box of silks fully directed had been sent to the defendants' warehouse in the country to be thence by them conveyed to *London*, where when it arrived, the direction was obliterated; that the name of the consignee was inserted in the way-bill, and that his name and place of abode appeared in the directory, which was found in the defendant's possession; that the defendants kept a regular porter to carry out goods, which came by their coach, and received the portorage of such goods as were sent out by him; but that no inquiry had been made to discover the consignee nor had any notice been given of the box, but it was suffered to lie in the warehouse a twelvemonth, whereby the silks were greatly damaged; it was holden, that the defendants were in this case bound by their general course of trade to deliver the box, and therefore answerable for the damage sustained by the detention of it.

goods

goods to the persons to whom they are consigned. But now in *London* by the statute of 39 Geo. 3. c. 58. which fixes the rates of portage to be taken by innkeepers, warehouse keepers, and other persons to whom goods are brought by any publick carriage, they are obliged to deliver them within a limited time.

Where a water-carrier had given notice, that "he would not be answerable for any damage, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10*l.* per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight;" it was holden, that a loss happening by his personal default (such as the not providing of a sufficient vessel, which is impliedly promised in the contract) is not within the scope of such notice, which was meant to exempt him from losses by accident, &c. even if it be competent to a common carrier to exempt himself by a special acceptance from his liability for any losses not occasioned by the act of God or the king's enemies.

Where the goods are of a specifick value, and the declaration does not state any particular damage or inconvenience in consequence of or independently on the loss, the defendant is allowed to pay money into court; but not where the damages are wholly uncertain.||

Lyon v. Mills,
5 East, 428.

Hutton v. Bolton, 1. H. Bl.
299. *Fail v. Pickford*,
2 Bos. & Pull.
234.

(C) Of his Interest in the Things delivered to his Charge.

A CARRIER, who hath goods delivered to him, undertakes for his hire to deliver them safely, and he hath the possession of them for no other purpose; yet he hath such a special limited property, that he may bring trover and conversion against a stranger that takes them away, or he may sue the hundred when robbed of them, because he is answerable over in damages to the absolute owner.

So, a carrier by reason of his possession, and this special kind of property, may have an appeal of larceny against one who robs him of the goods committed to his charge.

Also, a carrier by not delivering the goods, or by embezzling them, cannot be guilty of felony; but, if he opens a pack and takes out part of the goods, with an intent to steal that part, he is guilty of felony; for a possession of part distinct from the whole was gained by wrong, and not delivered by the owner; and it was also obtained basely, fraudulently, and clandestinely, in hopes to prevent it from being discovered at all, or fixed upon any one when discovered,

So, if a carrier, after he hath brought the goods to the place appointed, take them away again secretly *animo furandi*, he is guilty of felony, because the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger.

Co. Lit. 89.
4 Co. 83. 7 H.
6. 60. 2 Bust.
311. Sid. 438.
Mod. 30.
2 Saund. 47.
Yelv. 44.
Dyer, 98.

2 Hawk. P. C.
c. 23. § 44.

13 E. 10.
5. F. C. 25.
Dalt. c. 102.
Kelynge, 35.
Roll. Abr. 73.
Hawk. P. C.
c. 33. § 5.

H. P. C. 62.
3 Inst. 107.
Bro. Coron.
160. S. P. C.
25. Ha.
P. C. c. 33.
§ 7.

7 H. 6. 43. Also, if a stranger steals the goods delivered to a carrier, he
 5 H. 7. 18 b. may be indicted generally, as having stolen the carrier's goods. So,
 Bro. Coron. 45. by reason of this special property, if the owner, with an intent to
 160. Cro. El. make the carrier answer for them, fraudulently and secretly takes
 536. S.P. c. 26. them away, he is guilty of felony, and may be indicted gene-
 11. 3 Inst. 310. rally, as having stolen his goods; for the injury is altogether as
 Mo. pl. 981. great, and the fraud as base, where they are taken away by the
 H. P. C. 67. owner, as by a stranger.
 Kelw. 70.
 1 Hawk. P. C. c. 33. § 30.

(D) Of the Regulations Carriers are under by Acts of Parliament, with respect to their Carriages, and the Prices they are to take.

[This act is repealed, as to highways, by 13 G. 3. c. 78. 84.] See penalty of taking more than the rates, 21 G. 2. c. 28. § 3. Justices of the city of London to assess the rates of carrying goods between London and Westminster, 30 G. 2. c. 22. § 3. * Commissioners for regulating the navigation of the Thames, to rate the price of water-carriage, 24 G. 2. c. 8. § 9. — Penalty for taking above the price. *Ibid.*

AS to the regulation of the prices of carriage of goods, by the 3 W & M. cap. 12. § 24. it is enacted, "That the justices of the peace of every county, and other place within the realm of *England*, or dominion of *Wales*, shall have power and authority, and are hereby enjoined and required at their next respective quarter or general sessions after *Easter* day, yearly to assess and rate the prices of all land-carriage of goods whatsoever, to be brought into any place or places within their respective limits and jurisdictions, by any common carrier or waggoner; and the rates and assessments so made to certify to the several mayors, and other chief officers of each respective market-town, to which all persons may resort for their information; and that no such common waggoner or carrier shall take for carriage of such goods and merchandizes, above the rates and prices set, upon pain to forfeit for every such offence the sum of five pounds, to be levied by distress and sale of his and their goods, by warrant of any two justices of the peace where such waggoner or carrier shall reside, in manner aforesaid, to the use of the party grieved."*

[For the regulations carriers are under with respect to the weight of their loads, and number of horses, upon highways and turnpike roads, see 13 Geo. 3. c. 78. & c. 84. and 21 Geo. 3. c. 20., and tit. *Highways*.

For the statutes respecting the post-office, see 12 Car. 2. c. 35. 9 Ann. c. 10. 6 Geo. 1. c. 21. § 51. 4 Geo. 2. c. 33. 26 Geo. 2. c. 13. 5 Geo. 3. c. 25. 7 Geo. 3. c. 50. 24 Geo. 3. c. 37. 41 Geo. 3. c. 7. 42 Geo. 3. c. 63.

[A post-master it hath been determined, can not only not demand, as a duty, any additional sum to the *legal* rate of postage, for the delivery of letters to the several persons to whom they are directed within a post-town or place, at their respective places of abode, but he is moreover bound to deliver them at such places.

Barnes v. Foley, and Stock v. Harris, 4 Burr. 2153. 5 Burr. 2709. Rowning v. Goodchild, 3 Wils.

443. 2 Bl. Rep. 906. S. C. Smith v. Powdich, Cowp. 182.

A place

A place connected to *London* by a street of contiguous buildings, prior to the act of 9 Ann. c. 10., is within the suburbs of the city: the penny-post office, therefore, is entitled only to one penny for the carriage and delivery of a letter to any of the inhabitants thereof, *viz.* the penny paid upon putting the letter into the office.]

Jones v. Walker, Cowp. 624.

|| See the stat. of 39 G. 3. c. 58. respecting portorage of parcels sent by carriers.||

CERTIORARI.

- (A) Out of what Court it issues; and therein of the discretionary Power of the Court of King's Bench in granting, denying, and filing it.
- (B) To what Court it lies.
- (C) Where it is necessary, or the Record may be removed without it.
- (D) What the Party, who applies for it, must do before it is granted.
- (E) Where by Acts of Parliament, the Court of King's Bench is restrained from granting it.
- (F) To whom it ought to be directed.
- (G) How far it is a *Supersedeas* to the Court below.
- (H) In what Manner it is to be returned.
- (I) Where the Record shall be said to be removed.
- (K) Of the Proceedings of the Superior or Inferior Court after the issuing out of the *Certiorari*.

- (A) Out of what Court it issues; and herein of the discretionary Power of the Court of King's Bench in granting, denying, and filing it.

A *CERTIORARI* is an original writ issuing out of Chancery, or the *King's Bench*, directed in the king's name, to the judges or officers of (a) inferior courts, commanding them to return the records of a cause depending before them, to the end the party may

F. N. B. 243. A. [To remove proceedings of a civil nature, it is

sues out of the other courts at Westminster. may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause.

2 Ld. Raym. 836. 1 Salk. 148. 1 H. Bl. Rep. 552.] (a) The Court of Chancery may issue a *certiorari* to the King's Bench; as, if in an action of debt brought in the Common Pleas, upon a judgment in *B. R.* the defendant pleads *nul tiel record*, the plaintiff may have a *certiorari* out of Chancery to send the record thither; and the same may be sent after, by *mittimus*, into the Common Pleas, notwithstanding the general rule, that records in *B. R.* shall not be moved out of that court into any other court. Cro. Car. 297. Semb. So, if in an action of debt brought in an inferior court upon a bond, the defendant pleads, that the plaintiff had recovered in *B. R.* upon the same bond; and the plaintiff replies *nul tiel record*, and thereupon issue is joined *quod habetur tale recordum*; the record in *B. R.* may be certified into Chancery, and from thence sent by *mittimus* to the inferior court. 1 Saund. 97. 99. 1 Sid. 223. 329. 2 Keb. 205. 249. 278.

1 Ld. Raym. 216. 1 Salk. 146. 2 Hawk. P. C. c. 27. § 27.

(b) [And this is done, sometimes, to consider and determine the

The court of *King's Bench* hath a superintendency over all courts of an inferior criminal jurisdiction, and may by the plenitude of its power (b) award a *certiorari* to have any indictment removed and brought before itself; and where such *certiorari* is allowable, ought of right to award it at the instance of the king, because every indictment is at the suit of the king, and he hath a (c) prerogative of suing in what court he pleases.

validity of the indictments, and to quash, or affirm them, as there is cause. Sometimes, to have the prisoner or offender tried either at the bar, or by *nisi prius*, before the king's justices of the courts of Westminster. Sometimes, to examine, and affirm, or reverse, proceedings and judgments given by inferior judges. Sometimes, to plead the king's pardon. Sometimes to issue process of outlawry against the offender, in those counties and places where the process of inferior justices cannot reach him. 2 H. H. P. C. 210. Sometimes too, to issue writs of execution upon judgments in inferior courts, where the defendant hath withdrawn his person and effects from the jurisdiction of those courts. See the 19 Geo. 3. c. 70. § 4., with respect to inferior courts; and 33 Geo. 3. c. 19., with respect to Wales, and the counties palatine. 1 H. Bl. 552. In the case of outlawry, as soon as the object is attained, by the coming in of the offender, the court will remit the record. Rex v. Perry, 5 T. Rep. 478. (c) But there is a distinction between those cases, in which the crown is specially concerned, and prosecuted by the attorney-general, and those which are nominally at the suit of the crown, but, in reality, are prosecuted by a private person. In the former, the crown hath a right to demand a *certiorari*; the court are bound to grant it: in the latter, it issues, indeed, of course; but, upon good cause, a *procedendo* may be awarded. 4 Burr. 2458. But this distinction was denied in the case of the King v. The Inhabitants of Bodenham, Cowp. 78.]

2 Hawk. P. C. *ibid.* Salk. 144. pl. 2. 149. pl. 15. 150. pl. 18. 151. pl. 20. Keb. 4. 1 Mod. 41. 1 Ventr. 63. 2 Ld. Raym. 937.

2 T. Rep. 89.]

But, though the court is to grant it at the suit of the king, yet it hath a discretionary power in granting or refusing it at the suit of the defendant; and agreeably hereto it is laid down as a general rule, that the court will never grant it for the removal of an indictment before justices of gaol-delivery, without some special cause; as, where there is just reason to apprehend that the court below may be unreasonably prejudiced against the defendant; or, where there is so much difficulty in the case, that the judge below desires that it may be determined in the *King's Bench*; or, where the king himself gives special direction that the cause shall be removed; or, where the prosecution appears to be for a cause not properly criminal.

Sid. 54. 2 Hawk. P. C. c. 27. § 28. [To remove an indictment from *Hicks's*-

Neither will the court of *King's Bench* ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment of perjury or forgery, or other heinous misdemeanour; for such crimes deserve all possible discountenance, and the *certiorari* might delay, if not wholly discourage, the prosecution.

hall, for bigamy, the consent of the prosecutor must be had. Cowp. 283. So, from the *Old Bailey*, for forgery, 2 Str. 717. 877.— But the court have granted it, on the application for the defendant, in perjury, from the *Old Bailey*, upon affidavit that he had twice paid costs for not going on to trial, the judges being gone away. 2 Str. 1049. This, however, is not usual; and was, in this instance, done upon the extraordinary circumstances of the case. Ca. Temp. Hardw. 369, 370. They have also granted it at the instance of the defendant, upon affidavit that the prosecutor's attorney was under-sheriff of *Middlesex*, and attended the grand jury on finding the bill. 2 Str. 1068. So, where the defendant appeared to be a man of good repute, and the prosecution on slight grounds. 1 Str. 549. So, where it was proved that the prosecution was malicious. 1 Barnardist, K. B. 7. 41. So, in the case of a conviction for compounding felony, where the objections, in arrest of judgment, were serious and weighty. *Id.* 415. So, in the case of a nuisance at the assizes, where a view was necessary. 2 Barnardist. K. B. 214.]

Nor will the court of *King's Bench* grant it for a conviction of recusancy on a default at the sessions, because by the statute such convictions are to be removed into the *Exchequer*, and process on them is to go from thence.

was never done but in the Duke of York's case. *Vide* head of *Papist and Popish Recusants*.

[Nor will the court of B. R. grant it to remove the record and proceedings out of a court leet, in order to inquire into the propriety of an amercement, where the fine hath been estreated into the duchy chamber of *Lancaster* and paid.]

Also it is said to be a good objection against granting a *certiorari*, that issue is joined, and a *venire* awarded for the trial in the court below.

A *certiorari* shall not be granted to remove an indictment or appeal after a conviction, unless for some special cause; as, where the judge below is in doubt what judgment to give.

S. C. 2 Ld. Raym. 937. S. C. || Rex v. Gwynne, 2 Burr. 749. Where the defendant, who had been convicted in an inferior jurisdiction, removed the record into B. R. by *certiorari* between verdict and judgment, that he might make objections in arrest of judgment, a *procedendo* was awarded, without going into the objections; for that the record might be removed after judgment by writ of error, and the sufficiency of the indictment then questioned. And Lord Kenyon said, that though there were instances in which the proceedings had been removed in this stage, it was a practice which ought to be discouraged, because it was attended with great expence and many inconveniencies. Rex v. Jackson, 6 T. Rep. 145. And in the case of the King v. the Inhabitants of the County of Oxford, 13 East, 411. where a *certiorari* was applied for to remove an indictment for a misdemeanour and proceedings thereon at the assizes between conviction and judgment, for the purpose of moving for a new trial, on the judge's report of the evidence, upon the ground of the verdict having been against evidence and the judge's direction, it was refused in the first instance; and Lord *Ellenborough* disclaimed the power of the court of B. R. to enter into the merits of verdicts, and grant new trials in proceedings before inferior jurisdictions.||

But, it hath been adjudged, that a *certiorari* for the removal of a presentment before justices in *cyre*, of a matter which is inquirable and punishable by the forest law only, shall not be granted before, but only after conviction; for if it should be granted before, the offence should be dispunished; but it may be granted after conviction, in order to give the party, the right of whose freehold is concerned in it, an opportunity so far to traverse it.

The court hath refused to grant a *certiorari* to remove a recognition of appearance before justices of *oyer and terminer*, &c. because

2 Hawk.
P. C. c. 27.
§ 29.
Salk. 145.
pl. 5. S. P.
and that it

Rex v. Ritson,
2 T. Rep. 184.

2 Hawk.
P. C. c. 27.
§ 30.
16 E. 4. 5.
Regina v. Potter.
Salk 149.
pl. 15.
6 Mod. 17.

Sid. 296.
2 Keb. 81.
2 Hawk.
P. C. c. 27.
§ 32.

2 Hawk.
P. C. c. 27.
§ 33.

because the court below is most proper to judge upon the whole circumstances of the case, which are equitably to be considered, whether it ought to be estreated or not.

[2 Hawk.
P. C. c. 27.
§ 34.
1 Salk. 145.
2 Keb. 157.
seems contrary. (a) A *certiorari* to bring up an order for the removal of their clerk is of common right, and not discretionary. 1 Str. 609.] (b) *Vide* 2 Keb. 500.

By a rule of the *King's Bench*, no order of commissioners of sewers is to be filed without notice to the parties concerned; neither will the court suffer the return of a *certiorari* for such order to be filed, without hearing (a) affidavits of the facts; whereon if the matter appear doubtful, it is usual in order to a trial of feigned issues, and after such trial, either to file the return, or supersede the *certiorari*, and grant a *procedendo*, and give (b) costs, &c. as shall appear to be most reasonable.

Rex v. Bass,
5 T. Rep. 251.

[The court of King's Bench will not grant a *certiorari* to remove a conviction before justices of the peace, where they see that the justices have drawn the proper conclusion from presumptive evidence.

Rex v.
Whitbread,
Doug. 549.
Rex v. Francis
Abbot, *id.* 553.
(c) Rex v.

They will not grant it, where an appeal is given, if the objection be not to the want of jurisdiction, but to the merits; for that is more properly the subject of appeal: *a fortiori* they will not grant it, pending an (c) appeal.

Sparrow, 2 T. Rep. 169. n.a. With respect to appeals, there is this distinction; if one party only has a right of appeal, or no time is limited for bringing the appeal, the *certiorari* shall be immediately granted; for in the one case, the party having the right, may waive it; and in the other, if the objection were to be allowed, the *certiorari* might never issue: but if both parties have a right to appeal, and the time is fixed; in that case, it shall not be granted, until after the appeal hath been made, or the time for making it hath elapsed. Rex v. Harman, Andr. 343. But, notwithstanding an appeal depending, if the order must be obeyed before the validity of it can be determined, a *certiorari* will lie. 2 Str. 991. Advantage must be taken of this rule, in the case of an order, before the order is filed. 1 Salk. 144.

(d) Rex v.
Uttoxeter,
2 Str. 932.
Rex v. the

They will not grant it, upon the ground of publick inconvenience, to remove (d) a poor's rate, or the assessments (e) of the land-tax, or proceedings before commissioners (f) of sewers.

Justices of Shrewsbury, *Id.* 975. (e) Rex v. King, 2 T. Rep. 234. (f) Rex v. Commissioners of Sewers in Yorkshire, 1 Str. 609.

2 Ch. Rep. 109.
Pr. Reg. 41.
Boh. Priv.
Lond. 291.
Car. Rep. 48.
1 Vern. 178.
Eq. Abr. 80.
(g) The *plaintiff* below, it seems, is not at liberty to make this application. Harrison's Ch. Pr. 119.

The writ of *certiorari* is used for the purpose of removing not only *legal*, but likewise *equitable* proceedings; for when an equitable right is sued for in an inferior court of equity, and by reason of the limited jurisdiction of the court, the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior court; the defendant (g) may file a bill in Chancery praying this writ to remove the cause into the court of Chancery. And when the bill is filed, he must enter into a bond with one surety in the penalty of 100*l.* to the Master of the Rolls and the senior Master in Chancery, to prove the suggestions of the bill within fourteen days: and in default of proof, a *procedendo* may be applied for of course.]

(B) To what Court it lies.

THE courts of *Chancery* and *King's Bench* may award a *certiorari* to remove the proceeding from any inferior courts, whether they be of an ancient or newly created jurisdiction, (a) unless the statute or charter, which creates them, exempts them from such jurisdiction.

pl. 7. 148. pl. 13. Ld. Raym. 113. 252. 454. Carth. 421. 491. Comyns, 76. See 12 Mod. 386. 643. 2 Ld. Raym. 836. 7 Mod. 138. 3 Salk. 79. pl. 4. 2 Lev. 86. Lev. 312. Cro. Car. 265. 3 Mod. 93. 12 Mod. 145. (a) As the statutes concerning the commissioners of *Cambridgeshire Fens*, &c. are said, by some, to have done. Sid. 296. cont. 2 Keb. 43. 722. [But there must be express words in the statute to take away the jurisdiction of the court of *King's Bench*. 2 Burr. 1041. For, *per Holt C.J.*, this court will examine the proceedings of all jurisdictions erected by act of parliament. 1 Ld. Raym. 580.]

And therefore it is agreed, that the *King's Bench* may award such *certiorari* to justices (b) in *eyre*, or of (c) gaol delivery, or of a (d) county palatine, and to the (e) college of physicians, having a special power by statute to impose fines, &c., and to justices of the peace, &c., even in those (f) cases, which they are empowered by statute finally to hear and determine; and to (g) commissioners of sewers; for the clause in 13 Eliz. cap. 9. *That such commissioners shall not be compelled to make any return of their ordinances*, (h) hath been construed to intend only to exempt them from returning their orders into *Chancery*, as by the statute of 23 H. 8. c. 5. they were obliged to do.

12 Mod. 145. pl. 5. (g) Salk. 145. pl. 6. Keb. 129. March, 196. Raym. 186. (h) Mod. 44, 45. Lev. 288. Vent. 66.

Also, it seems settled at present, that a *certiorari* lies to the courts of the *cinque ports*, to remove an indictment from those courts, and that the privilege of the *cinque ports*, which they have enjoyed time out of mind, that the king's writs do not run there, is to be intended only of civil (i) causes between party and party.

Cro. Jac. 531. Sid. 432. Hard. 475.

Also, a *certiorari* lies from the *King's Bench* to the courts of grand sessions, and to other courts in *Wales*, whether in the old *Welsh* counties, or in the lordships marches; and whether such indictments be for inferior crimes or for felony. [But (k) it cannot be sued out as of course, without laying some special ground.]

Langton, Dougl. 749. Williams v. Thomas, *Id.* 751. note (2).

[It lies also to *Berwick* and other dominions of the crown.]

Also, it lies to remove an indictment from any court of criminal jurisdiction in *London* or *Middlesex*; but by the city charter, it is said, only the tenor of the indictment shall be removed.

[It lies to the quarter-sessions of a corporation.

It

Cowp. 458.

It lies to remove a presentment in a court-leet; and the presentment, when removed, is traversable.

Rex v. Bolton, M. 26

G. 3. 2 Hawk.

P. C. c. 27. § 23. note.

It lies to remove examinations taken before justices of the peace in pursuance of 2 & 3 P. & M. c. 10.

(a) Andr. 27.

(b) 10 Mod.

278.

It lies (a) to remove an information before justices of assize, against a parson for non-residence, for they have no jurisdiction. But (b) not to justices of oyer and terminer to remove a recognizance of appearance.

(c) 2 Burr.

1040.

(d) 3 Burr.

1458.

(e) 2 Wils. 35.

It lies (c) to remove orders of conviction on the conventicle act, 22 Car. 2. c. 1.; and orders (d) on appeal from a scavenger's rate; and orders (e) of bastardy, if applied for in six months.

4 Burr. 2244.

It lies to remove an inquisition taken by the sheriff under a private act of parliament, and the verdict and judgment thereon.]

(C) Where it is necessary, or the Record may be removed without it.

Fide 2

Hawk. P. C.

c. 27. § 44. and

several autho-

rities there

cited.

IF a justice of peace, or other judge of record, having taken a recognizance or inquisition, or recorded a riot, or done any other executory matter, still continue in the commission without interruption, the *King's Bench* may, without any *certiorari*, receive the record from his hands: also, the clerk of the assises may, without *certiorari*, bring in the records of *nisi prius* on the death of the justices: but the executor of the judge cannot do it without writ; neither can a record executed, as by acquittal, &c., be brought into a higher court without writ: neither can a justice who is out of the commission at the time, nor one who hath been out, and is restored, certify any record without writ.

(D) What the party, who applies for it, must do before it is granted.

BY the 21 Jac. 1. cap. 8. § 6, 7. all *certioraris* for indictments of riots, forcible entry, or assault and battery, found at any quarter-sessions of the peace, or otherwise, shall be delivered at some quarter-sessions of the peace in open court; and the parties indicted shall before the allowance thereof become bound to the prosecutor in the sum of 10*l.*, with such sureties as the justices at their quarter-sessions of the peace shall think fit, with condition to pay to the prosecutor within one month after conviction such reasonable costs and damages as the justices of the county, where the indictment shall be found, in the sessions of the peace shall assess or allow; and in default thereof it shall be lawful to proceed, such *certiorari* notwithstanding.

And.

And the like recognizance in the sum of 40*l.* is required by 13 & 14 (a) Car. 2. cap. 6. on *certioraris* for indictments on that statute concerning the highways.

These statutes do not extend to all indictments at sessions in general, but only to those particular ones therein mentioned: but this defect was in a great measure supplied by the rules of the court of *King's Bench*, which, upon the removal of an indictment from *London* to *Middlesex*, required a recognizance from the defendant, to carry down the record to trial the same term on which the *certiorari* was returnable, or the sittings after, and, on the removal of an indictment from other counties, required such recognizance for a trial at the next assizes.

And agreeably hereto it is enacted by 5 W. & M. cap. 11. and 8 & 9 W. 3. cap. 33. that all parties indicted at a general or quarter-sessions of the peace, prosecuting a *certiorari*, before the allowance thereof shall find two sufficient manucaptors, who shall enter into a recognizance in the sum of 20*l.* before one or more justices of the peace of the county or place, (or else before one of the judges of the *King's Bench*, in which case such judge shall make mention of it under his hand on the back of the writ,) and the recognizance shall be with condition, at the return of such writ, to appear and plead to the indictment or presentment in the court of *King's Bench*, and at his own costs to procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereto, to be tried at the next assizes for the county wherein the indictment was found, after such *certiorari* shall be returnable, if not in *London*, *Westminster*, or *Middlesex*; and if there, then to cause it to be tried the next term after wherein such *certiorari* shall be granted, or at the sitting after the said term, if the court of *King's Bench* shall not appoint any other time for the trial thereof; and if any other time shall be appointed by the court, then at such other time, and to give due notice to the prosecutor, or his clerk in court; and also that the party or parties prosecuting such *certiorari*, shall appear from day to day in the said court of *King's Bench*, and not depart till he or they shall be discharged by the said court; and such recognizance, *certioraris*, and indictments, shall be filed in the *King's Bench*, and the name of the prosecutor, (if he be the party grieved or injured,) or some publick officer, endorsed on the back of the indictment; and if the person prosecuting such *certiorari*, being the defendant, shall not before allowance thereof procure such manucaptors to be bound in a recognizance as aforesaid, the justices of the peace shall and may proceed to trial of the indictment notwithstanding such *certiorari*.

And it is further enacted by the said statute of 5 & 6 W. & M. cap. 11. and 8 & 9 W. 3. c. 33., that if the defendant prosecuting such *certiorari* be convicted, the *King's Bench* shall give reasonable costs to the prosecutor, if he be the party grieved

(a) But this statute is repealed by 13 Geo. 3. c. 78. Keb. 225. 2 Salk. 526. pl. 8. 2 Hawk. P. C. c. 27 § 47.

[This act, it is said, relates only to quarter sessions of the peace, not to indictments or

from the court
of oyer and
terminer at
Hicks's-hall.

For the
sessions sit
there in both
capacities, and
draw up their
orders, with
one title, or
with the other,

according to the offence, and the *certioraris* are directed accordingly. 1 Burr. 11. 3 Burr. 1462.]

or injured, or be a civil officer who shall prosecute on account of any fact that concerned him, as officer, to prosecute or present; which costs shall be taxed according to the course of the said court; and the prosecutor for the recovery of such costs, shall within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by the said court for such his contempt, and the said recognizance shall not be discharged till the costs so taxed shall be paid.

And the like in effect is enacted by the said statute of 5 & 6 W. & M. cap. 11. concerning the removal of indictments by *certiorari*, within the counties palatine of *Chester*, *Lancaster*, and *Durham*.

In the construction of these statutes, the following points seem most remarkable.

Keb. 225.

Sid. 70.

2 Hawk. P. C.

c. 27. § 51.

That notwithstanding the express words are, that justices may proceed to trial, &c. if a proper recognizance be not given, notwithstanding such *certiorari*, yet they will be in contempt if they make no return to it: for all writs must be obeyed, unless good cause shew to the contrary.

6 Mod. 246.

That these statutes extend only to *certioraris* procured by defendants, and therefore those procured by prosecutors remain as they were at common law.

2 Hawk. P. C.

c. 27. § 53.

2 Salk. 564.

pl. 3. 2 Ld.

Raym. 756.

That these statutes being in the affirmative, as to the taking of recognizances, do not take away the power which the justices of the *King's Bench* had before; and therefore, if such a justice take a recognizance variant from the form prescribed by the statute, it will be as effectual as before: but it is said, that in such case the *certiorari*, if procured by the defendant, will be no *supersedeas*, because the statutes seem to be express, that the sessions may proceed notwithstanding any *certiorari* procured by a defendant, whereon such recognizance is not given as is prescribed.

March, 27.

2 Hawk. P. C.

c. 27. § 54.

That if the persons offering to be sureties appear to be worth twenty pounds, the justices cannot refuse them.

2 Hawk P. C.

c. 27. § 55.

March, 27.

(a) Keb. 231.

Salk. 55. pl. 5.

That if there be several defendants, and some find sureties, and others not, the indictment shall be removed as to those at least who find sureties, because they shall not be prejudiced by the fault of others; and, as (a) some say, it shall be removed as to all.

2 Ld. Raym.

354.

That in the taxing of costs, those only are to be considered that were subsequent to the *certiorari*.

2 Hawk. P. C.

c. 27. § 57.

Salk. 55. pl. 5.

2 Ld. Raym.

354.

That the prosecutor, by accepting the costs so taxed, is not restrained from aggravating the fine, because he has a right to them by the express words of the statute: but in other cases, if a prosecutor accept costs from a defendant, he cannot afterwards aggravate the fine, because having no right to the costs, if he

he takes them at all, he must take them in satisfaction of the wrong; after which it is unreasonable for him to harass the defendant.

That notwithstanding the condition of the recognizance be, that the defendant shall procure a trial at the next assizes, yet the recognizance shall not be forfeited unless the prosecutor give rules, &c. Salk. 370. pl. 4.

That after the recognizance is forfeited for not procuring a trial, &c. no motion shall be made to quash the indictment. Salk. 380. pl. 26.
2 Hawk. P. C. c. 27. § 59. *sed qu.*

[That the statute of 5 & 6 W. & M. c. 11., respecting costs, doth not extend to a prosecutor, even when bound over by the magistrate to prosecute, unless he be either a civil officer, or the party injured. But (a) if it be proved that he is so, it is immaterial whether the name be on the back of the indictment or not.] 1 Wils. 130.
1 Burr. 431.
(a) 1 Burr. 54.
2 T. Rep. 47.

|| That the prosecutor of an indictment for stopping a common footway, who had used it for some years before it was stopped, is a party grieved within this act, and as such entitled to costs. Rex v. Williamson, 7 T. Rep. 32.

That persons specially aggrieved by a publick nuisance, and prosecuting an indictment for it, are entitled as *parties grieved* to their costs under this act. Rex v. Dewsnap, 16 East, 194.

That the prosecutor is not entitled to the costs of a trial at bar, the statute extending only to small offences. 2 T. Rep. 48.

That a justice of the peace prosecuting to conviction a gaoler for suffering a prisoner to escape committed by him on a charge of felony, is not entitled to costs, the statute extending only to those officers who prosecute or present *ex officio*. || Rex v. Sharpness, 2 T. Rep. 47.

[That costs being given only by the statute, if the recognizance be taken as at common law, and not upon the statute, the prosecutor is not entitled to them. But, if the defendant (b) forfeit his recognizance under the statute, such recognizance shall stand as a security to the prosecutor for his costs (if taxed) for the defendant's not going to trial pursuant to the condition, notwithstanding he was afterwards acquitted, and the prosecutor had taken him in execution for the amount of them. 2 Str. 1165.
1 Burr. 11.
(b) 3 Burr. 1463.]

That as the statute of 5 & 6 W. & M. empowers the Court to give *reasonable* costs, if the prosecutor hath received a part of the fine, and then applies for his costs under the recognizance, they will order what he hath received to be deducted from the amount of the taxation. But the payment of a fine doth not discharge the defendant's recognizance for costs. 4 Burr. 2125.
Rex v. Osborn, Say. Law of Costs, 267.

That the representatives of the prosecutor are entitled to the costs taxed during his life, though no personal demand were ever made by him. 1 T. Rep. 103.

It is enacted by stat. 16 Geo. 3. c. 30. § 19. against deer-stealers, that no *certiorari* shall be allowed to remove any conviction or proceedings on that act, unless the party convict shall, before the allowance thereof, become bound to the prosecutor in one hundred pounds, with [such (c)] sufficient sureties as the justice or justices before whom the offender was convicted [shall approve (c) Omitted in the printed statute.]

(a) Omitted.

approve (a)] with condition to pay to the prosecutor, within thirty days after such conviction confirmed, or a *procedendo* granted, his full costs and damages to be ascertained on his oath; and shall become also bound to such justice or justices, with such sufficient sureties as he or they shall approve of, in sixty pounds for each offence, with condition to prosecute such *certiorari* with effect, and to pay such justice or justices the forfeitures due by such conviction, to be distributed as therein directed, or to render the convict to such justice or justices within thirty days next after the conviction confirmed, or a *procedendo* granted; and in default thereof it shall be lawful to proceed to the levying of the penalty mentioned in the conviction, in such manner as if no *certiorari* had been awarded. And the like in effect is enacted by 4 & 5 W. & M. c. 23. and 5 Ann. sess. 2. c. 14. in relation to convictions on those acts of offences concerning the game.

And whereas in many cases his majesty's justices of the peace by law are empowered to give or make judgments or orders, and divers writs of *certiorari* have been procured to remove such judgments or orders into his majesty's Court of King's Bench at Westminster, in hopes thereby to discourage and weary out the parties concerned in such judgments or orders by great delays and expences; it is therefore enacted by 5 Geo. 2. c. 19. § 2.

“ That no *certiorari* shall be allowed to remove any such judgment or order unless the party or parties (b) prosecuting such *certiorari*, before the allowance thereof, shall enter into a recognizance with sufficient sureties, before one or more justices of the peace of the county or place, or before the justices at their general quarter sessions, or general sessions, where such judgment or order shall have been given or made, or before any one of his majesty's justices of the said Court of King's Bench, in the sum of fifty pounds, with condition to prosecute the same at his or their own costs and charges with effect, without any wilful or affected delay, and to pay the party or parties, in whose favour, and for whose benefit such judgment or order was given or made, within one month after the said order or judgment shall be confirmed; their full costs (c) and charges, to be taxed according to the course of the court where such judgments or orders shall be confirmed; and in case the party or parties prosecuting such *certiorari* shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall and may be lawful for the said justices to proceed and make such further order or orders for the benefit of the party or parties for whom such judgment shall be given, in such manner as if no *certiorari* had been granted.”

And it is further enacted, § 3. “ That the recognizance to be taken as aforesaid shall be certified into the Court of King's Bench, and there filed with the *certiorari*, and order or judgment thereby removed; and if the said order or judgment shall be confirmed by the said Court, the persons entitled

(b) This requisition cannot be dispensed with. Rex v. Boughiey, 4 T. Rep. 281.

(c) But costs are not to be paid where any material part of an order is quashed. 2 Str. 1108.

“titled to such costs, for the recovery thereof within ten days
 “after demand made of the person or persons who ought to
 “pay the said costs, upon oath made of making such demand
 “or refusal, shall have an attachment granted against him or
 “them by the said Court for such contempt, and the recog-
 “nizance so given upon the allowing of such *certiorari* shall
 “not be discharged until the costs shall be paid and the order
 “so confirmed shall be complied with and obeyed.”

And for the better preventing of vexatious delays and expences
 occasioned by suing forth writs of *certiorari* for the removal of
 convictions, judgments, orders, and other proceedings before
 justices of the peace; it is further enacted by 13 G. 2. c. 18.
 § 5. “That no writ of *certiorari* shall be granted, issued forth,
 “or allowed to remove any conviction, judgment, order, or
 “other proceedings had or made by or before any justice or
 “justices of the peace of any county, city, borough, town
 “corporate, or liberty, or the respective general or quarter
 “sessions thereof, unless such *certiorari* be moved or applied
 “for within six calendar months next after such conviction, (a)
 “judgment, order, or other proceedings shall be so had or
 “made (b), and unless it be duly proved upon oath, that the
 “said party or parties suing forth the same hath or have
 “given six days’ (c) notice thereof in writing to the justice or
 “justices, or to two of them, (if so many there be,) by and before
 “whom such conviction, judgment, order, or other proceed-
 “ings shall be so had or made, to the end that such justice or
 “justices, or the parties therein concerned, may shew cause, if
 “he or they shall so think fit, against the issuing or granting
 “of such *certiorari*.”

(a) The *certiorari* must be applied for within six months after the date of the conviction; || *Rex v. Boughey*, 4 T. Rep. 281. or after the order of sessions, though made subject to the opinion of B. R. on a case to be stated, which case was afterwards stated and settled by the justices at sessions. *Rex v. The justices of Sussex*. 1 Maule & Selw. 631. ||

(b) These words give the act a retrospective operation. 1 Wils. 35. [(c) This notice must be given before moving for a rule to shew cause why the *certiorari* should not be granted. *Rex v. The Justices of Glamorganshire*, 5 T. Rep. 279.]

If no recognizance hath been entered into, the Court have no power under the above act of 13 Geo. 2. to award costs upon the removal of summary proceedings: but to obviate this mischief, they have resolved, before they allow the *certiorari*, to oblige the party applying for it to enter into such recognizance.

Rex v. Jenkinson, 1 T. Rep. 82.

By the 12 Ann. st. 1. c. 2. it is provided, “That if any malt
 “happens to be burnt after the duty paid, the proprietor may
 “apply to the next quarter sessions, who are to adjust the
 “*quantum*, and give him a certificate, which entitles him to
 “receive back the duty.” The proceedings of the sessions
 in this case cannot be removed by *certiorari*; their granting
 or denying the certificate cannot be considered as an order
 of sessions; and the *certiorari* goes only to fetch up their
 orders.]

The case of *Mayo and Parsons*, 1 Str. 391.

(E) Where by Acts of Parliament the Court of King's Bench is restrained from granting it.

(a) If a *certiorari* be taken out in vacation, and tested of the precedent term, the *fiat* for it must be signed by some judge of the Court some time before

the essoyn day of the subsequent term, otherwise it is irregular; and the Court, upon motion, will order a *procedendo*; but it is said, that there is no need for any judge to sign the writ of *certiorari* itself, but only in such cases wherein it is required by statute. Salk. 150. pl. 19.

BY the 1 & 2 Ph. & Ma. c. 13. it is enacted, "That no writ of *habeas corpus* or *certiorari* shall be granted to remove any prisoner out of any gaol, or to remove any recognition, except the same writs be (a) signed with the proper hand of the chief justice, or, in his absence, of one of the justices of the Court out of which the same writ shall be awarded or made, upon pain that he that writeth any such writs, not being signed as is aforesaid, to forfeit for every such writ five pounds."

And by 5 W. & M. cap. 11. no *certiorari* in term-time, at the prosecution of the defendant, shall be granted out of the King's Bench, to remove any indictment or presentment from any general or quarter sessions before trial, but on motion and rule in open Court: but in vacation, such writ may be granted by any judge of the said Court, whose name shall be endorsed thereon: and also the party's name at whose instance it is granted.

[It is enacted by 13 G. 3. c. 78. § 24. "That the justices shall make presentment of any highway, causeway, or bridge, at their respective assizes or sessions, wherein the same do lie, and not elsewhere; and that no such presentment, nor any indictment shall be removed by *certiorari*, or otherwise, out of such jurisdiction till such indictment or presentment be traversed, and judgment thereupon given, except where the duty or obligation of repairing such highways, causeways, or bridges may come in question."—And by § 81. it is further enacted, that no proceedings to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or removed by *certiorari*, or any other writ or process whatsoever (except as therein before excepted) into any of his majesty's courts at *Westminster*."

But it is enacted by 5 & 6 W. & M. c. 11. "That if the right or title to repair such causeways, &c. may come in question, upon suggestion and affidavit of the truth thereof, a *certiorari* may be granted to remove such indictment into the King's Bench," upon the like recognizance which is required by this statute for the removal of indictments from sessions.

2 Str. 944.
Say. Rep. 128.

It hath been adjudged, that if the sessions manifestly exceed their authority in making orders concerning the highways, such orders may be removed by *certiorari* into the King's Bench, and quashed.

It hath been adjudged too, that these acts relate only to *certiorari* applied for on the part of the defendants: that a *certiorari* lies for the prosecutor without affidavit, or recognizance, and before traverse and judgment.

|| R. v. Farewell, 2 Str. 1209. 1 East, 305. S. C. R. v. The Inhabitants of Bod-

enham, Cowp. 78. R. v. Battams, 1 East, 298. R. v. The Inhabitants of the County of Cumberland. 6 T. Rep. 194. 3 Bos. & Pull. 354. R. v. Davis, 5 T. Rep. 626. R. v. Allen, 15 East, 333. R. v. Tindall. Id. *ibid.*||

|| The king, notwithstanding these acts, may, if he sees fit, have a *certiorari* in the name of the defendant, without laying any special ground, and after the expiration of the six months.||

R. v. Tindall, E. 27. G. 2. R. v. Burgess, E. 27. G. 2.

both referred to in 4 Burr. 2458. R. v. James, M. 26 G. 3. 1 East, 304. notes. R. v. Stannard, 4 T. Rep. 161

It is enacted by 12 Car. 2. c. 23. § 35. concerning the excise, "That no writ of *certiorari* shall supersede execution or other proceedings, upon any order by justices of peace, in pursuance of that statute, but that execution, and other proceedings shall and may be had thereupon, any such writ or allowance thereof notwithstanding." And the like is generally enacted by other statutes concerning the revenue.

[If a new offence be created by statute, and a special jurisdiction out of the course of the common law be prescribed, in that case, though there be no words of exclusion, yet the superior courts are ousted, because they never could have jurisdiction. Not so, where a new offence is created, and directed to be tried in an inferior court established according to the course of the common law; for in that case the inferior court tries the offence as a common law court, subject to be removed by writs of error, *habeas corpus*, *certiorari*, and to all the consequences of common law courts. In this last case, therefore, the Court of King's Bench cannot be ousted of its jurisdiction without express negative words. But, if a statute creating an offence take away the *certiorari*, and another statute be afterwards passed inflicting heavier punishment upon the offender, but not expressly taking away the *certiorari*; the clause in the former act for taking away the *certiorari*, cannot be extended to proceedings under the latter act.]

Cowp. 524.

Rex. v. Terret, 2 T. Rep. 735.

By the 7 & 8 W. 3. cap. 6. made for the recovery of small tithes before justices of the peace, it is enacted, "That no proceedings, or judgment by virtue thereof, shall be removed or superseded by any writ of *certiorari* out of any court whatsoever, unless the (a) title of the tithes, &c. shall come in question."

7 & 8 W. 3. c. 34. § 4. (a) If the party insists on any matter of law before the justice of peace, which is any

way doubtful; as, on a custom in a parish to be discharged of a certain kind of tithe, &c. the order may be removed, within the intent of the statute. 2 Hawk. P. C. c. 27 § 38. A *certiorari* is not grantable on the following proceedings:— Bridges; 1 Ann. st. 1 c. 18. § 5. Hides; 9 Ann. c. 11. § 47. Coaches; 1 G. c. 57. § 6. 48 Geo. 3. c. 74. Malt; 12 Ann. st. 1 c. 2. § 37. Coffee; 10 G. c. 10. § 42. Woollen manufacture; 13 G. c. 23. § 6. Seamen; 1 G. 2. c. 25. § 15. Attornies; 2 G. 2. c. 23. § 25. Turnpikes; 8 G. 2. c. 20. § 16. County rates; 12 G. 2. c. 29. § 21. House of correction; 17 G. 2. c. 5. § 31. Swearing; 19 G. 2. c. 21. § 8. Havens; 19 G. 2. c. 22. § 5. Coals; 19 G. 2. c. 35. § 23. Wages; 20 G. 2. c. 19. § 6. Artificers; 23 G. 2. c. 13. § 9. Sope, &c. 23 G. 2. c. 21. § 33. Small debts; 23 G. 2. c. 33. § 4. Bawdy-houses; 25 G. 2. c. 36. § 10. Clocks and watches; 27 G. 2. c. 7. § 4. Stealing lead, &c. 29 G. 2.

G. 2. c. 30. § 7. London bridge; 29 G. 2. c. 40. § 39. Gaming; 30 G. 2. c. 24. § 20. [For obtaining goods by false pretences; 30 G. 2. c. 24. § 1. Cowp. 24. 2 T. Rep. 472.] Militia; 30 G. 2. c. 25. § 58., &c. Bread; 31 G. 2. c. 29. § 37., &c. The Thames; 32 G. 2. c. 16. § 24. 27. 2 G. 3. c. 28. § 11. London streets; 33 G. 2. c. 30. § 31. See further, the Tables to the Statutes, title *Certiorari*.

(F) To whom it ought to be directed.

2 Hawk. P. C. c. 27. § 41. **R**EGULARLY, a *certiorari* ought to be directed to the judge of the inferior court: but in some cases it may be directed to the officer known to have the custody of the record; and in some other cases to others, as shall be most agreeable to the course of approved precedents; which seems to be the best guide in this matter.

(a) 2 Keb. 750. If the person who ought to certify a record, as a justice of 8 H. 4. 3. (a) peace, who hath taken a recognizance; or (b) a judge of *nisi* Cro. Ja. 669. *prius*, who hath taken a verdict, or a (c) coroner, who hath taken (b) Dyer, 163. an inquest, die with the record in his custody, the *certiorari* may Rast. Ent. 439. go to his executor, &c. 2 Inst. 424. 2 Roll. Abr. 629. (c) Bro. Certiorari, 9. Indictment, 23.

11 H. 7. 5. Also it hath been adjudged, that it may be directed to a jus- Bro. Receipt, tice of assise, to certify a record of assise taken before his com- 81. 2 Hawk. panion in his absence. P. C. c. 27. § 42.

Reg. 90. *Certioraris* for the removal of indictments, &c. from sessions F. N. B. 81. of the peace, are commonly directed either to the justices of the Hob. 135. peace of the district generally, or to some of them in particular (d) *Vide* by name, and not to the *custos rotulorum*; yet it hath been holden, 2 Hawk. P. C. that after a recognizance is brought in to him he shall (d) cer- c. 27. § 43. tify it. leaves it a doubt whether it can be certified by him, unless he does it as justice of peace.

Rex v. Inhabit- [A *certiorari* to remove an order of two justices may be di- tants of War- rected to the sessions and returned by them. minster, 1 Str. 470.

Daniel v. If a *certiorari* be misdirected, no third person can object to it, Phillips, if the proper officer in whose keeping the record was, waves the 4 T. Rep. 499. objection, and returns the record upon the writ.]

(G) How far it is a *Supersedeas* to the Court below.

Cro. Car. 261. **I**T is clearly settled, that after a *certiorari* is allowed by the Salk. 148. court below, all subsequent proceedings on the record are er- pl. 13. roneous. Also before 21 Ja. 1. c. 8. (which requires that all *cer-* Cro. Eliz. 915. *tioraris* for indictments, forcible entries, at sessions, shall be deli- Dyer, 98. vered in court,) the delivery of such *certiorari* to any one justice Mo. 677. of the peace of the same place, made all subsequent proceedings 2 Ld. Raym. erroneous; and if any process had been before awarded on the 836. 7 Mod. indictment, the justice to whom the *certiorari* was delivered, ought 138. 12 Mod. to be immediately reversed. 643. 3 Salk. 79. pl. 4.

immediately to have awarded a *supersedeas* to the sheriff, in order to have stopped the execution of it: and it seems that the delivery of such a *supersedeas* to the sheriff before he hath begun to put a process in execution, makes his subsequent execution of it wholly void, because it is but a ministerial act: but if it be not delivered till after the execution is begun, he may afterwards go through with it, by virtue of a (a) writ of *venditioni exponas*.

It is said that the bare delivery of a *certiorari* makes all subsequent proceedings on the record, whether before or after the return of the *certiorari*, erroneous, by force of the words *coram nobis terminari volumus & non alibi*; in which respect a *certiorari* is of greater force than a writ of *error*: for that becomes of no effect if the record be not certified in a reasonable time: also it hath been holden that the very issuing of a *certiorari* is of itself a *supersedeas*, though it be never delivered, in the same manner as an appearance in the court above; and a *supersedeas* purchased there, though not delivered to the sheriff till after the *quinto exactus*, will avoid an outlawry pronounced after: but it seems the better opinion, that if a *certiorari* be not delivered before issue is joined, or at least before the return of it is expired, it is of no effect: however, it is of no force at this day as to indictments at sessions, as appears *supra*, (D).

[A *certiorari* removes all things done between the *teste* and return.]

A *certiorari* for the removal of a recognizance for good behaviour, or for an appearance at the sessions, will not supersede its obligation; because it would be highly inconvenient that the party, against whom there may be very just matter of complaint, should be let loose upon the bare bringing of a writ.

492. and Dalt.

(a) But 2 Hawk. P. C. c. 27. § 63. questions whether without such writ he can proceed.

Vide 2 Hawk. P. C. c. 27. § 64. and the authorities there cited.

2 Ld. Raym. 838. 1305.

Cro. Ja. 282. Yelv. 207. Skin. 244. 2 Hawk. P. C. c. 27. § 64. 2 Roll. Abr. c. 75. cont.

(H) In what Manner it is to be returned.

THE return of a *certiorari* ought to be under the seal of the (b) inferior court, or of the justice or justices to whom it is directed; and if such court have no proper seal, it may be under any (c) other seal. Also it must be made, by the person to whom the *certiorari* is directed; for if to the justices of peace of such a place, and the (d) clerk of the peace only return it; or to the constable, or to the recorder of B. and the (e) deputy constable or deputy recorder return (without shewing in the return, that the principal had power to make a deputy); or to the steward of St. Paul's, and the steward of the church of (f) St. Peter and St. Paul return it; nothing is removed.

But, if it be directed to the justice of *Chester*, it may be (g) returned by A. B. chief justice; for the same officer is known to be meant in the writ and return, and his description in both is in substance the same.

(g) But if a *certiorari*, directed to several justices, be returned by one of them only, *quare* what shall be done? *Vide* 2 Hawk. P. C. c. 27. § 71.

(b) Cro. Eliz. 821. (c) Lev. 311. (d) 2 Salk. 479. pl. 27. (e) Roll. Abr. 752. 2 Keb. 385. (f) 2 Keb. 385. cited.

Sid. 64. Lev. 50. Keb. 165. 2 Salk. 452. pl. 3.

Cro. Ja. 669.

A recognizance taken by a justice of peace, ought to be certified by such justice only till it be made a record of the sessions, after which it shall be certified in the same manner as the other records of the sessions.

2 Hawk.

P. C. c. 27.

§ 73.

The return to a *certiorari*, directed to justices of the peace for the removal of an indictment, ought to have the clause *nec non ad diversas felonias, &c.* in the description of the justices who make the return, where such clause is necessary in the caption of an indictment.

Carth. 223.

The King
v. Berry.

See the form
of returns to
certioraris,

Lamb. B. 2.

c. 2. 107.

Dalt. c. 73

and 134.

A *certiorari* issued to remove an indictment upon the statute 5 Eliz. c. 4. for exercising a trade in a borough, to which the mayor made this return, *viz. humillime certifico quod ad sessionem pacis, &c. per juratores presentatum existit quod billa sequens est vera, viz. quod predict. S. J. did exercise*, omitting the clause *juratores pro domino rege presentant quod, &c.* and though the court held that without these words no indictment was returned, yet they would not quash it, but ordered the mayor to amend his return: also the court held, that *humillime certifico* was not a good return.

6 Mod. 90.

(a) 2 Hawk.

P. C. 295.

(b) But an
action on the
case lies for a
false return

at the suit of the injured party, or there may be an information at the suit of the king. 6 Mod. 90. 2 Hawk. P. C. c. 27. § 74. See 1 Str. 63.

2 Salk. 492.

pl. 58. 2

Hawk. P. C.

c. 27. § 75.

2 Hawk.

P. C. c. 27.

§ 76. and *vide*
several autho-
rities there
cited, and

note in F. N. B.

242. B.

2 Atk. 318.

Whatsoever is put into the return to a *certiorari*, by way of explanation or otherwise, besides what is ordered to be returned, is put in without warrant, and not to be regarded.

Generally, the record itself, or the tenor of it, or the tenor of the tenor, is to be certified in the return of a *certiorari*, according as the writ requires; for if, on a *certiorari* to return an order of justices of the peace, the tenor of it be only certified, the return is naught; but the return of the tenor of an indictment from London is good, by the city charter: also it is said to be sufficient to certify the tenor only in all cases where the purport of the *certiorari* is not to proceed on the record removed, but only to try the issue of *nul tiel record*. However it seems clear, that if the court, which awards a *certiorari*, have no jurisdiction to proceed on the record ordered to be removed, as where the Court of Common Pleas award a *certiorari* for an indictment, the tenor only shall be removed, lest there should be a failure of justice.

(I) Where the Record shall be said to be removed.

For which *vide*
supra (F), (G),
and (H).

WHERE the writ of *certiorari* is improperly directed or returned, nothing can be removed by it.

A cer-

A *certiorari* may remove a record coming within its description, before the time of its return, though there were no such record at the time of its teste, or at the time of its delivery to the court below.

Salk. 148.
pl. 13. 2 Ld.
Raym. 836.
[A *certiorari*
to remove an
indictment,

will not remove a conviction. 2 Ld. Raym. 971.] It will remove an indictment, though there were a discontinuance below, in the same manner as a *recordare* will remove a plaint that was discontinued below. 2 Hawk. P. C. c. 27. § 79. [A verdict cannot be removed from the sessions before judgment. 2 Str. 763. 819.]

But it removes no record which materially varies from the record described in it; as where the writ describes a record taken before *A. B. justiciario nostro* and eight others, and the record certified was taken before *A. B.* and seven others only, or before him and others, besides the eight, or before *C. D.* and the other eight, or before justices of a former reign; or where the writ describes an indictment for stealing two horses, or an order concerning foreign salt, or the manor of *Anesley*; and the record certified mentions one horse only, or salt in general, or relates only to the manor of *Anesley*, without shewing in the return, that *Anesley* and *Anesley* * are the same, &c.; or where the writ mentions orders of indictments against *A. B.* and *C.*, and those certified are against *A.* only, or against *A.* and *B.* only.

But a writ for the removal of all indictments against *A.* may remove an indictment against *A.* and twenty others, so far at least as it (a) concerns him; because in judgment of law it is a several indictment against each defendant.

Hawk. P. C. *ibid.* it is not agreed whether, in such a case, the indictment shall be removed, so far as it concerns the other twenty.

Vide 2 Hawk.
P. C. c. 27. § 81.
82, 83, 84. and
the several au-
thorities there
cited, most of
which were on
the returns to
writs of *error*,
for which *vide*
head of *Error*.
* See *post*
next clause
but one.

Salk. 146. pl. 9.
2 Hawk. P. C.
c. 27. § 85.
See 1 Str. 116.
(a) But *per* 2
be removed, so

A variance between the *certiorari* and the record certified in the spelling only, where the words are of the same sound, as *Bird* and *Burd*, seems not to be material, because it appears not by any record of the court, but that the name in the *certiorari* may be the true one, and that in the record, being in the same sound, shall be intended to mean the same person: neither doth it seem to be a material variance that the *certiorari* omits an addition which the record gives the party: but if the *certiorari* give the party an addition which the record doth not, the variance is fatal: and so *a fortiori* is a variance in giving the party names of a different sound, or additions of a different kind in the *certiorari* and record certified; as where the one calls him *William Giggure*, and the other *William Gigueer*; or the one calls him *Henry Coachman*, *quocunque nomine censeatur*, and the other *Henry Murton Coachman*; or the one calls him *John of S.* and the other *John S.*; or the one calls him knight and baronet, and the other baronet only; or the one calls him *Garret* and the other *Gerrard*; or the one *J. S. nuper de B.*, and the other *J. S. nuper de C.*; or the one *J. S. de B. sadler*, the other *J. S. de B. salter*.

Vide 2 Hawk.
P. C. c. 27.
§ 86. and the
authorities
there cited.
Vide head of
Misnomer.
[A *certiorari*
will remove an
indictment up-
on a statute,
though it do
not so describe
it. 2 Str. 845.
But to remove
an indictment
after convic-
tion, it must
give the party
a day in court.
2 Ld. Raym.
971.]

(K) Of the Proceedings of the Superior or Inferior Court, after the issuing out of the *Certiorari*.

Raym. 186.
Vent. 66.
Salk. 144.

AFTER the *certiorari* delivered, if the inferior court proceeds, where by law it ought not, it is a contempt, for which the court will grant an attachment.

2 Hawk. P. C. c. 27. § 66.
(a) But by the common law

But, if an indictment be removed after issue joined and remanded, the inferior court (a) shall proceed as if no *certiorari* had been granted.

if a *certiorari* be once filed, the proceedings below can never be revived by any *procedendo*.
2 Hawk. P. C. c. 27. § 68. [It is true, that while it continues on the file, the court cannot award a *procedendo*. But it may be taken off the file, if it have issued *improvidè*; and when that is done, a *procedendo* will be granted. 1 Burr. 488. 4 Burr. 2459. 2522.]

(b) 12 H. 7.

25 Sid. 193.

2 Keb. 142.

(c) Keb. 101.

Salk. 147.

(d) 2 Hawk.

P. C. c. 27.

§ 87.

(e) 12 H. 7. 25.

3 Ass. pl. 3. 2 R. 2. 9. 2 Keb. 14. Carth. 223.

Also, if a *certiorari* issues, and the record is not thereby removed, the court (b) above cannot proceed upon it, but will (c) quash the writ, and award (d) a new one, or suffer the court below to proceed, and take such (e) order in relation to the defendant's appearance, either in the one court or the other, to answer the further prosecution of the cause against him, as shall in discretion appear to be most proper.

6 Mod. 264.

Salk. 61.

(f) But if two *nilils* are returned, *quare* what is to be done?

2 Hawk. P. C. 297.

2 Burr. 749.

If the defendant, against whom a record is removed into the King's Bench, do not appear, the like process shall go from thence as if the cause had been commenced there; but since the record is put without day, by the removal, there is no way to nonsuit the plaintiff before he has appeared there, but by taking out a *scire facias* to warn him to prosecute, whereon, if the sheriff (f) return a *scire feci*, he may be nonsuit.

[If the defendant is convicted by confession, and the prosecutor brings a *certiorari*, the defendant shall have a *procedendo*.

Rex v. Inhabitants of Seton,
7 T. Rep. 373.

|| Where a writ of *certiorari* had been issued before verdict, but not served till after judgment, on an indictment for a misdemeanour, the court quashed it, because after judgment the record can be removed only by writ of error.||

CHAMPERTY.

1 Hawk. P. C. c. 84. 2 Inst. 208. Co. Lit. 368. b.

CHAMPERTY is the unlawful maintenance of a suit, in consideration of some bargaia to have part (g) of the thing in dispute, or some profit out of it.

Stat. of Conspirat. 33 E. 1. (g) [That is, *campum partire*. Champerty is derived immediately from the French *champart*, which signifies a division of the profits of the land, being a part of the

the crop annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit, or right of suing. This was an offence extremely abhorred by our law. Nor was it less so by the laws of other countries. By a statute of Robert I. of Scotland: "*Nec terram seu aliquam rem aliam capiat ad champarte, ad defendendum, differendum, seu prolongandum jus alterius extra formam juris.*" Du Fresne, *verbo Campiparticeps.*" And, by the Roman law, "*qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipsius reductum fuerit inter eos communicaretur, lege Julia de vi privata tenentur.*" F. 48. 7. 6 and the offenders were punished by the forfeiture of a third part of their goods, and perpetual infamy. 4 Bl. Com. 135.]

¶ Champerty is a species of maintenance, and was an offence at 2 Inst. 208. common law; for the rule of law is, *culpa est se immiscere rei ad se non pertinenti.* And, *pendente lite nihil innovetur.*

By st. Westm. 1. or 3 E. 1. c. 25. (which, Lord Coke saith, 2 Inst. 209. is the foundation of all the acts and book-cases that ensued upon this subject,) "No officer of the king by themselves "nor by other, shall maintain pleas, suits or matters hanging "in the king's courts for lands, tenements, or other things "for to have part or profit thereof by covenant made between "them, and he that doth shall be punished at the king's "pleasure."

As the translation given in the statute books of the early acts is not very exact, we insert the original. "Nul ministre le Rey "ne mainteigne, par li ne par autre, les ples poles, ou bosoignes "q̄ sont en la court le Rey, de teres, tenement ou de autre chose, "por aver part de ceo, ou antre p fit par covenant fet entre eaus, "e qe le fra seit puni a la volente le Rey."

The words "en la court le Rey" mean some of the king's 2 Inst. 208. courts of record.

Maintenance in an action personal, to have part of the debt 47 Ass. pl. 5. or damages, is within the statute.

A grant of rent out of the lands in question is within the statute; but not a grant of rent out of other lands.

F. N. B. 172.
M. 1 Hawk.
P. C. c. 84. § 4.

Any covenant or agreement, whether in writing or by parol, is within the statute.

2 Inst. 209.
563. F. N. B.
172 L.

By st. Westm. 2. or 13 E. 1. c. 49. "The Chancellour, Treasurer, Justices, nor any of the king's council, no clerk of the "Chancery, nor of the Exchequer, nor of any justice or other "officer, nor any of the king's house, clerk ne lay, shall not receive any church nor advowson of a church, land, nor tenement in fee, by gift, nor by purchase, nor to farm, nor by "champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers; nor shall take no reward "thereof. And he that doth contrary to this act, either himself or by another, or make any bargain, shall be punished at "the king's pleasure, as well he that purchaseth, as he that doth sell."

"Chaunceler, Tresorer, ne Justice, ne nul de Consayl le Roy, "ne Clerk de la Chauncelerye, del Eschequer, ne de Justice, ne "autre Ministre, ne nul del hostel le Roy, Clerk ou lay, ne "puisse

Lord Coke is positive that this chapter was not so late as the

13th E. 1. " puisse recevoir Eglise, ne Avoeson de Eglise, ne tere ne tene-
 He refers it to " ment, ne fee, ne par doun, ne par achat ne a ferme, ne a
 the 3d E. 1. " chaumpart, ne en autre manere; taunt come la chose est en
 and considers " pleedevaunt no, ou devant nul de noz Ministres, ne nul loer ne
 it as an ad- " seyit pris. Eki ceste chose face, ou par lui, ou par autry, ou nul
 dition to the " baret y face, seyt puni a la volente le Roi auxi bien celui q̄ le
 stat. Westm. " purchasera, com celui q̄ le fera."

217. The statute of Westm. 1. is in *French*, whereas the statute of Westm. 2. is in *Latin* upon the Roll, though it appears in many manuscripts in *French*. The present chapter is wholly omitted in the Tower Roll, and in many other copies which give the statute in *Latin*, but is found in those copies which give the statute in *French*. In no copy, however, is it inserted but in *French*. It seems upon the whole to be exceedingly questionable whether it originally belonged to this statute. See the note in the first volume, page 95. of the statutes lately published by his majesty's command.

2 Inst. 484. This statute extends only to the officers therein named.

1 Hawk. P. C. It hath been holden, that it so strictly restrains all such officers
 c. 84. § 13. from purchasing any land, pending a plea, that they cannot be
 2 Inst. 484. excused by any consideration of kindred or affinity, and that they
 are within the meaning of the statute by barely making such a
 purchase, whether they maintain the party in his suit or not;
 whereas such a purchase, for good consideration, made by any
 other person, or any ter-tenant, is no offence, unless it appear that
 he did it to maintain the party.

By st. 28 E. 1. c. 11. " Because the king hath heretofore or-
 " dained by statute, that none of his ministers shall take no plea
 " for maintenance, by which statute other officers were not
 " bounden before this time; the king wills, that no officer nor
 " any other, for to have part of the thing in plea, shall not take
 " upon him the business that is in suit; nor none upon any such
 " covenant shall give up his right to another; and if any do
 " and he be attainted thereof, the taker shall forfeit unto the
 " king so much of his lands and goods as doth amount to the
 " value of the part that he hath purchased for such maintenance.
 " And for this atteindre, whosoever will shall be received to sue
 " for the king before the justices, before whom the plea hangeth,
 " and the judgment shall be given by them. But it may not be
 " understood hereby, that any person shall be prohibit to have
 " counsel of pleaders, or of learned men in the law for his fee,
 " or of his parents and next friends.

" Derechief, par ceo q̄ le Roi avoit avant ordiné par estatut q̄
 " nul de ses Ministres ne preist nul plai a champart, & p cel
 " estatut autres q̄ Ministres ne estoient pas avant ces heures a
 " ceo lieez, voet le Roi, q̄ nul Ministre, ne nul autre, pur part
 " aver de chose q̄ est en plai, enpreigne les busoignes q̄ sont en
 " plai; ne nul sur tieu covenant soen droit ne lesse a autri; et
 " si nul le fet, & de ceo soit atteint, soit forfet & encouru devers le
 " Roi, des biens ou de tres lempnour, la value dautant comesa ptie
 " de son purchaz p tele enprise amontera. E a ceo atteindre
 " soit resceu celui qui suivre vodra pur le Roi devant les Justices
 " devant

“ devant quieus le plai avera este, & p eus soit le agard fet.
 “ Mes en ceo cas ne est mie a entendre q̄ home ne puet aver
 “ consail de contours, & des sages gentz, p^r du soen donant, ne
 “ de ses parentz & ses pcheins.”

By a statute, which has been heretofore printed as of the 33 E. 1. under the title of “the Statute of Champerty;” but which in the volume lately printed by his majesty’s command is placed among the statutes of *uncertain date*, under the title of “Statutum de Conspiratoribus,” reciting, “Where it is contained in our statute, “that none of our court shall take any plea to champerty “by craft nor by engine, and that no pleaders, apprentices, “attornies, stewards of great men, bailiffs, nor any other of “the realm, shall take for maintenance or the like bargain, “any manner of suit or plea against other, whereby all the “realm is much grieved, and both rich and poor troubled “in divers manners: It is provided by a common accord, That “all such as from henceforth shall be attainted of such em- “prises, suits, or bargains, and such as consent thereunto, shall “have imprisonment of three years, and shall make fine at the “king’s pleasure.”

This statute is spoken of by Lord Coke, 2 Inst. 217. as of the 11th of E. 1. In the oldest printed copies by Pynson and Berthelet, the first part of it is given as a separate instrument, entitled “Statutum de Champertie,” and dated at Berwick. 11 E. 1. In those old printed copies

is also inserted an instrument intituled “Statutum de Conspiratoribus” as of 33 E. 1. in which the statute of Champerty is again erroneously printed with some verbal variations, with the date 20 E. 1. and the provision and writ against conspirators is subjoined. In Tottel’s printed copy, 1556, the “Statutum de Champertie” and “Statutum de Conspiratoribus” are given as separate articles; the former with the date 11 E. 1. and the latter without a date. In Cay’s edition a copy of the first part is given from MS. Cott. Claud. D. II. fol. 163. where it is inserted without any title, immediately after the statute of *Gloucester*, which is marked “Ex p rotul.” In a manuscript marked M. m. v. 19. in *Cambridge University Library* is a copy of this first part, immediately after the statute of *Gloucester*, which in that manuscript is also marked as examined by the Roll. This copy agrees with that in MS. Cott. except that at the head thereof there is a little addition. See note in page 216. of the above mentioned volume of the statutes.

“ Cum contenu seit en nre estatut ke nul de nre Curt enprenge
 “ play a champart, ne par art, ne par engin, Cunteurs ne
 “ atturnez ne apprentifs, seneschaus, des hautz homes baillifs
 “ ne autres de la tre nenprengent a champart ne par autres
 “ barettours de tute manere de play, ou tute manere de gent,
 “ parunt tote la tre est greve, riches & pources sunt travaille en
 “ mutz de maneres: Purveu est par commun acord ke tuz ceus
 “ ke desoremes sunt atteintz de celes enprises, suters & Bar-
 “ gayngnurs, e ceus ke a cele chose assentent eyent la prison de
 “ trois annz, e ne purkaunt seient reintz a la volunte le Rey.
 “ Done a Berwyk sur Twede lan du regne le Rey Edward,
 “ fiz le Rey Henr, vintime.”

The maintenance of the tenant or defendant, is as much with- in the meaning of the statute, as the maintenance of a demand- ant or plaintiff.

A grant of part of a thing in suit, made in consideration of a precedent debt, is not within the meaning of the statute, but such only as is made in consideration of maintenance.

1 Hawk. P. C. c. 84. § 9.

2 Roll. Abr. 113. pl. 3.
 15 H. 7. 2. a.
 Bro. tit. Cham-
 perty, 6.

1 Hawk. P.C.
c. 84. § 8.

In a prosecution on this statute, it doth not seem material whether the plea, wherein the maintenance is alleged, be determined or not; or whether the party did, or did not suffer any prejudice by it.

|| By 4 E. 3. c. 11. the justices of the one bench and of the other, and the justices assigned to take assises, whensoever they shall come to hold their sessions, or to take inquests upon Nisi Prius, shall inquire, hear, and determine as well at the king's suit, as at the suit of the party of maintainers, &c. and also of champertors.||

1 Hawk. P.C.
c. 84. § 16.
|| That the offence is not confined to courts of common law, see
3 Ves. 502. 15 Ves. 156. 18 Ves. 120.||

Champerty in any action at law, seems to be agreed to be within the statute of 28 E. 1. and a purchase of land, pending a suit in equity concerning it, hath also been holden to be within it: also a lease for life or years, or a voluntary gift of land, pending a plea, is as much within the statute as a purchase for money.

Stevens v. Bagwell, 15 Ves. 139.

|| An assignment of part of the subject of a prize suit then depending, was declared void, as amounting to champerty.

Wood v. Downes, 18 Ves. 120.

Where an attorney had obtained a conveyance from his client, pending the suit, of the estate, which was the subject of it, Lord *Eldon* relieved against it, considering the transaction as being actually champerty, and decreed the conveyance to stand as a security only for what was actually due. And a subsequent conveyance after a recovery in ejectment in right of the plaintiff, and possession taken under it, upon a suggestion of doubts of the validity of the former instrument, possession not having then been recovered, was also decreed to stand only for a security; his Lordship not considering it as a confirmation, because not a separate, independent, voluntary transaction, but as under the same pressure, and called for under the covenant for farther assurance.||

Hawk. P.C.
c. 84. § 15. 18.
19, 20.

But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain, nor any surrender by a lessee to his lessor, nor any conveyance or promise thereof made by a father to his son, or by any ancestor to his heir apparent; nor a gift of land in suit, after the end of it, to a counsellour for his fee or wages without any kind of precedent bargain relating to such gift, is within the meaning of the statute.

Strachen v. Brandon in Canc. 1767, cited by Lord Chancellor in 18 Ves. 127.

|| But, though a gift of part of the land in suit after the end of the suit to a counsellour for his wages is not within the meaning of the act, if it evidently appears there was no kind of precedent bargain relating to such gift, yet it seems dangerous to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty. The plaintiff, by descent a *Swede*, but born in *England*, claimed, as heir of a *Swede*, a large estate: being in indigent circumstances he applied to *Willis*, an attorney, who agreed to undertake his cause, if a fund could be procured. A subscription was proposed, and

Willis

Willis became one of the subscribers upon these terms; that the plaintiff, if he succeeded, should pay the subscribers, and among them *Willis*, double the sums advanced; and, if he failed, the subscribers were to lose their money. A bond was given with a penalty of 4000*l.*; and 1000*l.* was advanced. Lord *Northington* decreed, that the bond could not be permitted to stand as a security for more than the 1000*l.* actually advanced; stating in his decree, that this transaction, though not strictly champerty, was so near it, that it could not be permitted to prevail; that it savoured of champerty; and was therefore dangerous to publick justice.||

CHARITABLE USES AND MORTMAIN.

- (A) Of the several Statutes prohibiting to purchase in Mortmain.
 - (B) Of Things exempt from, or out of the Statutes of Mortmain.
 - (C) What is a good charitable Use within the Statute 43 Eliz.
 - (D) What is a superstitious Use to which the King is entitled.
 - (E) How charitable Dispositions have been construed, [and how far favoured in Equity.]
 - (F) Of the Commissioners of charitable Uses, pursuant to the Statute 43 Eliz.
 - *(G) Of the Statute 9 Geo. 2. c. 36. for regulating Devises in Mortmain, &c.
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- (A) Of the several Statutes prohibiting to purchase in Mortmain.

THE clergy in former days had so great an ascendant over the people, by instilling in them the notions of purgatory, and had so wrought on them by their art and management, that they prevailed on them to be very liberal of their possessions, and

See too, 2 Bl. Com. 263.

9 H. 3. c. 36.

(a) [Licences in mortmain were necessary, before

the granting of *Magna Charta*, both from the king, as ultimate lord of the fee, and from the intermediate lord between the king and the alienor. And if no such licence was obtained, the king, or other lord, might respectively enter on the lands aliened in mortmain, as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon, in respect of advowsons, which the monks always greatly coveted, as being the ground-work of subsequent appropriations. "*Ecclesia de feudo domini regis non possunt in perpetuum dari sine assensu et concessione ipsius.*" MS. Cotton. Claud. B. fol. 26. When a licence could not be obtained, the clergy seem to have had this contrivance: that, as the forfeiture for such alienations accrued, in the first place to the immediate lord of the fee, the tenant who meant to alienate, first conveyed his lands to the religious house, and instantly took them back again to hold as tenant to the monastery; which kind of instantaneous seisin was probably holden not to occasion any forfeiture; and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired signory, as immediate lords of the fee. And this was the mischief, which the clause in *Magna Charta* was intended to provide against. 2 Bl. Comm. 269.

But religious men found means to avoid this statute, by purchasing lands holden of themselves, and by taking long leases: also all ecclesiastical persons regular, as abbots, &c. thought themselves out of this statute. To meet therefore with these evasions, the 7 Ed. 1. stat. 2. called the statute, *De viris religiosis* was made.

Co. Lit. 2.

Burn's E. L.

tit. Mortmain.

|| By that statute it is provided, "That no person, religious or other, whatever he be, that will buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other title whatsoever it be, lands or tenements, or by any other craft or engine will presume to appropriate to himself under pain of forfeiture of the same, whereby such lands or tenements may anywise come into mortmain: and that if any person, religious or other, do presume either by craft or engine to offend against this statute, it shall be lawful for us and others chief lords of the fee immediate to enter into the land so aliened within a year from the time of the alienation, and to hold it in fee as an inheritance," &c.

We give the original, and subjoin another translation:

"*Providimus, quod nullus Religiosus aut alius quicunque terras aut tenementa aliqua emere vel vendere, aut sub colore donationis aut termini vel alterius tituli cujuscunque, ab aliquo recipere, aut alio quovis modo arte vel ingenio sibi appropriare præsumat, sub forisfacturâ eorundem, per quod ad manum mortuam terræ et tenementa hujusmodi deveniant quoquo modo. Providimus etiam, quod si quis Religiosus aut alius contra præsens statutum aliquo modo arte vel ingenio venire præsumpserit, liceat nobis et*

“ *aliis immediatis capitalibus dominis feodi taliter alienati, illud*
 “ *infra annum a tempore alienationis hujusmodi ingredi et tenere*
 “ *in feodo et hereditate,*” &c.

“ We have provided, that no person, religious or other, whatsoever he be, presume to buy or sell, or under colour of gift or lease, or any other title whatsoever, to take of any person, or by any other means by craft or engine to appropriate to himself any lands or tenements whereby such lands and tenements may in anywise come into mortmain, on pain of forfeiture of the same. We have provided also, that if any person religious or other, presume in any manner by craft or engine to offend against this statute, it be lawful for us and the other immediate chief lords of the fee so aliened into the same within a year from the time of such alienation to enter, and to hold it in fee and inheritance,” &c. ||

The clergy, when they found themselves prohibited by *Magna Charta* from purchasing lands, and perceived that their evasion of that law was provided against by 7 E. 1. stat. 2., which prohibited them not only from purchasing, but also *ullâ arte vel ingenio terras sibi ipsis appropriare sub pœnâ forisfacturæ earundem*, began to apply the judgments of the courts, against the intention of the law, to their own advantage; for they brought their *præcipe* against the tenant, who had agreed either to give or sell them the lands in demand, and prosecuted the suit, as if it had been really an adversary one, till the tenant, according to the precedent agreement, made default, which was always looked upon as sufficient ground for a judgment in favour of the demandant; and the judges presuming all recoveries just and lawful, which were prosecuted in the usual course of law, would not bring those covinous ones within the statute, though they were apparently *in fraudem legis*, and attended with all the inconveniencies which the statutes were made to prevent. But the clergy were quickly stopped in this course, for (a) the statute of Westm. 2. made these recoveries by default to be mortmain; and the exposition of this statute by the judges hath been carried as far beyond the letter, as their exposition on 7 E. 1. seems to have fallen short of the meaning and intention of that law; for though the letter of this act extends only to recoveries by default, yet they, (and with good reason too,) have extended it to all other recoveries, whether by demurrer or verdict, or otherwise; for if these should not be within the meaning of the act, an issue might be taken so much in favour of the clergy, and the evidence offered might be so weak, that the whole intention of the statute would be eluded.

2 Inst. 75.
Comp. Incumb. 374.

(a) 13 E. 1.
c. 32.

2 Inst. 429,
430.

Afterwards they found out the method of conveying to uses, which was first introduced to evade the statutes of mortmain; and this served them effectually; for they generally sitting in Chancery, where uses were solely cognizable, obliged the feoffee to execute the use according to the trust and confidence reposed in him. But this mischief was provided against by the statutes of 15 Rich. 2. cap. 5. and 23 H. 8. cap. 10.

(B) What Things are exempt from, or out of the Statutes of Mortmain.

Co. Lit. 99.
(a) Formerly
this licence or
dispensation
was to have
been made by
the king and
all the lords
mediate and
immediate; but now by 7 & 8 W. 3. it may be granted by the king alone, of whomsoever the lands are holden. (b) And it hath been holden, that such licence is good without any clause of *non obstante*. Co. Lit. 99. Plow. 502. Dyer, 269. — Also if the king dies before execution thereof, it may be executed afterwards Co. Lit. 52. b.

WHERE the (a) king (b) licenceth any corporation civil or religious, they may purchase, notwithstanding the above mentioned statutes of mortmain. This power the king seems always to have had; but the dispensing power having been carried too high, and greatly abused in a late reign, it was thought proper to restrain it by 1 W. & M. st. 2. c. 2. § 12. (also *vide* 3 W. & M. c. 2. § 17.) but now,

[See the note
in Co. Lit. 99.
a. 13th ed.]

By the 7 & 8. W. 3. c. 37. it is enacted, “That it shall and may be lawful to and for the king, his heirs and successors, when and so often, and in such cases as his majesty, his heirs or successors, shall think fit, to grant to any person or persons, bodies politick or corporate, their heirs and successors, licence to alien in mortmain, and also to purchase, acquire, take, and hold in mortmain, in perpetuity, or otherwise, any lands, tenements, rents, or hereditaments whatsoever, of whomsoever the same shall be holden. And it is thereby declared that lands, tenements, rents or hereditaments so aliened or acquired, and licensed, shall not be subject to any forfeiture, for or by reason of such alienation or acquisition.”

§ 8.

By 17 Car. 2. cap. 3. § 7. *for the augmentation of poor benefices with cure*, it is enacted, “That every owner or proprietor of any impropriation, tithes, or portion of tithes, in any parish or chapelry within the kingdom of *England* or dominion of *Wales*, shall be enabled and empowered to give or bestow, unite and annex the same, or any part thereof, unto the parsonage or vicarage of the parish or chapel where the same or any part thereof do lie or arise, or settle the same in trust for the benefit of the said parsonage or vicarage, or of the curate and curates there successively, where the parsonage is impropriate, and no vicar endowed, according to his or their respective estates, without any licence of mortmain.” And it is further enacted, “That if the settled maintenance of such parsonage, vicarage, churches and chapels so united, or of any other parsonage or vicarage with cure, shall not amount to the full sum of 100*l.* *per ann.* clear and above all charges and reprises; that then it shall be lawful for the parson, vicar, and incumbent of the same, and his successors, to take receive, and purchase to him and his successors, lands, tenements, rents, tithes, or other hereditaments, without any licence of mortmain.”

By the 2 Ann. cap. 11. a corporation is erected for the disposing of the first-fruits to the clergy, with power to take lands

lands and tenements for the use of the clergy, having no settled competent provision, by bargain and sale enrolled, according to the statute 27 H. 8. cap. 16. or by last will and testament in writing, duly executed according to law, without any licence or writ of *ad quod damnum*, notwithstanding the statute of mortmain.

¶ By st. 43 Geo. 3. c. 108. every person having in his own right any estate or interest in possession, reversion or contingency of or in any lands or tenements, or of any property in goods or chattels, may by deed enrolled (in *England* under st. 27 H. 8. c. 16. and in *Ireland* under st. 10 Car. 2. c. 1. § 17.) or by will (the deed or will to be executed at least three months before his decease, including the days of the execution and death,) give to any person or persons, bodies politick or corporate, their heirs and successors, lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.* for or towards the erecting, rebuilding, repairing, purchasing or providing any church or chapel where the liturgy and rites of the united church shall be used, or any mansion-house for the residence of any minister of the united church officiating in such church or chapel, or of any out-buildings, offices, church-yard or glebe for the same, to be applied for those purposes, according to the will of the benefactor in the deed or will expressed, the consent of the ordinary being first obtained; and in default of such direction, in such manner as shall be directed by the patron and ordinary with the consent of the incumbent; and such persons and bodies politick and corporate shall have capacity to purchase, receive and hold as well from such persons as shall be so charitably disposed to give the same, as from all other persons who shall be willing to sell or alien to them any lands, &c., without any licence or writ of *ad quod damnum*, the statute of mortmain, &c. notwithstanding.

But by § 2. it is provided that only one such gift shall be made by any one person; and where the gift shall exceed the amount, the lord chancellor may, upon petition, make an order for reducing it. And by § 3. no glebe containing upwards of fifty acres shall be augmented with more than one acre, the excess to be reduced as in the last proviso.

By § 4. plots of land not exceeding one acre holden in mortmain may be granted either by exchange or benefaction for the above purposes.

By st. 51 Geo. 3. c. 115. the king may grant land not exceeding five acres, by any deed or writing under the great seal or under the seal of the duchy of *Lancaster*, as the case may be, for the purposes aforesaid.

By § 2. any person seised of or entitled to the fee-simple of any manor may grant to the minister of any parochial church or chapel any parcel of the waste (not exceeding five acres) discharged of all right of common within the parish, or within any extra-parochial district, wherein such church or chapel

shall be or be intended to be erected for the purpose of erecting thereon, or enlarging any such church or chapel, or for enlarging a church-yard or burying-ground therein, or for a glebe for the minister, or to erect a mansion-house or other buildings thereon, or to make other conveniences for the residence of the minister.||

Doct. & Stud.
c. 10. Bridgm.
103. Bro.
Customs, 7.
38 Ass. pl. 18.

Also, by the custom of *London*, any citizen being a freeman of *London*, and being resident there, and taxable to scot and lot, may by will in writing devise his lands lying (a) in the said city in mortmain, notwithstanding the above statutes.

45 Ed. 3. 26. Roll. Abr. 556. (a) [But he cannot so devise lands lying out of *London*.
Middleton v Cater, 4 Br. Ch. Rep. 409.]

(C) What is a good Charitable Use within the 43 Eliz.

Vide 35 Eliz.
c. 7. 39 Eliz.
c. 5. 1 Co. 24.
11 Co. 70.
That a disposition to any of these uses will be good at this day, without any licence, notwithstanding the statutes of mortmain.

THE statute 43 Eliz. cap. 4. enacts, "*That the commissioners empowered by the lord chancellor shall inquire, &c. as to the lands, &c. given by well disposed people, for relief of aged, impotent, and poor people; for maintenance of sick and maimed soldiers and mariners, schools of learning, free-schools, and scholars in universities; for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; for education and preferment of orphans; for or towards the relief, stock, or maintenance of houses of correction; for marriages of poor maids; for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.*"

Duke's Char.
109.

In the construction of this statute, it has been holden, That lands, &c. given for the building of an hospital, for the relief of poor people, is a charitable use within the equity of the statute.

Duke's Char.
109..

So, for the building of a sessions-house for a city or county; the making of a new or repairing of an old pulpit in a church, or the buying of a pulpit-cushion or pulpit-cloth, or the setting up of new bells, where none are, or the amending them where they are out of order.

Poph. 139.
decreed.

Duke's Char.
109. S. C.
1 Ves. 321.

It seems settled, that money given for the maintenance of a preaching minister, though not a charitable use (a) mentioned in the statute, yet comes within the equity of it; for *summa est ratio quæ pro religione facit*.

(a) A gift of lands, &c. to a chaplain or minister, to celebrate divine service is neither within the letter or meaning of this statute; for it was on purpose omitted in the penning of the act, lest the gifts intended to be employed in purposes grounded on charity, might, in change of time, contrary to the mind of the giver, be confiscated into the king's treasury; for religion being variable, according to the pleasure of succeeding princes, that, which at one time is held for orthodox, may, at another, be accounted superstitious; and then such

such lands are forfeited, as appears by the statute of 1 Ed. 6. c. 14. Sir Francis Moor's Reading on the statute 43 Eliz. c. 4.

But, if a school-house is erected by the voluntary contributions of the inhabitants of *A.* on the waste of the lord of the manor, and the lord enfeoffs trustees, in trust that the inhabitants of *A.* may for ever have a school, as of the gift of the lord of the manor; this is not a free-school, and so not a charity within the statute of 43 Eliz. for which the inhabitants have a right to sue in the Attorney General's name.

Attorney General v. Hewer,
2 Vern. 387.

So, if the lord of the manor should erect a mill, and convey it to trustees, to the intent that the inhabitants might have the convenience of grinding there, this would not be a charity within the statute.

Id. *ibid.*

[Augmentations made be ecclesiastical persons to small vicarages and curacies under the act of 29 Car. 2. c. 8. are to be considered by § 7. of that act, as charities within the intent of stat 43 Eliz.; therefore an information may be filed in the name of the attorney-general to establish a right to a curacy so augmented.]

Attorney General v. Breton,
2 Ves. 425.

|| Where there is a gift to charity, in general, whether it is to be executed by individuals selected by the testator himself, or the king, as *parens patriæ*, is to execute it, it is the duty of such trustees on the one hand, and of the crown on the other, to apply the money to charity, in the sense which the determinations have affixed to that word in the Court of Chancery; viz. either to such charitable purposes as are expressed in the statute of 43 Eliz. or to purposes having analogy to those. The expression "charitable purposes," as used in that court, has been applied to many acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the statute given to all the purposes described.||

By Lord Eldon,
10 Ves. 541.

(D) What is a Superstitious Use to which the King is entitled.

A Superstitious use is described to be where lands, tenements, rents, goods, or chattels are given, secured, or appointed, for and towards the maintenance of a priest or chaplain to say mass (*a*); for the maintenance of a priest, or other man, to pray for the soul of any dead man, in such a church, or elsewhere; to have or maintain perpetual obits, lamps, torches, &c. to be used at certain times, to help to save the souls of men out of purgatory; these, and such like uses, are declared to be superstitious, to which the king, by force of several (*b*) statutes, and as head of the church and state, and entrusted by the common law, to see that nothing is done in maintenance or propagation of a false religion, is entitled, so as to direct and appoint all such uses to such as are truly charitable.

4 Co. 104.
Bridg. 105.
Cro. Ja. 51.
Salk. 162. pl. 1.
(a) [Since the Reformation, a charitable foundation for saying mass, praying for the souls, &c. is adjudged to be performed by saying the service according to the Liturgy. Co. Lit. 95. b.]

(b) *Vide*

(b) *Vide* 1 E. 6. c. 14. 15 Rich. 2. c. 5. 23 H. 8. c. 10. 1 Geo. 1. c. 55. || There is no statute making uses void generally. The statute of 1 E. 6. relates only to superstitious uses of a particular description then existing. The statute of H. 8. relates only to assurances of lands to churches and chapels; which, if for a longer term than twenty years, it declares absolutely void. The statute of Geo. 1. was only temporary.||

Duke's Char.
107.

And all limitations of land, &c. in fee-tail, for life or years, to any of the above-mentioned uses, are said to be superstitious, and to belong to the king, who is to direct and appoint them *in eodem genere*; so that they cannot revert to the donor, his heirs or representatives, during the time that they were to continue to the purposes aforesaid.

4 Co. 104.
Duke's Char.
106.

So, if lands be given on condition to find a priest, &c. though no priest be found, yet this is a superstitious use, to which the king is entitled.

4 Co. 104.
Duke's Char.
107.

But, if there be a charitable use intermixt with the superstitious use, so that they may be distinguished, the king shall have only so much as is limited to the superstitious use.

Salk. 162. pl. 1.
The king and
Lady Port-
ington.

It was found by inquest, that *A.* devised to *J. S.* and his heirs absolutely, without a trust; that he did it for the good of his soul: and that the devisee owned that this estate was not his, but belonged to God, and his saints: the Court of King's Bench held, that this could not be averred to be a superstitious use, by reason of the statute of frauds and perjuries; and said that a *monk* might now take by purchase, and seemed to think so of a *nun*: but an information being exhibited in the Exchequer, for a discovery, and that an application might be made of the devise to a use truly charitable (*a*), it was holden there, that the statute of frauds did not bind the king; that he, as head of the commonwealth, is entrusted and empowered to see that nothing is done to the disherison of the crown, or the propagation of a false religion, and to that end entitled to pray a discovery of a trust to a superstitious use; and that this being a superstitious use, the king shall order it to be applied to a proper use.

||(a) See Lord
Hardwicke's
observations
on this point
in giving
judgment in
Adlington v.
Cann, 3 Atk.
154.||
Smart v. Pru-
jean, 6 Ves. 560.
See also *De*
Garcin v.
Lawson, 4 Ves. 433. note.

|| A legacy for such purposes as the superior of a convent or his successor shall judge most expedient, would seem to be void as a superstitious use.||

Vern 248.
Attorney Gen-
eral v. *Bax-*
ter. Decreed
by *North*, Lord
Keeper; but
this decree
was reversed
1 W. & M. by
the Lords
Commission-
ers. See the
case in 2

A., being a beneficed clergyman, devised 600*l.* to *Mr. Baxter*, to be distributed by him among sixty *pious ejected ministers*, and added, that he did not give it to them for the sake of their non-conformity, but because he knew many of them to be pious and good men, and in great want; he also gave *Mr. Baxter* 20*l.*, and 20*l.* to be laid out in a book of his, entitled, *Baxter's Call to the Unconverted*; and this was holden a superstitious use, which though void, yet the charity is good, and shall be applied *in eodem genere*; and it was decreed for the maintenance of a chaplain in *Chelsea college*.

Vern. 105. by the name of Attorney General v. *Hughes*. || This case is mentioned in Lord *Hardwicke's* note-book thus: "The case of *Mr. Baxter* upon *Mayo's* will: the decree " reversed; not upon any thing contradicting the general principle reported to have been
" stated,

* stated, but because really a legacy to sixty particular ejected ministers to be named by *Baxter*, "and as if a legacy to those sixty individuals." 7 Ves. 76. A trust in favour of a dissenting congregation is most clearly since the toleration-act enforceable in equity. *Lloyd v. Spillet*, 3 P. Wms. 344. & 2 Atk. 148. *Attorney General v. Cock*, 2 Ves. 273. *Attorney General v. Fowler*, 15 Ves. 85. ||

A., by will, charged his estate with an annual sum for the maintenance of *Scotchmen* in the university of *Oxon*, ||to enter into holy orders as soon as capacitated by the canons of the church of England, || to be sent into *Scotland*, to propagate the doctrine of the church of *England* there; and *presbyteries* being settled in *Scotland* by act of parliament, the question was, Whether this devise should be void, and so fall into the estate and go to the heir, or should be applied *cy pres*? But the matter doth not appear by the report to have been determined.

2 Vern. 266. Pasch. 1692. Attorney General and Guise. ||The decree in this cause as to the charity was, that the trustees named in the will should convey

over the estate in question to the six senior fellows of *Baliol college Oxford* (one of the colleges mentioned in the testator's will) subject to mortgages, annuities, &c. as therein mentioned, to be disposed of as in the said decree particularly mentioned, the end of the decree being "for the effectual execution of the said trust as near as can be to the said will and intention;" the heir at law, &c. to have their costs. Reg. Lib. 1692. A. fol. 1074. See another suit as to this charity mentioned by Lord *Loughborough* in 3 Ves. 650.

(E) How Charitable Gifts and Dispositions have been construed; [and how far favoured in Equity.]

OUR chancellors have been very liberal in their constructions as to charitable dispositions, so as to make them answer the intention of the donors, and for that purpose have dispensed with several ceremonies required in other grants; and therefore it has been holden, that an appointment to a charity without livery of seisin, or attornment, is good.

Duke's Char. 109, 110. [The uniform rule of a court of equity, before, at, and after the statute of Elizabeth,

hath been, that where the uses are charitable, and the person hath, in himself, full power to convey, it will aid a defective conveyance to such uses. Per Lord *Henley*, keeper. 1 Bl. Rep. 90.—Where a donor hath expressed himself so obscurely, as to leave it quite doubtful whether he intended to give a principal sum to a charity, or only the interest and produce of it, a court of equity, it seems, will not confine it to the latter. 2 Atk. 328.]

So, a deed of bargain and sale to a charitable use, though not good by 27 H. 8. c. 16. for want of enrolment, yet shall be good as an appointment within the statute 43 Eliz. c. 4.

Preced. Chan. 391.

So, if copyhold lands are devised to a charity, they shall pass without any surrender, and shall bind the heir, but the lord shall not lose his fine.

Duke's Char. 110. 1 Ves. 225. Attorney General v. An-

draws. [But, where there are prior limitations of the copyhold to several persons, a court of equity will not interfere in favour of a charity. *Attorney General v. Lady Downing*, Ambler. 573.]

Tenant in tail, without levying a fine or suffering a recovery, may devise to a charity, and such disposition shall be good, by way of appointment within the statute 43 Eliz. c. 4., which being subsequent in time, hath so far repealed and abrogated the statute *de donis*.

Duke's Char. 110. 2 Vern. 453. S. P. Preced. Chan. 390. S. P.

Attorney
General v.
Lady Down-
ing, Highmore,
134. Ambl. 572.
Smith v.
Stowel, 1 Ch.
Ca. 195.

[If a devise be to a charitable use, though the object be not *in esse*, and though it depend on the will of the crown whether it shall be ever called into existence, equity will establish it.

An appointment to a charity, made precedent to the stat. of Eliz., and so void, was holden to be made good by the statute.]

2 Vern. 597.
Salk. 163, pl. 3.
S. P. Preced.
Chan. 270. 390.
[But, where
copyhold lands
were surren-
dered to the

But, if *A.* devises lands by will, not duly executed within the statute of *frauds and perjuries*, such disposition is void, and cannot operate as an appointment; for the statute of *frauds* is subsequent to the 43 Eliz. c. 4.; and requires, that all devises of lands, &c. should be in writing duly attested, &c., without making any exceptions as to charitable dispositions.

use of a will, and devised in charity, Lord *Hardwicke* held the will, though not signed in the last sheet, and without witnesses, to be a good appointment of the estate for the charity, under the stat. 43 Eliz. Attorney General v. Sawtell, 2 Atk. 497. Attorney General v. Andrews, 1 Ves. 225. Habergam v. Vincent, 4 B. Ch. Rep. 353. 2 Ves. Jun. 204. S. C.]

Duke's Char.
110. Moor,
822.

Also, if an infant, lunatick, or feme covert, by will or deed, give any thing to a charitable use, it shall be void in the same manner as all other acts of theirs are.

Duke's
Char. 79.

But *choses in action*, as statutes, bonds, &c., though not assignable at law, yet a gift of them is good, as an appointment to a charity.

Duke's
Char. 82. said
to be decreed.
Qu. & vide
Gravenor v.
Hallum, Ambl.

Also, if lands are given to churchwardens of a parish, to a charitable use, although the devise be void in law, they not being a corporation capable of taking lands in succession, yet they shall be capable for this purpose.

644. [Where a conveyance was to certain officers of a corporation, and not to the body corporate, equity supplied the defect. 1 Bl. Rep. 91. Ambl. 351.] A devise to the principal, fellows, and scholars of *Jesus College in Oxford*, and their successors, for maintenance of a scholar, is good, and they shall be in nature of trustees for this purpose; though before 43 Eliz. c. 4. such disposition would have been mortmain by 22 H. 8. c. 10. Hob. 136. Lev. 284. S. P.

2 Vent. 349.

So, where an impropriator devised to one who served the cure, and to all that should serve the cure after him, all the tithes and other profits, &c., though the curate was incapable of taking by this devise, in such manner, for want of being incorporate, and having succession; yet it was holden, that the heir of the devisee should be seised in trust for the curate for the time being.

Duke's
Char. 82.
Mayor of
London's case.

Where there hath been an uncertainty in the description of the persons to take, the courts have been very liberal in their explanations; as, where a devise of lands to a charity was to a corporation by a wrong name; as to the mayor and chamberlain, instead of the mayor and commonalty.

West v. Knight
1 Ch. Ca. 134.

So, where money was given generally to a parish, it was holden, that it must be intended to the poor of the parish.

Duke's
Char. 113.

So, where lands were devised to *A.* for life, remainder to the church of St. *Andrew's, Holborn*, it was holden, that the parson of the church should have this remainder.]

|| Where

¶ Where 500*l.* was bequeathed to the church of *St. Helen's*, it was holden it should not go to the vicar or stipendiary of the church, but that it belonged to the churchwardens for the repairing and adorning of the fabrick. ||

[So, a legacy to the poor inhabitants of *Saint Leonard, Shore-ditch*, was deemed to go to the poor not receiving alms. Attorney General v. Ruper, 2 P. Wms. 125. Clarke, Ambl. 422.]

So, where a legacy was given *to the poor*, the court directed it to be given to the poor *French* refugees, it appearing that the testator was a *French* refugee. Attorney General v. Rance, cited *ibid.*

So, where a bequest was for the benefit of poor dissenting ministers living in any of the counties of *England*, it was holden to be good; and it being in proof, that there are three distinct societies of dissenters, and that collections are made for the poor ministers of each, it was directed to be so applied. Walker v. Childs, Ambl. 524.

If the gift is for the poor of any city, and other parishes are afterwards admitted within the precincts of the city, and added thereto; the poor of the parishes admitted shall have a proportion of the charity. Attorney General v. Corporation of Rochester, Finch 194. Qu.

A legacy of 5*l.* was bequeathed to the poor of two hospitals in *Canterbury*, naming them; and, by a codicil, an annuity of 5*l.* to all and every the hospitals: it appearing that the testatrix lived at *Canterbury* many years, and died there; and that she had taken notice by her will, of two *Canterbury* hospitals; the charity was holden not to be void for uncertainty, but to have been intended for all the hospitals in *Canterbury*; but not to extend, as was pressed, to an hospital about a mile out of *Canterbury*, though founded by the same archbishop, and governed by the same statutes. Masters v. Masters, 1 P. Wms. 425.

One *Penning*, of *Saffron Walden*, and several others, subscribed to a charity-school there, of twelve boys and girls, which subscription was only during the pleasure of the benefactors. *Penning*, pleased with seeing these children, declared he would leave them something at his death: there was also a free-school in the same town; and *Penning* made his will, giving "500*l.* to the charity-school." Lord Chancellor *Parker* said, that though the free-school be a *charity-school*; yet the charity-school for boys and girls went more commonly by that name: and, as the testator was fond of the latter, and declared he would leave them a legacy; therefore, *that*, and not the free-school, was entitled thereto. Attorney General v. Hudson, 1 P. Wms. 674.

A sum of money was bequeathed to be distributed every year, on certain days, to the poor of the parish of *L.* in the county of *M.*, in which county there was no such parish; but there was in the county of *D.*: the court established the will, because it appeared that the testator was born there, and that both he and his parents lived and died there. Owen v. Bean, Finch. 395.

Noel Lord Carron, formerly ambassador here from the States General, being seised in fee of a great house in *Lambeth*, called *Carron-house*, and the lands thereto belonging called the *Park*, and Finch. 353.

and having built an alms-house in that parish, wherein he placed seven poor women of *Lambeth*, of sixty years of age and upwards, whilst he lived, and appointed 4*l.* to be paid to them every year quarterly, did, in order to establish the same as a perpetual charity, by his will, charge the premises with 28*l. per ann.*, to be distributed equally among *seven poor women*; and directed that when one or more of them died, their places should be supplied, at the appointment of the owners of *Carron-house*, by other poor women, who, as it was suggested, and as had always been the case during his life, he intended should be poor women of that parish. It appeared that the owners of *Carron-house* had for some time paid the charity, but of late had refused, so that it was become in arrear; neither did they fill up the vacant places, pretending that the charity was not payable in succession, there being no such direction in the will of the donor, but only to *seven* poor women who were in possession at his death; or that if it must be paid, yet it might be to other poor women out of any other parish at their own appointment. A bill, therefore, was brought against the owners of *Carron-house*, to have the charity established for ever, and the arrears thereof paid by the defendants, and the growing payments duly made for the time to come, and the poor women to be chosen in succession out of *Lambeth* parish, and not out of any other parish; for otherwise the charity would rather be an injury than a kindness to *Lambeth*; because, if taken out of other parishes, *Lambeth* must maintain them, the 4*l. per ann.* being not sufficient. It was decreed as prayed, and a charity was established in the hands of the churchwardens in succession, though not given so in direct words.

White v. || A bequest to *poor relations* may be sustained as a charity.
White, 7 Ves. 422.

Attorney General v. Price, 17 Ves. 371.
Isaac v. De Frieze Id. not.
S. P. Bransden v. Woolridge, Ambl. 507.
So, where there was a devise to *A.* and his heirs, with a direction, that yearly he and his heirs should for ever divide and distribute according to his and their discretion among the testator's *poor kinsmen and kinswomen, and amongst their offspring and issue dwelling in the county of Brecon* 2*ol.*; it was adjudged to be in the nature of a charitable bequest, and (the will being made in 1581) was sustained, and inquiries directed as to the poor relations living in that county.

Cox v. Bassett, 3 Ves. 155.
A legacy for a general charity-purpose wholly undefined is void.

Morice v. Bishop of Durham, 9 Ves. 399.
and S. C. on appeal, 10 Ves. 522.
A bequest for such objects of *benevolence and liberality* as the trustee in his discretion shall approve, cannot be supported as a charitable legacy, but is a trust for the next of kin.

Brown v. Yeale, stated in 7 Ves. 50. note.
Where a fund was vested by will in trustees, "to be from time to time for ever applied in the purchasing of such books, as by a proper disposition of them under the following directions might have a tendency to promote the interests of virtue and religion, and the happiness of mankind; the same to be disposed of in *Great Britain*, or in any other part of
" the

“ the *British* dominions; this charitable design to be executed
 “ by and under the direction or superintendency of such per-
 “ sons, or under such rules and regulations as by any decree or
 “ order of the high Court of Chancery shall from time to time
 “ be directed in that behalf;” Lord *Thurlow* was of opinion, that
 the testator, not having given the Court more of specifick di-
 rection as to the nature of the books, than that they were to
 be such as may have a tendency to promote the interests of
 virtue and religion, and the happiness of mankind, had not given
 direction enough; and therefore held the next of kin entitled.

But, where a testatrix bequeathed to trustees the residue of
 her personal estate, “ for the use of the *Welch* circulating cha-
 “ rity schools, as long as the same should continue, and for
 “ the increase and improvement of Christian knowledge, and
 “ promoting religion in such manner as the trustees for the
 “ time being should think most proper and conducive to the said
 “ charitable purposes; and moreover that they should purchase
 “ from time to time new Bibles and other religious books,
 “ pamphlets, and tracts as they should think fit for such pious
 “ uses and purposes as were intended for those already bought,
 “ and should apply and dispose of the said books, effects, and
 “ personal estate accordingly; and in the mean-time should
 “ deposit all the said Bibles, books, pamphlets, and tracts in
 “ the house,” which she devised for that purpose; and also
 made provision in her will for keeping up the number of trustees;
 the devise of the house was declared void; but the personal
 bequest was sustained as a general charitable purpose of pro-
 moting Christian knowledge, to be executed, regard being had,
 as far as reasonably might be, to the particular charity pointed
 out, with checks for the purpose of making it conformable to
 the establishment of the country.

Henry Fryer enfeoffed several persons in trust, and by his
 will appointed them to pay 10*l.* *per annum* to three parishes in
London, viz. *A. B. & C.* for the poor of those parishes; and
 appointed some other charities since determined, and of the
 residue he declared they should stand seised for the use of the
 poor in general for ever. After the testator’s death, *Dr. Fryer*,
 his son and heir, whom he had disinherited upon some dis-
 pleasure, contested the will and settlement in the Court of
 Wards, and at last the matter was referred to the king, who
 awarded, that the 10*l.* *per annum* should be distributed among
 the three parishes, viz. 2*l.* to *A.* and 4*l.* a-piece to *B. & C.*
 and that 8*l.* *per annum* for ever should go to the rebuilding
 and repair of the church of *St. Paul, London*, and the residue
 to *Dr. Fryer* and his heirs. This award was confirmed by
 several orders in the Court of Wards, but no formal decree
 was made there, nor in the Court of Chancery, by a decree of
 which Court also the king by his award ordered it to be settled.
 And the trustees were to convey the land subject to these uses
 to *Dr. Fryer*, and the land having been enjoyed by him, and
 the trust performed accordingly, the commissioners of charita-

Attorney General v. Step-
 ney, 10 Ves.
 22.

Attorney General v. Matthews, 2 Lev. 167. S. C. Finch, 245. by the name of Fryer v. Peacock. It appears in some places by the name of Attorney General v. Peacock. This case is given at length in the words of the reporter, as being the earliest upon the subject, and as having been marked with particular attention by

Lord Chancellor *Eldon*, in delivering his judgment in the case of *Moggridge v. Thackwell*. The result of His Lordship's reasoning upon this and the several other cases which he examined was, that where there is a general indefinite purpose of charity, not fixing itself upon any object, and no trust interposed, the disposition is in the king by sign manual: but, where the execution is to be by a

able uses upon complaint to them, made a decree, whereby they settled the whole estate to charitable uses, without regard to former proceedings. And the decree of the commissioners was quashed by the Lord Keeper *Finch*, because this being a general charity, and for the poor in general, the commissioners have nothing to do with it; but it is to be determined by the king himself in the Court of Chancery, upon an information by the attorney-general in behalf of the king, which accordingly he directed to be brought. And upon the information, the lord keeper said, that this general charity belongs to the king himself to dispose of, but yet to the poor. And therefore the disposal of 80*l. per annum* to *Paul's* was out of the trust and void, and the distribution to the three parishes good, and to be confirmed. But as to the poor kindred of *Fryer*, who prayed to be considered, he said that no consideration could be had of them, for the disposition is to be such as may endure for ever, and they cannot live poor for ever. But before he would dispose of the residue, he said he would acquaint the king with the case and the value of the estate, to have his directions how the disposition of this general charity should be, and that to be confirmed by the decree of the Court. And afterwards the king directed it should go to the maintenance of the mathematical scholars in *Christ's Hospital*; which was accordingly confirmed by the decree of the Court.||

trustee with general or some objects pointed out, there the Court upon an information administers the trust, and a scheme for that purpose is laid before the master. *Moggridge v. Thackwell*, 7 Ves. 86. *Paice v. Archbishop of Canterbury*, 14 Ves. 372. 2 Freem. 261. *Attorney General v. Pearce*, 2 Atk. 87. *Cook v. Duckenfield*, Id. 569. *Clifford v. Francis*, 2 Freem. 330.

Attorney General v. Syderfin, ||1 Vern. 224. See the statement of this case from the Registrar's book, 7 Ves. 43. note; and a further account of it by Lord *Eldon*, Id. 70, &c.||

A. having devised 100*l.* to be applied to such charitable uses as he had, by writing under his hand, formerly directed, and no such writing being to be found, it was holden that the king should appoint, who gave it to the mathematical boys in *Christ's Hospital*; which was decreed accordingly; and that the parties should be indemnified against the writing referred to.

Attorney General, v. Herrick, Ambl. 712.

||A testator devised the residue of his property to trustees to be paid to charitable and pious uses. Lord *Apsley* said there was no objection to the uncertainty of the object, for the king may appoint, and that he would apply to his majesty, as Lord *Nottingham* did in the case of the attorney-general v. *Peacock* (supra.)||

Cook v. Duckenfield, 2 Atk. 562.

[*A.*, by his will, devised all his lands and tenements, in the event of his son's dying under age or without issue, to the defendant and four others by name, for such charitable uses and purposes as he should direct by codicil or otherwise. By his codicil, he ordered and directed, pursuant to that clause in his will, that the said lands and tenements should, at the discretion of his said trustees, be sold and disposed of, or kept in their hands and possession; and that the purchase-money arising thereby, or the rents and profits thereof, should be applied and distributed to and amongst such persons, or to and for such

uses

uses or purposes, in such manner as he should by any writing appoint; and for want of such direction and appointment, then to such person or persons, or to such uses and purposes, as they the said trustees, or the major part of them, or, in case of death, the survivors or survivor of them, or the heirs of such survivor, should judge fit and convenient. The testator's son died under age and without issue. The testator left no directions by writing or memorandum as to the application of the estates devised. The trustees insisted upon the beneficial interest in them: the heir at law of the testator claimed them as a resulting trust. But Lord *Hardwicke* decreed, that, as the intention of the testator was clear in favour of charity, a scheme should be laid before the master for applying the estate to such charitable uses and purposes as should answer his intention, and also for the application and distribution of the money that should be coming in out of the growing rents and profits, or out of the money that should arise by any future sale.

A., by his will, gives to *Bread-street ward 200l.*, according to Mr. —'s will: Lord *Hardwicke* decreed, that the money should be disposed of in such charities as the aldermen and inhabitants of the ward should think most beneficial. Baylis and Church v. Attorney General, 2 Atk. 239.

The testator, by his will, gave a moiety of the residue of his estate to such of the *lying-in hospitals* as his executor should appoint. Afterwards he struck out of his will the name of his executor, but did not appoint any other executor. It was decreed by Lord *Thurlow*, that the Court would appoint; and it was accordingly referred to a master, to which of the *lying-in hospitals* the legacy should be paid. White v. White, 1 Br. Ch. Rep. 12.

Sir *George Downing* devised an estate to trustees for the purpose of founding a college; and directed them to form a plan for the government of it: the trustees died in the testator's life-time; and Lord *Camden* held the heirs at law entitled to the conduct of the charity. Attorney General v. Lady Downing, Ambl. 575.

¶ A legacy was given to *B.* to be disposed of for the benefit of non-conforming ministers, with the advice of *C. & D.*: *B. C.* and *D.* all died in the testator's life-time; yet the Court sustained the legacy. Attorney General v. Hickman, 2 Eq. Ca. Abr. tit. Charity, pl. 14.

So, where a residue was given to *J. V.*, with a desire that he would dispose of it in such charities as he should think fit, recommending poor clergymen who have large families and good characters, and *J. V.* died in the life-time of the testatrix; yet the charity was sustained, and executed by the Court. Moggridge v. Thackwell, 3 Br. Ch. Rep. 517. 1 Ves. Jun. 464. S. C. 7 Ves. 36. S. C. reheard.

[*W.* left money to be distributed in charity at the discretion of his three executors, one of whom died before the information was filed. Lord *Hardwicke* held, that this not being a bare authority, but coupled with an interest, survived to the other two executors: but that the executors, in this case, could not divide the charities into three parts, and each executor nominate a third absolutely, because the determination of the property of every Attorney General v. Gleg, 1 Atk. 356.

every object was left by the testator to the direction of all the executors.

Attorney General v. Bishop of Chester,
1 Br. Ch. Rep.
444.

Archbishop *Secker*, among many charitable legacies, gave to his trustees, the defendant and Dr. *Stinton*, since dead, 1000*l.* stock, for the purpose of establishing a bishop in his majesty's dominions in *America*, and ordered, that if any charity to which he had given a legacy, should no longer subsist, such legacy should fall into the residue. It was contended, that there being no bishop in those parts of *America*, nor any likelihood that there ever would be one, the legacy was void, and fell into the residue. But by Lord *Thurlow*, the money must remain in Court, till it shall be seen whether any such appointment shall take place.

Id. *ibid.*

Archbishop *Secker* also gave 1000*l.* to be laid out upon repairing parsonage-houses. The counsel for the Bishop of *Chester* said, that the archbishop's other trustee being dead, the selection of the objects belonged to his client alone. But, by Lord *Thurlow*, it must be referred to the master, and proposals of proper objects be laid before him.]

Hibbard v.
Lamb. Ambl.
309.

|| Where money, given in charity, is to be disposed of in such manner as the executors or the survivors shall think fit, it is considered as a personal trust which dies with the executors.||

Widmore v.
The Corporation of Q.
Anne's
Bounty, Ambl.
636. 1 Br.
Ch. Rep. 13.
in not. S. C.

[The testator gave 200*l.* to the corporation of *Q. Anne's Bounty*, to augment poor livings, and directed his executors to divide the residue of his personal estate into three parts, and to pay one third either to the corporation of *Q. Anne's Bounty*, or the society for propagating the gospel, and another third to some publick charity. The legacy to the corporation of *Q. Anne's Bounty* was holden to be void, as, by the rules of that institution, it must be laid out in lands. The legacy which was given to the same charity, or to the society for propagating the gospel, was, on the same account, ordered to be paid to the latter. And the legacy to some publick charity was declared to be good, but that the executors ought to dispose of it under the eye of the Court, and therefore were to propose a charity to the master.]

8 Co. 130.
School of
Thatford's
case, that the
price of lands
increasing,

If one dispose of lands worth 10*l.* a-year, to maintain a preacher, schoolmaster, and poor people in *Deal*, and the lands after come to be worth 100*l.* a-year, it must be all employed to increase the several charities.

the rents shall be raised, and laid out in augmentation of the charity. See acc. Duke's Charitable Uses, 71. 112. [Attorney General v. Mayor of Coventry, 2 Vern. 397. 2 Br. P. C. 236. S. C.]

Arnold v.
Attorney General, Show.
P. C. 22.

Where *A.*, seised of a manor of the yearly value of 240*l.* devised several legacies, and particularly to his heir at law 40*l.*, and then added, *that being determined to settle for the future, after the death of me and my wife, the manor of F. with all lands, woods, and appurtenances, to charitable uses, I devise to M. and N., upon trust, that they shall pay yearly and for ever, several particular sums to charitable uses, amounting in the whole to 120*l.* per annum; and gave the trustees something for their pains; there*

there being an overplus, it was decreed to go in augmentation of the charities, it appearing to be the testator's intent to settle the whole manor, and that the heir should have no more than 40*l.*

|| Wherever it is evidently the intention of the testator to dispose of the *whole* estate to the charity, and the revenue's increase, such increase goes to the charity, and does not result to the heir at law.

Attorney General v. Sparks, *Id.* 201. Attorney General v. Towner, 2 Ves. 1. 4 Br. Ch. Rep. 103. Attorney General v. Minshull, 4 Ves. 11. Attorney General v. Earl of Winchelsea, 3 Br. Ch. Rep. 373. Attorney General v. Green, 2 Br. Ch. Rep. 492., in which case Lord *Thurlow* varied the nature of the trust. The object of the gift was to purchase advowsons for University College, *Oxford*: the college had as many advowsons as the legislature would allow them to take; His Lordship increased those they already had.

Attorney General v. Johnson, *Ambl.* 190.

Attorney General v. Johnson, *Ambl.* 191.

But if there are several uses, the Court is not bound to direct that they shall all be augmented proportionably; but may exercise its discretion as to the method in which the surplus shall be distributed.||

Attorney General v. Johnson, *Ambl.* 191.

If in the constitutions for founding an hospital, it be ordained that no lease shall be made for above twenty years, and the rent not to be raised, nor above three years' rent taken for a fine; though the tenant of the hospital lands is entitled to a beneficial lease upon renewal, yet this constitution is not to be followed according to the letter; but as times alter, and the price of provisions increaseth, so the rent ought to be raised in proportion.

Watson v. Hinsworth Hospital, 2 Vern. 596.

|| So, if an hospital, restrained by its constitution from granting a lease for any longer term than twenty-one years, makes a lease for twenty-one years, with a covenant by renewal to make it up sixty years, and by deed of covenants the lessee covenants to pay all additional rents, this covenant is not binding in equity, as being equally prejudicial to the hospital, as a lease for sixty years. And the corporation are but trustees for the charity, and may improve for the benefit of the charity, but cannot do any thing to its prejudice, in breach of the founder's rules. But the additional rent and arrears shall be paid during the term of twenty-one years; for though it was an indenture of mutual covenants on the lessor's part to renew, and on the lessee's part to pay the additional rent, those covenants appeared in the deed to have been made on distinct considerations, viz. the covenant for increase of rent, because the price of provisions was raised, and the covenant for renewal, because the lessee undertook to lay out 100*l.* in building.

Lydatt v. Foach, 2 Vern. 410. See acc. Taylor v. Dulwich Hospital, 1 P. W. 655. Watson v. The Master, &c. of Hems-worth Hospital, 14 Ves. 324.

In 1715 the trustees of a charity granted a lease of lands, theretofore let at 31*l.* per annum, for nine hundred and ninety-nine years, in consideration of 500*l.* to be laid out, and 4*l.* per annum additional rent. The Court considered this as an alienation of the property in *perpetuum*, and decreed the lease to be delivered up; but, as the tenant had lately laid out 600*l.* in improvements, he was to have just allowances in the account. The present annual value was about 100*l.*

Attorney General v. Green, 6 Ves. 452.

Attorney General v. Owen,
10 Ves. 555.

In 1747 the trustees of a charity demised to the defendant's ancestor for ninety-nine years a farm, part of the charity-estate, at the yearly rent of 32*l.*, with an agreement that he should lay out 40*l.* in repairs. The original lessee died in 1753, and in 1801, the existing trustees filed their bill against his representative, praying that he might surrender the former lease, and accept a new one, which they offered for a reasonable term, and at a fair rent. The farm was proved worth to be let at 130*l. per annum.* Lord Chancellour held, that this was a breach of trust in the first trustees, and that the lease ought to be delivered up; but said he would not charge the defendant with more rent than 32*l. per annum* previously to the filing of the bill, nor with costs, if he gave up the lease without trouble; which he accordingly did.

Attorney General v. Griffith,
13 Ves. 565.
The trustees who grant such leases may be relators in the information for the purpose of setting them aside; for it cannot be objected, that they come to set aside their own deliberate acts, the Court being the paramount trustee of a charity. Attorney General v. Talbot, cited in 13 Ves. 571.

Where trustees had granted a lease of a charity estate for seventy years under terms, not only against the express directions of the founder, but most improvident in themselves, the Court set it aside, and would have done so with costs, but that the information had been filed before the decisions in the two last cases (*supra*). The relators not wishing to disturb the under lessees, the account was confined to the filing of the information or previous demand.

Attorney General v. Backhouse, 17 Ves. 283.

But the length of the term would seem not to be of itself a sufficient reason for setting a lease aside, particularly against persons claiming under several mesne assignments. Therefore Lord *Eldon* supported a charity lease for eighty years as to the interest of a sub-lessee, for a fair consideration several years before, and without notice, except that it was a charity-lease. And as to the original lease, his lordship taking into consideration the length of time, the surrender of a former lease, the terms of which did not appear; the rent reserved, and an expenditure, though not according to the covenant, yet equally beneficial; directed inquiries to be made for the purpose of ascertaining, whether the lease was reasonable, or unreasonable to such a degree as that fraud could be inferred.||

Duke's Char.
94.

Neither will the courts suffer a charity to be diverted to other uses than the donor intended it; and therefore where money was given for the relief of the poor, and the trustees laid it out in building a *conduit*, this was holden a misemployment.

Vern. 42.
Man and Ballet, Eq. Ca.
Abr. 99. pl. 4.
S. C.

So, where several distinct charities were given to a parish, *viz.* 12*l. per ann.* for repairing the church 6*l. per ann.* for mending the highways, and so much to the poor, in all 40*l. per ann.*, and the trustees having paid 10*s.* for every day's lecture to a lecturer, and laid out other parts of it for the service of the parish, but not according to the directions of the donor; it was holden by my Lord Chancellour, that if it should be admitted that parishioners might change and apply parochial charities as they thought fit,

it would destroy all charities; and therefore ordered that for what was paid the parson, they should not be allowed a farthing, but that for the other payments they should be allowed the money, being promiscuously paid for several years before; but for the future, that it should be paid according to the terms of the charity.

[One seised in fee of a manor grants a rent in fee out of it, as a charity, for the support of several poor persons, and afterwards grants the manor to *J.S.* in fee: the nomination of the poor persons belongs to the heir of the grantor, and doth not go with the manor. But forasmuch as the grantees and owners of the lands had for upwards of sixty years enjoyed the nomination of the persons, who had partaken of the charity, the court allowed to them all the payments they had made to any of the poor, though nominated by themselves, and would not disturb any thing that had been already done.

Where trustees of a charity had a discretionary power to lay out money on a road, the Court said it would not interpose to control them, unless it had been shewn that they had acted corruptly or partially; at the same time the Court would not dismiss the information, but retained it in order to keep a hand over them. (a)]

Attorney General v. The Haberdashers' Company, 1 Ves. Jun. 295. Lord Chancellour says, that the only way of administering a charity is by general directions to the trustees: that the information is not to be kept under the direction of the court to be executed from time to time; but that if the trustees misbehave, there must be another information upon the new ground.||

|| Where trustees of a charity, whether they be individuals or a corporate body, (and a corporate body for charitable purposes are considered as trustees,) have mismanaged the funds, and neglected the objects, the Court has decreed them to make good the deficiency, and visited them with costs.

And where there has been very gross misconduct in a corporation, misapplication, &c. of the increased revenues, and inability to pay the money due in consequence, the Court has directed the estate to be conveyed to other trustees.

But the court will not interfere with the governors of a charity established by *charter*, unless they have also the management of the revenues, and evidently abuse their trust.

Ves. Jun. 42. 4 Br. Ch. Rep. 167. S.C. Attorney General v. Corporation of Bedford, 2 Ves. 505. Eden v. Foster, 2 P. Wms. 326.

The Court of Chancery has jurisdiction in all cases of abuse and mismanagement of the revenues of a charity by the governors; and where the heir of the founder was a lunatick, an irregular appointment of governors and a schoolmaster by his committee was vacated upon petition to the Lord Chancellour, as visitor.||

[Dr. Radcliffe, by his will devised 300*l.* a-year to two persons, to be chosen by the Archbishop of *Canterbury*, and certain other

Attorney General v. Rigby, 3 P. Wms. 145.

Attorney General v. Governors of Harrow School, 2 Ves. 552.

|| (a) In the case of the Attor-

ney General v. The Haberdashers' Company, 1 Br. P. C. 9.

Mayor, Bailiffs, &c. of the City of Coventry v. the Attorney General, 2 Bro. P. C. 236.

Attorney General v. Foundling Hospital, 2

Bedford, 2 Ves.

Attorney General v. Dixie, 13 Ves. 519.

Attorney General v. Stephens, 2 Jur.

Eccl. 157.
Burn's E. L.
tit. Charitable
Uses. 1 Atk.
358. S. C.
2 Eq. Ca. Abr.
tit. Charity,
(A), pl. 17.

trustees out of University College in *Oxford*, which sum he ordered to be paid to them for ten years for their maintenance; five years whereof they were to spend in *England* in the study of physick, and the other five abroad. The defendant was one so chosen, and studied here according to the directions of the will, and for that time he received his five years' salary; but afterwards did not go abroad on account of the ill state of his health; and thereupon in the year 1730 resigned to the trustees, who accepted his resignation, and chose another in his room; and in the year 1735 an information was exhibited against him, that he might account for the five years' salary thus received. For the defendant it was argued, that in a late case which came before the House of Lords between *Gaudy* and *Anstis* upon an appeal, their lordships were of opinion, that the word *maintenance* included education; and therefore, though that word was used in the present will, *education* must be intended by it, as implied; and when the defendant had spent half of the time in his education here in *England*, and was prevented by ill health from going abroad, and thereupon had resigned, and his resignation had been accepted, and another chosen in his stead, it was submitted that the present suit must be thought an unreasonable one. And the Lord Chancellour was of that opinion, and dismissed the information.]

Attorney General v. The Margaret and Regius Professors in Cambridge, &c.
1 Vern. 55.
|| But the devise, as to certain lands, being considered as void, the defendant *A. K.* the heir at law and administrator with the will annexed of the testator, with a view to promote the

The courts will not be easily prevailed on to change the terms of a charity, though by the consent of all the parties interested; as, where *A.* devised 50*l.* *per annum* for a lecturer in polemical or casuistical divinity, so as he was a bachelor or doctor in divinity, and fifty years of age, and would read five lectures every term, and at the end of the term deliver fair copies of the same, to be kept in the university; and in default of such lecturer he gave the 50*l.* *per annum* to ——— College in *Oxon*, with consent of the heir. Application was made to mitigate the rigour of the qualifications, *viz.* that a man of forty may be capable, that three lectures may be sufficient every term, and that if fair copies are delivered in every year it may suffice: but my lord chancellour refused to intermeddle though no opposition was made, and said, that it was not in the power of the heir to alter the disposition of his ancestor.

design of the testator, did, by a deed duly executed, settle certain lands to the purposes of the said intended will. After taking notice that the said settlement might have its effect, as near as might be, according to the intent of the said testator's will, which it could not well have by the strictness of the penning of the will, without capacitating a lecturer of fewer years, and abridging the number of lectures terminly, the decree, as stated in the registrar's book, as to this part of the testator's will, is as follows: "His Lordship doth further order
"and decree, by and with the consent of the said *A. K.*, as heir and next of kin, and being
"the founder of the said gift, having made the settlement as aforesaid to effect the same, that
"the professor to be chosen by the electors shall be doctor, or, at least, bachelor in divinity,
"and capable if he be of the age of *forty* years or upwards, and that the said lectures shall be
"reduced to *four* in each term, instead of *five*, and that such lectures shall be delivered in
"writing to the Vice Chancellour for the time being *once only* in every year, *viz.* on the 20th
"of *July*, and if the said lectures are neglected to be read, then the rents of the premises to
"go according to the will." Reg. Lib. 1681. A. fol. 892. 1 Vern. 56. note in 2d Edit.

Where

Where the parties come to an agreement with the heir at law, and he confirms the devise of land to a charity, the court will not take it away, for it becomes the act and deed of the heir. Amb. 158. ||

[By a private act of parliament for regulating *Bolton* school, the number of trustees was limited to 12, of whom 7 were to constitute a *quorum*; and there was a clause in the act, that if any of the constitutions or provisions in the act should be found inconvenient or impracticable, the trustees might apply by petition to the lord chancellor, who might in a summary way vary such constitution or provisions. It having been found impracticable to collect together so many as 7 out of 12 trustees, inso-much that no meeting had ever been had, application was made to the Lord Chancellor, either to increase the number of the trustees, or to reduce the number of the *quorum*. But his lordship thought this not within his jurisdiction; that, though it might extend to varying by-laws, or particular provisions, it did not comprize a power to alter the general constitution of the trust itself, and therefore, that the application must be to parliament.]

Ex parte Bolton School.
2 Br. Ch. Rep. 662.

|| Where the charity intended by the founder was a free grammar school at *Leeds* for teaching grammatically the learned languages, the Court of Chancery refused to permit the application of part of the funds to the procuring of masters for French and German, and to other establishments with a view to commerce; the Lord Chancellor holding, that it is not competent to the court, as long as it can find any means of applying the charitable fund to the charity, as created by the founder, upon any general notion, that another application will be more beneficial to the inhabitants of the place, to change the nature of the charity. A case may arise, his Lordship added, in which the will cannot be obeyed; but then the fund will not go to the heir; upon the principle, that an application is to be made as near as may be; growing out of another principle, that you are to apply it to the object intended, if you can. It must therefore appear by the master's report, that the court must despair of attaining that object, or it cannot enter into the question in what other way the fund is to be applied.

Attorney General v. Whiteley, 11 Ves. 241.

Under a bequest "to such number of the poor inhabitants of several parishes at such times and in such proportions, and either in money, provision, physick, or clothes, as the trustees or the major part of them for the time being shall think fit, for the better support and maintenance of such poor inhabitants;" the fund being very considerable in proportion to the objects, the court, upon the principle of *cypres*, extended the application of it, against the claim of the next of kin, to purposes not expressly pointed out by the will, as instruction and apprenticing of children.

Bishop of Hereford v. Adams, 7 Ves. 324.

By will dated in 1699 a bequest was made of 200*l.* to the congregation of Presbyterians to which the testator belonged, to be laid out in land, to raise yearly two several sums out of the profits

Attorney General v. Wansay, 15 Ves. 231.

for placing out and putting apprentices two poor boys of such as were members of the said congregation, and lived in the parish of St. Martin in New Sarum. The fund being considerably more than adequate to that object, the Lord Chancellour directed the surplus to be applied, upon the principle of *cypres*, to place out, 1st, sons of members of the congregation in that place: 2dly, such boys in other parishes: 3dly, daughters of members of the congregation in the same manner: 4thly, sons of Presbyterians generally. A proposal, which the master had approved, in favour of the sons of persons within the parish of the *established religion* his Lordship rejected, observing, that the Presbyterians are a body known to and tolerated by the law; and that it is the duty of the court (and of the crown where the distribution is in the crown by sign manual) to distribute an unexpected surplus *cypres* the object to which the fund was originally given; and if there are no legal objections, or objections arising out of considerations of policy, the surplus must be applied as near as can be to that object, which the testator meant to prefer, and that it would be very inconsistent with his intention to hold, that it might be applied in placing out, as objects of his bounty, children of persons of different religious persuasions, the Roman Catholick, the Jewish, or even the Church of England; his objects being children of persons professing the same religious worship which he professed.

Attorney General v. Andrew, 3 Ves. 633.

Trinity Hall in Cambridge, devisee in remainder after estates for lives, in trust for purposes partly for their own benefit, and very specifick with respect to themselves, were holden not to have accepted the devise by acts done merely for the preservation of the fund: and upon their refusal to accept it, after the death of the tenant for life, the court directed the master to receive a proposal in order to have it considered whether it could be executed *cypres*: and the testator having expressed in his will, that no person should be qualified for the fellowship he intended to found, unless he should have been educated in Merchant Taylors' school, the master was particularly directed to receive a proposal on the part of that school. A compromise afterwards taking place to apply part of the fund to an establishment at St. John's College in Oxford, with which College the Merchant Tailors' Company are connected, and to give the rest to the next of kin, it was, with the consent of the Attorney General, established by decree. And the next of kin, after this compromise, having filed a bill against Trinity College for an account, the bill was dismissed, the Court holding him bound by the compromise.

Attorney General v. Master, &c. of Merchant Tailors' Company, 7 Ves. 223.
Andrew v. Trinity Hall, Cambridge, 9 Ves. 525.

Attorney General v. Whitechurch, 3 Ves. 141.
Brantham v. East Burgold, 2 Ves. Jun. 388.

Where a charity cannot be executed as directed, but the general purpose appears distinctly, and may be in substance attained by another mode, it shall be executed *cypres*. Where a testator directed bread to be distributed among poor persons attending divine service, and chanting his version of the psalms; though that version could not be chanted, because not authorized,

authorized, yet the bequest of the bread was established, that being the testator's general object, and the chanting of the psalms only accessory.

Where there are two purposes in a charitable donation, and one of them, by the neglect or obstinacy of the persons who are to administer the charity, is prevented from taking effect, that shall not defeat the other. Therefore, where upon a trust for the vicars of *P.* provided they were presented at the recommendation of the trustees, the trustees neglected to recommend, and the chancellor, the living being in the presentation of the crown, presented; it was holden that the vicar, so presented, was entitled to the benefit of the trust.

But, if there is a legal purpose, which from circumstances cannot be executed, the Court will not execute the charity *cypres* by directing it to any other purpose. As, where the purpose was to build a church in the parish of *A.*, and the parish would not let the church be built, it was adjudged, that the fund could not be applied to any other purpose.

Where a legacy was given to the trustees of a protestant dissenting chapel for the purpose of discharging a mortgage upon the chapel, and the mortgage was afterwards paid off by other funds in the testator's life-time; it was holden, that, supposing the bequest not to be void, (as it was under the statute of 9 Geo. 2.,) it was evidently confined to the chapel, and was not applicable to any other purpose.

Where a personal bequest is attached to a void charity; where there is an ulterior bequest, good in itself and if it stood alone, but dependent for the extent of its provision, upon a prior bequest, which cannot take effect; there the whole must fail.

ney General v. Davies,

Attorney General v. Boulton, 2 Ves. Jun. 380.

Attorney General v. Bishop of Oxford, 1 Br. Ch. Rep. 444.

Corbyn v. French, 4 Ves. 418.

Chapman v. Brown, 6 Ves. 404.

Attorney General v. Whitchurch, 3 Ves. 141. Attorney

Wilm. Op. & Argum. 32.

Property destined to superstitious uses is given by the statute of 1 E. 6. c. 14. to the King to dispose of as he pleases; and it falls properly under the cognizance of a court of revenue. But, where property is given to mistaken charitable uses; to a purpose prohibited by the law, or inconsistent with the policy of the country; the court distinguishes between the charity and the use; and seeing a charitable bequest in the intention of the donor, they execute the intention, varying the use, as the king, who is the curator of all charities, and the constitutional trustee for the performance of them, may direct and appoint. Where therefore there was a bequest by a Jew of the interest of 1200*l.* for establishing a Jesuba, or assembly for reading the Jewish law, it was agreed at once, that it was not a good legacy to the intent for which it was given; but, whether it was void generally, or only to this particular intention; or, whether it should devolve upon the crown for its own use, or was to be applied to some other charity, was matter of consideration. At length it was determined, that as it was a charitable bequest in the intention of the

Da Costa v. De Pas, Id. 34. Amb. 228. S. C. erroneously reported as to the point of superstitious use. 7 Ves. 76. S. C. cited by

Lord Eldon
from Lord
Hardwicke's
note-book.
Ambl. S. C.
cited from the
same book.
Cary v. Abbott,
7 Ves. 490.
S. P. upon a
bequest of a
residue for the
purpose of
educating children in the Roman Catholick faith.

testator, though not of a nature to be established in the Court of Chancery, it must be applied to some other charitable use to be fixed by the crown; and that it was not a superstitious use given to the crown for its own benefit. His Majesty, accordingly, by sign manual, gave effect to the Jew's charitable disposition, by appointing 1000*l.*, part of the bequest, to the governors and guardians of the Foundling Hospital for supplying a preacher in their chapel, and for the instruction of the children under their care in the Christian religion, and for other incidental expences attending the chapel.

Waldo v.
Caley, 16 Ves.
211.

Where a residue is to be applied, the Court of Chancery frequently directs a scheme, even where an unlimited discretion as to a distribution is left to a trustee, and where, consequently, a scheme can answer no purpose, but to shew that the fund is applied to the proper objects. But, where part of an annual and temporary income is to be disposed of from year to year, according to a discretion to be exercised every year, a scheme is not directed, but the parties are left at liberty to apply to the court in case of any misapplication.||

Supple v. Law-
son, Ambl.
729.

Attorney Ge-
neral v. Og-
lander, 3 Br.
Ch. Rep. 166.
(a) If there are
no persons suf-
ficient to an-
swer the description of the charity, the land charged with the payment of the charity shall not be discharged in the interim, but the money shall accumulate, and be applied towards the advancement and increase of the charity. Aylet v. Dodd, 2 Atk. 238. (b) Attorney General v. City of London, 3 Br. Ch. Rep. 171.

[Where a charity is so given that there can be no objects of it, the court will order a different scheme to be laid before it; but, if the objects may exist (a), though they do not at present, it will not. And where (b) the trusts of a charity cease for want of objects, the charity must be applied *de novo*.

3 Br. Ch. Rep.
171.

The college of *William and Mary* in *Virginia*, who were appointed administrators of certain charities, having become subject to a foreign power, it was ordered that a new scheme should be laid before the court for the administration of the charities.

2 Atk. 87.
Per Lord
Hardwicke.

Whether a charity be a publick one, or not, depends upon its extensiveness; not upon the charter of the crown; for this can only make it more permanent than it otherwise would be. A devise to the poor of a parish is a publick charity. Where testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to choose out the object; though such person is private, and each particular person may be said to be private, yet in the extensiveness of the benefit arising from them, they may very properly be called publick charities. A sum to be disposed of by *A. B.* and his executors, at their discretion, among poor house-keepers, is of this kind.]

Townley v.
Bedwell,
6 Ves. 194.

|| A devise of real and personal estate in trust for the establishing of a perpetual botanical garden, was declared void upon

upon the expression of the testator that he trusted it would be a *publick* benefit.||

[A court of equity will give a proper direction as to a charity, without any regard to the propriety or impropriety of the prayer of the information; and though the relator be mistaken in the title he hath set up, yet if in the cause a title in fact comes out, that title must be established. For it is a rule of equity, that an information for a charity is not to be dismissed; but there must be a decree for its establishment;] ||a rule, however, which holds only in private charities; for charities founded by the crown are already established by a higher authority.

If the original decree omit to declare the nature of the charity, the court will correct it upon further directions without a re-hearing.||

[It is not absolutely necessary that the relators in an information should be the persons principally interested; for the court will take care at the hearing to decree in such a manner as shall best answer the purposes of the charity; and, therefore, any persons, though the most remote in the contemplation of the charity, may be relators.]

||In charity causes, particularly, where there have been gross breaches of trust, the court has given the relators costs beyond the taxed costs; as otherwise people would not come forward to file informations. On the other hand, where informations are brought contrary to the real charity, though colourably for the benefit of the charity, the relators must pay the costs.

As informations in these causes cannot be filed without the consent of the Attorney General, the principle requires his authority and consent throughout; and therefore the court will not act under an award without his consent, or without referring it to the master to see whether it was for the benefit of the charity; and though it will itself occasionally refer matters of this sort to particular persons, yet it is not to them as arbitrators, but by name.

Where a legacy is given to a charity, a bill may be filed for an account, &c. without making the Attorney General a party.||

[Although a court of equity gives a very unwilling ear to an application to declare void a charitable bequest as within the statute of mortmain, after a long acquiescence in the party applying; yet it doth not think itself in such case warranted immediately to dismiss the bill, but will direct a reference to the master to inquire into the circumstances.

If there be a deficiency of assets, charity legacies must abate in proportion as well as other legacies, notwithstanding that by the civil law they have preference to all others.

422. Attorney General v. Hudson. Id. 674. But, where a testator, among other bequests to charities, gave 3*l.* a piece to the poor of three several parishes; the court looked upon them as part of the funeral expences, and as doles at the funeral; and therefore held, that no abatement ought to be made out of them. Attorney General v. Robins, 2 P. Wms. 25.

1 Atk. 355.
2 Ves. 328.
426. 1 Ves. 43.
72. 418.
11 Ves. 247.

Attorney
General v.
Whiteley,
11 Ves. 241.
2 Atk. 328.

7 Ves. 425.

1 Ves. 720.

Attorney
General v.
Hewitt, 9 Ves.
232.

Chitty v.
Parker, 4 Br.
Ch. Rep. 38.

Pickering v.
Earl of Stam-
ford, 4 Br. Ch.
Rep. 214.

Tate v. Austin.
1 P. Wms. 265.
Masters v.
Masters. Id.

Makeham v. Hooper, 4 Br. Ch. Rep. 153. Attorney General v. Tyndall, Ambl. 614. Waller v. Childs, Id. 524. Foster v. Blagden, Id. 704. Hillyard v. Taylor, Id. 713. Mogg v. Hodges, 2 Ves. 52. Attorney General v. Martin, cited in 3 Br. Ch. Rep. 377.

(F) Of the Commissioners of Charitable Uses, pursuant to the Statute 43 Eliz.

(a) *Vide* the uses before mentioned letter (C). note: The same power is given to the chancellor of the duchy of Lancaster, for lands lying within the duchy, *Vide* 2 Inst. 710.

BY the 43 Eliz. cap. 4. it is enacted, That where lands, &c. are given to any (a) charitable use, the Lord Chancellor or keeper of the great seal, may award commissions under the great seal, unto any parts of the realm, directed to the bishop and his chancellor, in case there shall be any bishop of the diocese at the time, and to other persons of good behaviour, authorizing them, or any four or more of them, to inquire, as well by the oaths of twelve men or more of the county, as by all other good and lawful ways and means, of all and singular such gifts, limitations, &c., of lands, tenements, &c., and of all abuses, breaches of trust, negligences, misemployments, not employing, concealing, defrauding, misconverting, or misgoverning any lands, &c., heretofore or hereafter to be given to any charitable use; and after calling before them the parties interested in any such lands, &c. shall make inquiry by the oaths of twelve men or more of the county, (to which the parties interested may make their challenges,) and upon such inquiry, hearing, and examination, set down such orders, judgments, and decrees, as the lands, &c. may be faithfully employed to the intent for which they were given; which orders, decrees, or judgments, being agreeable to the intention of the donors or founders, shall stand good and be executed until the same be undone or altered by the Lord Chancellor, upon the complaint of any party grieved; which orders, judgments, and decrees of the commissioners, shall be certified under their seal, or any four of them, within the time limited in the commission, to the Lord Chancellor, who shall take such order for the due execution of all or any the judgments, orders, or decrees, as shall be fit and convenient; and may upon the hearing thereof, at the application of any party grieved, annul, diminish, alter, or enlarge the orders, judgments, and decrees of the commissioners, and may tax and award good costs against persons complaining without cause.

§ 8, 9. ¶ The act not to extend to lands, &c. given to any of the colleges in *Oxford* or *Cambridge*, nor to the colleges of *Westminster*, *Eton*, or *Winchester*; nor to any cathedral or collegiate church within the realm. Neither is it to extend to any city or town corporate; nor to any lands or tenements therein given to charitable

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charitable uses, where there is a special governor appointed to direct them; nor to any college, hospital, or free school which have special visitors or governors, or overseers appointed them by their founders. Nor is it to be any way prejudicial to the jurisdiction or power of the ordinary. Purchasers of any lands, &c. *bonâ fide* and without notice of the charitable uses, not to be affected by the decrees or orders of the commissioners; but power is given to proceed against persons in trust, or having notice of the uses, who shall break the trusts or defraud the uses, and their representatives, to the extent of the assets, whether legal or equitable. ||

By virtue of this act the commissioners may appoint trustees, and enable a certain number of them to demise lands, &c. for the best advantage of the charity; and that when such a number of them die, the survivors may elect others, and so continue the number appointed. Duke's Char. 124.

They may likewise turn out trustees who misbehave themselves, as, by making leases at small fines and low rents, &c. and may decree such leases void. 2 Inst. 710. Duke's Char. 124.

If one who hath a lease of lands charged with a charity commits waste, this is a misemployment for which the commissioners may decree the lease void. Duke's Char. 116.

|| Where the king founded a school, and endowed it, and appointed governors, who had the legal estate of the endowment vested in them, but without any express words appointing them visitors; it was resolved, that a commission might issue to visit, and call these governors to an account. || Edenv. Foster, 2 P. Wms. 325. Gilb. Eq. Rep. 178. S. C.

If a rent-charge is granted to a charitable use out of lands in several counties, the commissioners are to charge this rent, by their decree, upon all the lands in every county, according to an equal distribution, having a regard to the yearly value of all the lands charged; and (a) cannot by their decree charge one or two manors with all the rent, and discharge the residue in other counties or places: for that would be decreeing contrary to the intent of the donors. Duke's Char. 65.

whole on one who held only part of the lands chargeable; and it was holden that, the whole town being made chargeable, they might sue for the whole, or any part; but a commission was awarded to apportion each man's share. Chan. Rep. 91. It hath been holden, that all the tenants of lands liable to a charity need not be made parties to the suit, for this would put the charity to too great difficulty. Attorney General v. Wyburgh, 1 P. Wms. 599. But yet those who are sued may make the others parties to the information, and compel them to a contribution, Attorney General v. Shelley, 1 Salk. 163. || Where to an information to establish the right of a charity to a small annual payment charged upon premises in London, the answer raised an objection that all the owners of the premises, which were referred to generally as houses in London, without any particular description, were not parties, Lord Chancellor thus concludes his argument in giving judgment: "The result is this at least, that if there is before the court a party, who, in respect of the land possessed by him, is liable to the rent charged upon that and other land not clearly and distinctly pointed out by objection for want of parties in the answer, farther than that were some houses originally charged, and the court does not know who are liable with the defendants, the court will go on, at least to inquire whether the defendants are liable. Whether, if they are liable, the court will charge them, and leave them to a new suit with the other terre-tenants: or, first deciding, that those lands are chargeable with them, it seems the court will not stop for

"for want of parties under such circumstances; and I think it better to go on to determine whether these lands are chargeable or not; for if not, the information ought to be dismissed. But, if I should now stop for want of parties, conceiving that I cannot dismiss the information, I should then direct expensive inquiries, at the hazard that I might find the case had not been actually established in fact, even as against the parties now before the court. The best way, therefore, is to go on to hear the question, whether the rent-charge can be proved to be issuing out of the land in question; reserving the consideration what I shall do as to any lands that may appear chargeable in the course of the hearing, until that principal question shall have been decided." Attorney General v. Jackson, 11 Ves. 372. ||

Salk. 163.

[1 Eq. Ca. Abr. 126. That the commissioners have no power to award costs was expressly determined in Wharton v.

The commissioners of charitable uses cannot decree costs on this statute; but if there be an appeal from their decree, my Lord Chancellor may decree the costs, not only of the appeal, but likewise of the commission; and, though they decree costs, yet that shall not, upon an appeal, be sufficient to reverse the decree; for my Lord Chancellor may either increase or lessen the costs, or exempt the party from them entirely.

Charles, Ch. Ca. Finch. 81. See too, 2 Atk. 239. Lord Coke thought, that the power of the courts of appeal to give costs being limited by the act *against such persons as they should find to complain without just cause*, no costs (if the order, judgment, or decree be annulled, diminished, or enlarged) ought to be given by the Lord Chancellor to the party complaining. 2 Inst. 712. But in the case of the Corporation of Burford v. Lenthall, Lord Hardwicke, on consideration of precedents, allowed costs to the exceptants upon those exceptions in which they had prevailed; and to the respondents upon the exceptions in which the respondents had prevailed; and this, he said, the courts of equity had always done, not from any authority, but from conscience and honest discretion, as to the satisfaction on one side or other, on account of vexation. 2 Atk. 552. 239.]

2 Atk. 552.

1 Ch. Ca. 135.

158. 193. 267.

3 Bl. Comm.

428.

[The decree of the commissioners is returned into the petty-bag office; and then the defendant is served with a writ of execution, upon which he may file exceptions, and pray to stay proceedings till they are heard. || And in the case of the Corporation of Burford v. Lenthall (*ubi supra*) Lord Hardwicke says, the words of the act, § 9. "That the Lord Chancellor, or lord keeper, shall and may take such order for the due execution of all or any of the said judgments, decrees, and orders as to them shall seem fit and convenient," have put it in the shape of an original cause, in which the exceptants are considered as plaintiffs, and the respondents as defendants, and put in an answer upon oath; and in the examination of witnesses in the cause, neither side is bound by what appeared before the commissioners, but may set forth new matter, if they think proper. || For the Court of Chancery mixes the jurisdiction of bringing informations in the name of the Attorney General (a) with the jurisdiction given it under the statute, and proceeds either way, according to its discretion.

(a) || The jurisdiction of the Court of Chancery in informations of this sort seems to have arisen since the reign of Queen Elizabeth. Prior to the time of Lord Ellesmere, as far as the tradition in times immediately following goes, there was none; but they made out their case as well as they could by law. By Lord Loughborough, 3 Ves. 726. But Lord Maclesfield said, that the king, *pro bono publico*, has an original right to superintend the care of charities; so that, abstracted from the statute of Eliz. relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in Chancery in the Attorney General's name for the establishment of charities.

2 P. Wms. 119. ||

It was resolved, in the 2 Cha. 1. That a determination once made by the Chancellour under this act could not be re-examined upon a bill of review, as is usual in other cases in Chancery; but that here the decree is conclusive (a), because it takes its authority by the act of parliament, which mentions but one examination; and it is not like the case where the Chancellour makes a decree by his ordinary authority. But in the year 1643, it was resolved by the judges and king's counsel, assistants in the House of Peers, that in such case the party grieved may petition the king in parliament, and have his complaint examined there; and so the decree may be confirmed, altered, or annulled, and then be final. All which was actually done in the aforesaid year, and pursuant to the aforesaid resolution, on occasion of a decree of the Lord Keeper *Coventry*, in the case of *East Ham*, in *Essex*.

Windsor v. Inhabitants of Farnham, Cro. Car. 40. *Sir W. Jones*, 147. *S. C. Pridgen's case*, Cro. Car. 350. *Duke*, 62. 3 Bl. Comm. 428. *Lee v. Warner*, Show. P. C. 110. (a) || But as, according to *Lord Hardwicke* in the paragraph immediately pre-

ceding, new matter may be introduced in the Chancery proceeding, how can the decision in that be considered as final? See Mr. *Railby's* note, 2 Vern. 741. ||

Where land is given to persons in trust to perform a charitable use, and the donor hath appointed special visitors to see that the trustees perform the use according to his intent; in that case, if the trustees defraud the trust, the commissioners cannot meddle, but the visitors are to perform it. But, where the visitors are trustees also, there the commissioners may, by their decree, reform the abuse of the charity; for, otherwise, such breach of trust would escape unpunished, unless in chancery or in parliament, which would be a tedious and disagreeable suit for poor persons.]

appointed, or a visitor by operation of law, the commission by virtue of that statute shall not interpose. But this doth not extend to a distinct, collateral charity. 2 Atk. 554. That the Court of Chancery will not interfere where there are local visitors, or where the charities are established by charter, unless the persons, appointed as visitors or governors, have also the management of the revenues, is settled in a variety of cases. 1 Ves. 72. 2 Ves. 328. 505. 3 Atk. 108. 2 Ves. Jun. 47.

Duke, 68, 69. See too, 2 P. Wms. 325. The construction of § 3. of the 43 of El. saith Lord *Hardwicke*, is, that where a college, hospital, or school is founded, and a special visitor

|| Where the founder of an hospital directed, that if, in making up the accounts of the wardens biennially going out of office, any doubt should arise which could not be decided by the new wardens, &c. the ordinary should decide it; and also gave to him the appointment of a master, upon the default of other persons to appoint within certain times; and power to correct or amove the master for certain causes; and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to him the power of interpreting the statutes in case of any doubt; and the founder also delegated to the dean and chapter of Y. power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity; it was holden, that none of these powers constituted a visitor, so as to exclude the application of the powers granted by this statute, and, consequently, that a commission

Ex parte Kirkby Ravensworth Hospital, 15 Ves. 305. 8 East, 221.

commission issued out of the Court of Chancery under it was valid.

15 Ves. ubi
supra.

Objections to a decree under a commission as having issued in a case not warranted by the statute, may come on in the form of exceptions, though rather to be taken as a species of complaint, than strictly as exception.

A more summary remedy in cases of abuses of trusts for charitable purposes has lately been provided; for by st. 52 Geo. 3. c. 101. it is enacted, "That in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a court of equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, lord keeper, or lords commissioners for the custody of the great seal, or master of the rolls for the time being, or to the court of Exchequer, stating such complaint, and praying such relief as the nature of the case may require; and it shall be lawful for the Lord Chancellor, &c. and they are hereby required to hear such petition in a summary way, and upon affidavits or such other evidence as shall be produced upon such hearing to determine the same, and to make such order therein, and with respect to the costs of such applications, as to him or them shall seem just; and such order shall be final and conclusive, unless the party or parties who shall think himself or themselves aggrieved thereby, shall within two years from the time when such order shall have been passed and entered by the proper officer, have preferred an appeal from such decision to the House of Lords, to whom it is hereby enacted and declared that an appeal shall lie from such order.

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"Provided that every petition so to be preferred as aforesaid, shall be signed by the persons preferring the same in the presence of and shall be attested by the solicitor or attorney concerned for such petitioners; and every such petition shall be submitted to and allowed by his Majesty's Attorney or Solicitor General, and such allowance shall be certified by him before any such petition shall be presented.

"And it is further enacted, that neither the petitions, nor any proceedings upon the same or relative thereto, nor the copies of any such proceedings or petitions shall be subject or liable to the payment of any stamp duty whatever."

By st. 52 G. 3. c. 102. (which was passed on the same day with the last act) it is enacted, that "a memorial or statement of the real and personal estate, and of the gross annual income, investment, and the general and particular objects of all and every charity and charities, and charitable donations, for the benefit of any poor or other persons in any place in *England* and *Wales*, which shall have been founded, established, made, benefited, increased, or secured, together with the names of

"the

“ the respective founders of or benefactors thereto, where known,
 “ and also of the person or persons in whose custody, pos-
 “ session, or controul, the deeds, wills, and other instruments
 “ whereby such charities or charitable donations shall have been
 “ founded, established, made, benefited, increased, or secured,
 “ may be, and also of the names of the then trustee or trustees,
 “ feoffee or feoffees, possessor or possessors of such real or per-
 “ sonal estate, shall from and after six calendar months after
 “ the passing of this act, be registered by such person or
 “ persons who shall then be the trustee or trustees, feoffee
 “ or feoffees, possessor or possessors thereof, or some or one
 “ of such persons, in manner and in the form contained in the
 “ schedule to this act annexed, in the office of the clerk of the
 “ peace of the county, or city or town, being a county of it-
 “ self, within which such poor or other persons shall be; and
 “ such memorial or statement shall be signed by such person or
 “ persons causing the same to be registered and left in the
 “ said office of such clerk of the peace, who shall forthwith
 “ transmit a duplicate or copy of the same unto the enrolment
 “ office of the High Court of Chancery.”

By § 2. “ wherever any such charity or charitable dona-
 “ tions shall be founded, established, made or benefited, in-
 “ creased or secured by any deed, will, or other instrument
 “ hereafter to be made or executed by any person or persons,
 “ that then a like memorial or statement, according to the
 “ directions hereinbefore contained, shall be registered, and
 “ left and transmitted as aforesaid, by such person or persons
 “ as are hereinbefore mentioned, within twelve months after
 “ the decease of such person or persons by whom any such will,
 “ deed, or deeds, or other instrument shall have been made or
 “ executed.”

By § 4. “ in case the persons to be benefited by any such
 “ charity or charitable donations as aforesaid, shall not be
 “ wholly within any one county, then and in such case such
 “ clerk of the peace of the county where any such charity
 “ or charitable donation shall be registered, shall forthwith no-
 “ tify in *The London Gazette*, the name or title thereof, ac-
 “ cording to the appellation or title used in the index, and
 “ the names of the several places wherein the objects of such
 “ charity or charitable donations shall be, and the particular or
 “ general objects thereof, and also the name of the county
 “ wherein such memorial or statement shall have been regis-
 “ tered.”

By § 5. “ if any such charity or charitable donation shall not
 “ be duly memorialized, stated, and registered according to
 “ the provisions of the act, it shall and may be lawful for any
 “ two persons or more, interested in such charity or charitable
 “ donation, to present a petition to the Lord Chancellor, lord
 “ keeper, or lords commissioners for the custody of the great
 “ seal, or master of the rolls for the time being, or the court of
 “ Exchequer,

“ Exchequer, complaining thereof; and they are required to
 “ hear such petition in a summary way, and upon affidavits,
 “ or such other evidence as shall be produced upon such hear-
 “ ing, to determine the same, and to make such order therein,
 “ and with respect to the costs of such application and proceed-
 “ ings, as to him or them shall seem fit, which order shall be
 “ final and conclusive.”

By § 6. “ no proceedings under the provisions hereinbefore
 “ mentioned, shall extend or be construed to extend to decide
 “ any right or title as to the property that shall be so registered,
 “ or as to the persons who shall be entitled, or claim to be
 “ entitled, to the benefit thereof, or any interest therein.”

By § 9. “ where any difficulty shall occur in making and
 “ preparing such memorial or statement as aforesaid, so as
 “ to render it necessary to employ any longer time than is al-
 “ lowed by the provisions of the act for registering such me-
 “ morial or statement as hereinbefore is mentioned, it shall
 “ and may be lawful for the court of quarter sessions for the
 “ county, or city or town, being a county of itself, wherein
 “ such memorial or statement is intended to be registered, to
 “ allow, on application made to them, and on examination of
 “ the circumstances, such further time, not exceeding six ca-
 “ lendar months, as to such court shall seem necessary to be
 “ given, for the purpose of duly registering such memorial or
 “ statement as hereinbefore is mentioned.”

By § 10. “ it shall and may be lawful for the court of quarter
 “ sessions of the county, or city or town, being a county of it-
 “ self, wherein such statement or memorial shall have been re-
 “ gistered, to allow such reasonable costs and charges attending
 “ the preparing and registering, notifying and transmitting such
 “ memorial or statement, with reference to the income of the
 “ charity or charitable donation, to such person or persons
 “ causing the same to be registered, as such court shall think
 “ fit; and it shall and may be lawful for such person or persons
 “ who shall have caused such memorial or statement to be re-
 “ gistered, to deduct out of the income, funds, rents, and
 “ profits, in his or their hands, of such charity or charitable
 “ donation so by him or them memorialized and stated and
 “ registered, the sum and sums so allowed, and no more: pro-
 “ vided always, that the said court of quarter sessions shall
 “ not allow any sum whatever for and in respect of such costs
 “ and charges, unless it shall be stated to them upon the de-
 “ claration in writing of the person or persons applying for
 “ such allowance, and signed by him or them, that such memo-
 “ rial or statement is to the best of his, her, or their knowledge
 “ and belief, true in every respect, and that it doth contain
 “ to the best of his, her, or their knowledge and belief a true
 “ and full account of the real and personal estate, annual gross
 “ income, investment, and the particular or general objects
 “ of the charity or charitable donation of which such memo-
 “ rial

“ rial or statement shall have been registered, together with
 “ the names of the respective donors or benefactors thereto,
 “ where known, and also of the person or persons in whose
 “ custody, possession, or controul, the deeds, wills, and other
 “ instruments hereinbefore mentioned, shall at such time be,
 “ and also the names of the trustee or trustees, feoffee or
 “ feoffees, possessor or possessors of such real and personal
 “ estate: provided that none of the provisions hereinbefore
 “ contained shall be construed to extend to any charity or cha-
 “ ritable donation not issuing out of or secured upon any
 “ lands, tenements, or hereditaments, or directed by the foun-
 “ der or donor thereof to be secured thereon, or to be perma-
 “ nently invested in government or any publick stocks or funds,
 “ nor to any charitable donation whatsoever, which by the direc-
 “ tion of the donor thereof, or by the lawful rules of any chari-
 “ table institution whatsoever, may be wholly or in part ex-
 “ pended in and about the charitable purposes for which the
 “ same may have been given, at the discretion of the governors,
 “ directors, managers, or the trustee or trustees of such chari-
 “ table institution, at any time whatsoever.”

By § 11. “ nothing in this act shall be construed to extend
 “ to any hospital, school, or other charitable institution what-
 “ soever, which shall have been founded, improved, or regu-
 “ lated by or under the authority of the King’s most excellent
 “ Majesty, or any of his royal predecessors, or of any special
 “ act of parliament thereunto particularly relating; nor to any
 “ charitable donation under the superintendence of any such
 “ hospital, school, or institution, nor to the governors of the
 “ corporation of the charity for the relief of poor widows and
 “ children of clergymen, nor to any friendly society, the rules
 “ whereof shall have been confirmed according to the provisions
 “ of the act or acts for the encouragement and relief of friendly
 “ societies; nor to either of the universities of *Oxford* or *Cam-*
 “ *bridge*, nor to any college or hall thereto belonging, nor to
 “ any charitable bequest, devise, gift, or foundation whatsoever
 “ belonging thereto, or under the controul, direction, super-
 “ intendence, or management of the said universities, or either
 “ of them, or any college or hall therein respectively; nor to
 “ the *Radcliffe* infirmary within the university of *Oxford*; nor
 “ to the colleges of *Westminster*, *Eton*, or *Winchester*, or any
 “ of them; nor to any cathedral or collegiate church within
 “ *England* and *Wales*; nor to the Charter-house; nor to the
 “ corporation of the Trinity-house of *Deptford Strond*; nor to
 “ any funds applicable to charitable purposes for the benefit of
 “ any persons of the *Jewish* nation.”

Nor by § 12. shall it “ extend to any charitable foundation or
 “ donation which shall have been or shall be given to and for
 “ the benefit of any person or persons of the society of people
 “ called *Quakers*, and which shall be under the superintend-
 “ ence and controul of persons of that persuasion.”

Nor

Nor by § 13. shall it “ extend to any charity or charitable donation or foundation, the accounts of the income and expenditure whereof shall have been directed to be annually passed in the High Court of Chancery, nor to any charity or charitable donation or foundation, the annual gross income whereof shall not exceed forty shillings, and of which the trustee or trustees, feoffee or feoffees, possessor or possessors, some or one of them, shall within six months after the passing of the act deposit in the hands of the minister of the parish wherein any of the objects of such charity, charitable donation, or foundation shall be, a written memorial or statement in like form as in the schedule annexed to the act is contained, and which by such minister shall be forthwith deposited in the parish chest.”

And by § 14. “ where any body corporate, guild, or fraternity, shall be entrusted with the possession or distribution of divers charities or charitable donations or foundations, or of the rents and profits thereof, in such cases all such charities, charitable donations and foundations, may be registered and stated in one and the same memorial.”

*(G) Of the Statute 9 Geo. 2. c. 36. to restrain the Disposition of lands, whereby the same become unalienable.

This act is commonly, but very improperly, called the statute of *Mortmain*; for it does not prevent the alienation of land in mortmain; nor was that the object of the act. It has nothing to do with that. The object was to prevent devises of land, or any interest in land, or bequests of money to be laid out in any such interest, for any charitable use whatsoever. By the Master of the Rolls, 4 Ves. 427.

|| “ WHEREAS gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by *Magna Charta*, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this publick mischief has of late greatly increased by many large or improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called *charitable uses*, to take place after their deaths, to the disherison of their lawful heirs;” || it is enacted, “ That no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the publick funds, securities for money, or any other personal estate whatsoever, to be laid out and disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or anyways conveyed or settled to or upon any person or persons, bodies politick or corporate, or otherwise, for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the publick

“ publick funds), be, and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses; twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death) and be enrolled in his majesty’s high court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the publick books, usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.”

The object of this act was the prevention of the locking up of land: the statutes of *Mortmain* had another view, viz. the services of the crown. The reasoning which produced this act is more like the political reasoning relating to the statute of

Westminster 3.
of entails, 1 Ves. 223.

§ 2. “ *Provided always*, that nothing herein before mentioned relating to the sealing and delivering of any deed or deeds, twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor, or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really, and *bonâ fide*, for a full and valuable consideration actually paid at, or before the making of such conveyance or transfer, without fraud or collusion.”

By § 3. “ All gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting, or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall be made in any other manner or form than by this act is directed and appointed, shall be absolutely null and void.”

§ 4. “ *Provided always*, that this act shall not extend to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities; or any of the colleges or houses of learning within either of the said universities; or to or in trust for the colleges of *Eton*, *Winchester*, or *Westminster*, for the better support and maintenance of scholars only upon the foundations of the said colleges of *Eton*, *Winchester*, and *Westminster*.”

§ 5. [“ *Provided nevertheless*, that no such college, or house of

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“ learning,

“ learning, which doth or shall hold or enjoy so many advow-
 “ sons of ecclesiastical benefices, as are or shall be equal in num-
 “ ber to one moiety of the fellows, or persons usually stiled or
 “ reputed as fellows; or where there are or shall be no fellows,
 “ or persons usually stiled or reputed as fellows, to one moiety of
 “ the students upon the foundation, whereof any such college or
 “ house of learning doth, or may by the present constitution of
 “ such college or house of learning consist—be capable of pur-
 “ chasing, acquiring, receiving, taking, holding, or enjoying any
 “ other advowsons of ecclesiastical benefices by any means what-
 “ soever: the advowsons of such ecclesiastical benefices as are an-
 “ nexed to, or given for the benefit or better support of the headships
 “ of any of the said colleges or houses of learning, not being com-
 “ puted in the number of advowsons hereby limited.”]

This act not to extend to estates in *Scotland*.

Ashburnham
 v. Bradshaw,
 Burn's E. L.
 tit. *Mortmain*.

[A will, devising lands to charitable uses, was made before this statute passed; but the testator did not die till after it had commenced: it was determined by eleven judges, that the devise was good in law, notwithstanding the statute.]

Willet v. Sand-
 ford, 1 Ves.
 178. 186.
 Ambl. 453.
 S. C.

A will, devising lands in trust for a charity, was made *before* the statute; and *after* the statute, the testator made a codicil, devising the same lands, together with another piece of land, to the same trustees, and to two others, for the same charity, making some slight alterations in other parts of the will, confirming it in the rest, and declaring, that the codicil should be annexed to, and taken as part of his will. Lord *Hardwicke* held that as to the lands given by the will, the devise was good, as the codicil did not revoke either the beneficial or trust estate, but was intended by the testator as a confirmation of the will; and, both from the nature of the instrument, and the words, was to be taken as a part of it. But as to the additional land given by the codicil, the devise was void, it being devised only by the codicil, which was subsequent to the statute.

Attorney
 General v.
 Hartwell,
 Ambl. 451.

But a will of personal estate admits of a different consideration: for where a testator, by a will dated prior to the statute, devised the residue of his personal estate to be laid out in land, and settled to certain charitable uses; and after the statute, made a codicil, by which, after giving a few legacies, he confirmed the will; Lord *Northington* declared so much of the will as related to the residue, to be void by the statute; the codicil, in this case, by altering the disposition of the residue, and confirming the will, making a new publication of it.

Attorney
 General v.
 Hartley,
 4 Br. Ch.
 Rep. 412.

A. (before the statute) gave real and personal estate to a use that would be within the statute, and to another use that would not be affected by it: *B.* (after the statute) gave personal estate to the use of *A.*'s will: the estate of *A.* being sufficient for the first use, the whole of the second gift shall go to the valid use.

(a) Soresby v.
 Hollings,
 Burn's E. L.
 tit. *Mortmain*.
 (b) Grimmet
 v. Grimmet.

As land itself cannot be devised to a charitable use, so neither can personal estate be laid out in land: but, (a) if money is given to be laid out in lands or otherwise, as the executors shall be advised; or, if (b) the testator directs money to be placed in the funds, until

until it can be laid out in lands to the satisfaction of his trustees; it hath been determined, that such devise is good, by reason of the election given to the trustees. But it hath been (a) adjudged, that a devise of money to be laid out in land, and until an eligible purchase can be made, to be placed out at interest, is void, because land ultimately is the thing intended to be given.

Ambl. 210.
Highmore, 79.
S. C. So in
Curtis v.
Hutton,
14 Ves. 537.
(a) Grice v.
Case, 4 Br.
Ch. Rep. 67.

A devise of money to trustees to erect (b) an hospital, in some convenient place in or near the city of Y.; or, in (c) order to and towards erecting a school; was thought by Lord Hardwicke not to be within the statute; there being no express direction to lay it out in the purchase of land; for that erect as much imports foundation as building. And where (d) indeed it was manifestly the intention of the testator, that the money should be laid out in land; his lordship held, that though it could not be lawfully so applied, yet it might be lawfully applied in building upon land already appropriated to charity, or which the trustees could get by the generosity of any person. But later (e) determinations have said, that if a building be expressly directed to be built upon ground purchased with the testator's money, a court of equity is not at liberty to direct it to be built upon ground acquired by other means; even though there be a clause in the will empowering the trustees, in case the declared intention cannot take effect by law, to lay out the money to other charitable uses as near such intention as the law will admit.

(b) Vaughan v.
Farrer, 2 Ves.
182.
(c) Gastril v.
Baker, cited
in 2 Ves. 185.
A gift of personalty to establish a school, was holden good by Lord Thurlow.
Attorney General v. Williams, 4 Br. Ch. Rep. 526.
(d) Attorney General v. Bowles, 3 Atk. 806. 2 Ves. 547. S. C.
(e) Attorney General v.

Tyndall, Ambl. 614. Pelham v. Anderson, 1 Br. Ch. Rep. 444. note. Attorney General v. Nash, 3 Br. Ch. Rep. 588.

And where money (f) was bequeathed to erect a school-house in a parish, and there was a piece of waste ground belonging to the parish, on which an old school-house formerly stood, yet, as the will did not point to this particular ground, the Court would not order the money to be laid out upon it. || The words "erect or build" import that land is to be bought, unless the will manifests a purpose that it is to be otherwise procured. ||

(f) Attorney General v. Hyde, Ambl. 751. 1 Br. Ch. Rep. 444. note. S. C. That a bequest of money to build or repair

upon land already in mortmain, is not within the statute, see Brodie v. Duke of Chandos, 1 Br. Ch. Rep. 444. note. Attorney General v. Bishop of Chester, Id. 444. Glub v. Attorney General, Ambl. 373. Harris v. Barnes, id. 651. Chapman v. Brown, 6 Ves. 404. Attorney General v. Parsons, 8 Ves. 186. Attorney General v. Davies, 9 Ves. 535. A bequest for rebuilding, repairing, altering or adding to and improving almshouses, is valid to the extent of any application to the land already in mortmain; but bad, as to any additions to be made by the acquisition of other land. Attorney General v. Parsons, *ubi supra*.

A devise of money to the corporation of Queen Anne's Bounty, was holden void, because they are bound by their rules to lay out the money in land; and though the crown has power to make new rules, the devise could not be supported, because it must be regulated by the rules in being at the time of the testator's decease.

Widmore v. Woodroffe, Ambl. 636. || A bequest, therefore, to the society for increasing

livings in England and Wales, for the perpetual purpose of increasing their livings, was declared void, there being no society that answers the description, but that of the governors of Queen Anne's Bounty. Middleton v. Clitherow, 6 Ves. 734. ||

"Clergymen's

2 Ves. 138-9.

¶If a large personal estate, said Lord *Hardwicke*, is left to trustees for a charitable use, which they direct, and there is no occasion to come to a court of equity for direction, there is nothing in this statute which restrains the trustees from laying it out in land; because, by the express proviso, all purchases to take effect in possession are good notwithstanding the act, which is a matter, perhaps, that may want a remedy. The clause of the purchases, I very well know, was put in relative to *Queen Anne's Bounty*, and, whether that may want a remedy hereafter, may be a question.¶

Burn's E. L.
tit. *Mortmain*.
Gravenor v.
Hallum, Ambl.
641. Attorney
General v.

If a man devise his land to trustees *to be turned into money, and that money laid out in a charity*, ¶whether the charity be in *England* or elsewhere¶, it is not good within this act; for it is an interest arising out of land.

Lord Weymouth, Id. 20. Durour v. Motteux, 1 Ves. 320. Curtis v. Hatton, 14 Ves. 537.

Attorney Ge-
neral v. Mey-
rick, 2 Ves.
44. Attorney
General v.
Graves, Ambl.
155. Attorney
General v. Tomkins, Id. 216.

So, a devise of a mortgage, or of a term of years, to a charity, is not good; for the words of the statute are, that the lands shall not be conveyed or settled, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable use.]

Attorney General v. Caldwell, Id. 635. Pickering v. Lord Stamford, 2 Ves. Jun. 272. 581. 3 Ves. 392. 492. White v. Evans, 4 Ves. 22. Paice v. Archbishop of Canterbury, 14 Ves. 364. Currie v. Pye, 17 Ves. 462. A lease for years from the crown of the right and power of laying chains in the river *Thames* for mooring ships, and of all profits arising therefrom, is an interest in land, and, therefore, within the statute. Negus v. Coulter, Ambl. 367.

Knap v. Wil-
liams, 4 Ves.
430. Howse v.
Chapman, Id.
542. Finch v. Squire, 10 Ves. 41.

¶Money secured upon turnpike tolls, or by an assignment of the poor or county rates, is within the act. So, of navigation shares.

Durour v.
Motteux,
1 Ves. 320.

A bequest of money to be laid out in land to be a fund for a perpetual annuity of 10*l. per annum* to a minister to preach a sermon once a-year to the testator's memory, to keep his tomb stone in repair, and the inscription thereon, and upon the stone against the wall, reciting the gift, legible, of which the minister was then to make oath; and 2*l. per annum* to the clerk, and 2*l.* more to the sexton for ever; with 4*l. per annum* to the mayor and corporation of *St. Alban's* for the managing and keeping account thereof, was adjudged to be a bequest to a charitable use, and void within this statute. The perpetual annuity to the minister, said Lord *Hardwicke*, is a charitable use, which is not prevented by the addition of the annual sermon. So are the other two annuities; and the rest is not only a vain concomitant of the charitable bequest, but a circumstance attending the general execution thereof. So the gift to the corporation is a reward for their service, and but a circumstance attending the charitable bequest; and though the keeping of the

the accounts is not void, yet, if the charity on which it was to attend is void, it must be so too.

Where a testator gave a legacy to a charity, which, being directed to be raised out of his real estate, was void by this statute, and he by a codicil revoked it, and gave a less legacy "instead thereof," to another charity; Lord *Thurlow* considered the last as charged upon the same fund with the other, and therefore void also.

Leacroft v. Maynard,
3 Br. Ch. Rep.
233.

A devise for a college in one of the universities, though not *in terminis* for the benefit of the college, yet, if it be in truth so, is within the meaning of the exception in the 4th section of the act, and unaffected by the statute.

Attorney General v. Tancred,
Ambl. 351.
Attorney General v.

Andrew, 3 Ves. 633.

But, where in an action for dilapidations by the present against the late rector, it appeared that the absolute seisin in fee of the land upon which part of the buildings in question stood was in certain devisees since this statute, and that no conveyance was enrolled according to the first section of it, nor any disposition made of it to any college according to the fourth section; it was holden, that though successive rectors had been in possession of the land for above fifty years past, yet no presumption could be made of any such conveyance enrolled, (which, if it existed, the party might have shewn,) and consequently that the rector had no title to the land; although it appeared also, that one of those devisees was the then rector, and that the title to the living was in *Baliol college, Oxford*.||

Wright v. Symthies,
10 East, 409

If a man gives a legacy to his executors by name, and then devises a copyhold to *A.*, he paying his executors 1000*l.*, and gives the residue of his estate to a charity; this 1000*l.* will go to the executors, not for their private benefit, but in their capacity of executors, for the purposes of the will; and being a charge on the real estate, is within the statute, and a void bequest.

Arnold v. Chapman,
1 Ves. 108.

A. H. having a considerable estate in land, and also a large personal estate upon mortgage on lands in *Norfolk*, devised a sum of 7000*l.*, to be laid out after the death of his wife, in the purchase of lands in *Ireland*, the rents and profits to be distributed among poor persons in *Ireland*. *E. H.* his widow and executrix, proved his will, and afterwards, by her will reciting the will of *A. H.*, and that his personal estate was out upon mortgage in *Norfolk*, she ordered her real estate to be sold, and the 7000*l.* to be paid to the uses declared by the will of *A. H.* — By the Lords Commissioners, *Loughborough*, *Ashurst*, and *Hotham* — the bequest to the charity would be good, being to a charity in *Ireland*, if it was not made otherwise by the circumstance of the money being upon mortgage on an estate here, which could not be liable to the devise to a charity: but it is too late to take that objection on the will of *E. H.* she admitting by the devise to the same uses, that she had personal estate of the testator: she is therefore paying a debt, not giving

Campbell v. Earl of Radnor, 1 Br. Ch. Rep. 271.

money, that is, upon mortgage, but only admitting that she had 7000*l.* personal estate from him; which, as she was executrix and residuary legatee, is admitting a debt to his estate. Although the Court will not marshal assets for a charity, yet it will make the legatees go upon the mortgage.

Blandford v. Tackerell,
4 Br. Ch. Rep. 394.

A charitable devise for general purposes is void within the statute: *secus*, of a devise for the benefit of persons sustaining a certain character, as children and grandchildren.

Jones v. Williams, Ambl. 651.

A bequest of money, to arise by sale of lands, to be applied in water-works for the use of the inhabitants of a town, is a publick charitable use, and therefore within the statute and void.

Olipphant v. Hendrie, 1 Br. Ch. Rep. 571.

A bequest of money, to be laid out in heritable securities in *Scotland*, is not within the statute.]

Mackintosh v. Townsend, 16 Ves. 330. S. P.

Doe v. Copestake, 6 East, 328.

|| A devise to trustees of a reversion in land (after payment of debts, &c., which were found to be paid) to be applied by them and their successors, and the officiating ministers for the time being, of a Methodist congregation, *as they should from time to time think fit*, is not a devise to charitable uses within this statute, and the trustees are entitled to recover at law, in whatever manner the Court of Chancery may hereafter deal with their application of it.||

CHURCHWARDENS.

(a) Of their first institution, *vide* Kennett's Par. Antiq. 649. Of sidesmen, or sinodsmen, *vide* Degg's

Parson, 183. [Burn's E. L. tit. *Churchwardens*. Walter Reynold's Constit. An. 1322. §6. Chichley's Constit. An. 1416. 2 Johnson's E. L.] See "The Duty of Churchwardens respecting the Church," a very useful little tract by Dr. Napleton, Chancellour of the diocese of *Hereford*.

(b) *Vide* Hard. 379.

(c) And may take goods for the benefit of the church, Roll. Abr. 393.

CHURCHWARDENS (a) are officers instituted for the benefit and advancement of religion. || Their principal duty, as their name imports, is the care of the church, which respects five points. 1. The fabrick or building. 2. The utensils and furniture. 3. The churchyard. 4. Certain matters of good order concerning the church and church-yard. 5. The endowments of the church.

But, though they deal chiefly in matters belonging to the church, yet are they every where treated of in our law books as (b) temporal persons, and are considered in favour of the church for some purposes, as a (c) lay corporation vested with a temporal right in their offices, and a special property in the goods belonging to the church; which further appears by the duties enjoined

injoined them by several statutes and acts of parliament; as will be more fully explained under the following heads. March, 66. but not lands; Ambl. 644.

1 Salk. 167. and therefore, if a feoffment be made to the use of the churchwardens of *D.*, the use is void. 12 H. 7. 27. Kelw. 32. a. Finch's Law, 8vo. edit. 178. Co. Lit. 3. a. S. P. March, 66. S. P. *per Cur.* and *vide* Duke's Char. Uses, 82., where it is said, that lands given them for a charitable use, shall be a good appointment within the 43 El. c. 4. But, by custom, in some places, as in *London*, the parson and churchwardens are a corporation, and may purchase and demise lands, &c. Cro. Ja. 532. March, 66, 67. Lane, 21. 5 Mod. 395. And Q. Whether they may not have land by prescription for the reparation of the church? But, admitting they may, yet they cannot prescribe generally *in non decimando*, for they are not spiritual persons, though their office be a kind of ecclesiastical office. Roll. Abr. 653. 2 Roll. Rep. 107. Comp. Incumb. 507, 508.

|| They are also overseers of the poor by the stat. 43 Eliz. c. 2. Burn's, E. L. tit. Churchwardens, § 9. and as such are joined with the overseers appointed by the justices of the peace in all matters relating to the poor, and indeed the churchwardens were the original overseers long before there were any others specially appointed by act of parliament.

They are not an integral part of the body of overseers, so that acts done by a majority of the conjoint body, or by the number required by the legislature, will be valid without them. R. v. Nantwich, 16 East, 228. R. v. Clifton, 2 East, 168.

But their duty as overseers does not extend to townships, which maintain their own poor, and in which overseers are appointed under the stat. 13 & 14 Car. 2. c. 12. § 21., for those townships are to be considered as not having churchwardens. R. v. Nantwich, *ubi supra*.

The st. 9 G. 1. c. 7. enables them to purchase a workhouse for the poor.||

- (A) Of the Manner and Right of choosing Churchwardens.
- (B) Of their Interest in, and Power over the Things belonging to the Church.
- (C) Of their Power and Duty in making Rates in Matters relating to the Church.
- (D) Of their Power and Duty in making Presentments, and hindering Irreverence in the Church.
- (E) Of their Accounts; and herein of Actions brought by, or against them, and the Remedies they have when their Time is expired.

(A) Of the Manner and Right of choosing Churchwardens.

Cro. Ja. 532. **Cro. Car. 552.** **Noy, 31. 139.** **2 Roll. Abr. 234. pl. 1.** **Hard. 379.** **Raym. 439.** [In some places the lord of the manor prescribeth for the appointment of churchwardens; and this shall not be tried in the ecclesiastical court, although it be a prescription of what appertains to a spiritual thing. *God. 153.*] That they may be chosen by a select vestry, *vide Jones, 439.* **Cro. Car. 551.** But *qu.* They are to be chosen every *Easter* week, or some week following, according to the direction of the ordinary. **Can. 89.** What persons are exempted from serving, *vide* head of *Privileges*, and **1 W. and M. c. 18.** by which statute, if any dissenting from the church be chosen churchwarden, he may execute the office by a sufficient deputy, by him to be provided, who shall comply with the laws in that behalf. (a) And hence also it is, that in *London*, where the parson and churchwardens are a corporation, and may purchase and demise lands, and dispose of goods, the churchwardens are always chosen by the parishioners. **Cro. Ja. 532.** **March 66. Lane, 22.** [But the canon shall take place in the new-erected parishes in *London* (unless the act of parliament, in virtue of which any parish was erected, shall have specially provided, that the parishioners shall choose both;) inasmuch as *no custom* can be pleaded in such new parishes. **Gibbs, 215.** (b) By 89th canon, ann. 1603, churchwardens are to be chosen by the parson and parishioners jointly, if it may be: if not, the parson names one, and the parishioners are to choose another. But this canon is said not to be regarded by the common law. **Hard. 378. per Hale. Carth. 118.** **S. P. per Holt, Ch. Just.** But *vide* 2 **Vent. 41.**, and the following case. There was a custom for the parson to appoint one churchwarden, and the two old churchwardens the other: but it went no further. The two old churchwardens could not agree; so the one presents *Berwick*, and the other *Catton*. And the Court held, that by this disagreement the custom was laid out of the case; and then they must resort to the canon: under which, *Catton* being duly elected, they decreed for him. **Catton v. Berwick, 1 Str. 145.**] (c) For if the archdeacon refuseth them, a *mandamus* lies; of which there are numberless instances. *Vide* 6 **Mod. 89.** 2 **Lord Raym. 1008.** 3 **Salk. 88.** And where, for a false return, an action on the case lies, 2 **Lutw. 1012.** And that in such action both the churchwardens may join. 3 **Lev. 362.** And for an ill and evasive return, *vide* **Vent. 267.** 2 **Salk. 433. pl. 14.** And that before he is sworn he may officiate. **Vent. 267.** And that there is no fee due for swearing him, except by custom. **Salk. 330. pl. 2.**

Carth. 118.

And though by custom the rector or vicar may name one, yet where the vicar of *St. Giles* in *Northampton* was under a deprivation for not taking the oaths to King *William* and Queen *Mary*, and the church being vacant, the parishioners proceeded to the election of two churchwardens, and presented them to be sworn; but the registrar of the consistory court being a friend to the vicar, refused to swear them, unless that person, whom the late vicar approved, was nominated one, a *mandamus* was granted.

The

The parishioners are also judges of the fitness and qualifications of the persons they choose for that office; and therefore, where to a *mandamus* to swear a churchwarden, chosen according to custom, the archdeacon returned, that the person presented was a poor dairy-man, who had no estate, and was *persona minus habilis & idonea* for that office; the Court granted a peremptory *mandamus*.

Raym. 138. S. C. 5

[*Mandamus* to the archdeacon of *Colchester*, to swear *Rodney Fane* into the office of churchwarden. He returns, that before the coming of the writ, he received an inhibition from the Bishop of *London*, with a signification that he had taken upon himself to act in the premises. But by the Court — the return is ill. It doth not appear that the town of *Colchester* is within the diocese of the bishop who inhibits: besides, the archdeacon is but a ministerial officer, and is obliged to do the act, whether it be of any validity or not. And a peremptory *mandamus* was granted.

There hath been some diversity of opinion among the judges, whether it be a good return to a *mandamus* to swear a churchwarden, that *he was not elected*, inasmuch as the archdeacon cannot judge either of the election or of the qualities of the person elected. But the proper distinction, as to this point, *Dr. Burn* thinks is taken in the case of *Q. v. Twitty (a)*, *M. 1 An. Mandamus* to swear a churchwarden, suggesting that he was *duly elected*. The return was, that he was *not duly elected*. It was objected, that this was not a good return. But by *Holt, C. J.* — Where the writ is, to swear one *duly elected*, there a return that he was *not duly elected*, is a good return; for it is an answer to the writ: but where it is to swear one *chosen* churchwarden, there a return that he was *not duly chosen*, is naught, because it is out of the writ and evasive.

To a *mandamus* to swear the plaintiff churchwarden of *Heston* in *Middlesex*, the defendant returned, that he was not duly elected. In the course of the trial, the question was, Where the common right of choosing churchwardens rests? The plaintiff insisted, it was in the parishioners at large as to both the churchwardens, and would therefore have left it upon the defendant to shew a custom or right in the parson to name one. The defendant on the contrary insisted, that of common right it was in the parson and parishioners, and therefore it lay upon the plaintiff to prove a custom in the parishioners to choose both. And of this opinion was *Lee C. J.*, and that though there are some dictums to the contrary, yet they had never been regarded. The plaintiff, therefore, went on to prove a custom to choose both by the parishioners, but failed in it; it appearing that though the parson had generally left it to the parishioners, yet he had sometimes interfered. *Lee C. J.* likewise held, that a curate stood

Carth. 393.
Hill. 8 W.
& M. The
King and Rees.
Comb. 417.
S. C. Salk.
166. pl. 5. S. C.
12 Mod. 116.
S. C. Ld.

Mod. 325. S. C.

1 Str. 610.
Although the
parishioners
neglect never
so long
to choose
churchwardens,
yet the
ordinary hath
no power of
appointing
them. *Stutter*
v. Freston,
1 Str. 52.

Rex v. White,
2 Ld. Raym.
1379. *Rex v.*
Harwood, Id.
1405. *Regin.*
v. Guise, Id.
1008.
(a) 2 Salk. 432.

Hubbard v.
Sir Henry
Penrice, 2 Str.
1246.

in the place of the parson, for the purpose of nominating one churchwarden.

Rex v. Dr. Harris, 3 Burr.
1420. 1 Bl.
Rep. 430. S.C.

A *mandamus* was directed to the commissary of the consistorial and episcopal court of the Bishop of *Winchester* for the parts of *Surry* to admit and swear *Henry Griffith* and *Thomas Garner* churchwardens of the parish of *Saint Olave, Southwark*. And a like *mandamus* was also directed to him to admit and swear another set of churchwardens into the same office. The commissary returned, that a cause was depending before him, in which it was disputed, which of the two sets of churchwardens had been duly elected, and till that is determined, he cannot admit either one set or the other.—By Lord *Mansfield* and the court—The return is bad; the commissary cannot try the right. He ought to obey both writs, and it is of no prejudice to either party.—It was proposed by the Court, and consented to by the parties, to try the right on a feigned issue; the execution of the peremptory *mandamus* to be suspended till after the trial, and then the peremptory *mandamus* to go to swear in those that should prevail on the trial.

Castle v. Richardson, 2 Str.
715.

To a libel in the ecclesiastical court for not taking upon him the office of chapel-warden, the defendant pleads that it is a donative, and thereupon moves for a prohibition. Upon debate, it was denied; the whole court being of opinion, that though there was a difference as to the incumbent, yet as to the parish officers, there was none; for they are the officers of the parish, and not of the patron of the donative.]

Mich. 27. Car.
2. in B. R. between Whaley and Lambert.
3 Keb. 533.
542. S.C.

Prohibition was granted *nisi* to the ecclesiastical court, in a case where *J. S.* sued as churchwarden of, &c. in *Colchester*, on a suggestion, that in *Colchester* there is a custom for the inhabitants to elect the churchwardens, and that *A.* and *B.* were duly elected, which matter the defendant had pleaded in the spiritual court; but the plea was refused; but it appearing that *J. S.* was churchwarden *de facto*, chosen by the parson, and that he all the year acted as such; and that he, with the inhabitants and another churchwarden, made the tax for which the defendant was sued in the ecclesiastical court; the rule for a prohibition was discharged; for *per Cur'*, where the question is only, Who is churchwarden? if such custom is alleged, a prohibition shall be granted: but the matter here is for a tax for the repair of the church; and it is not material now whether he was duly elected or not; it is sufficient that he was guardian *de facto*; and it may be as well put in issue, Whether the minister was a rightful minister? Besides, this tax is not rated by the churchwardens, for they have no such power; but it is a common charge, imposed by the major part of the parishioners; and the churchwardens do no more in assessing it, than the other parishioners; and the tax will be well assessed by the major part of the inhabitants, though the churchwardens are against it: their chief business is in collecting it; and the matter is a matter of ecclesiastical cognizance; for the spiritual judge may enquire touching the want of reparations of the church. And Note, That upon the rule for dis-

discharging the prohibition, all this matter was ordered to be entered, for fear it should be afterwards thought, that a prohibition was decreed where a custom was in question.

¶ Where one of the churchwardens was appointed by the rector, and the other chosen by parishioners paying scot and lot; and at the election of the latter there was no regular presiding sworn officer, but the rector's churchwarden in fact presided: it was adjudged, that the control of the election devolved at common law upon the electors themselves (a); but that, unless there were a custom to regulate the time for making the election, it was not competent to a majority of the electors assembled at the election to narrow the period which the common law would allow; and that therefore a resolution by them that it should conclude at a given time must at least limit a time reasonable in itself as to numbers and distance, and be of sufficient notoriety; but that whether a resolution by a majority of the vestry on the first day of the election to close the poll at four o'clock on the next day in a parish where the number of electors did not exceed 180, and where the affidavits stated a custom for 200 years not to keep the poll open for more than two days, and no instance within living memory of extending it beyond 4 o'clock of the second day, were sufficient to warrant the closing of the poll at that time, whilst some of the voters were coming in to poll, and others had no notice of the resolution; was a fit question to be tried on a mandamus.

R. v. Commissary, &c. of the Bishop of Winchester, 7 East, 573.

(a) Stoughton v. Reynolds, 2 Str. 1045.

An indenture binding out a poor apprentice executed by *W. S. churchwarden*, and *J. G. overseer* of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens and overseers of the hamlet, was deemed good, the Court intending that there were two overseers for the hamlet as required by stat. 13 & 14 C. 2. c. 12. § 21., and only *one churchwarden* in the same place by custom.¶

R. v. Hinckley, 12 East, 361.

(B) Of their Interest and Power over the Things belonging to the Church.

THE churchwardens, when chosen, are a corporation entrusted with the care and management of the goods belonging to the church, which they are to order for the best advantage of the parishioners: they are likewise enabled to take goods for the benefit of the church; but cannot dispose of them without the consent of the parishioners.

Roll. Abr. 393.
2 Inst. 492.
2 Roll. Rep. 67
Yelv. 173.
2 Brownl. 215.
Comp. Incumb. 390.
[2 P. Wms.

125. Where an obligation is made to them and their successors, and they die, their executors shall have the action, and not their successors. Vin. tit. *Churchwardens*, D.]

They have such a special property in the (a) organ, (b) bells, (c) parish books, (d) Bible, chalice, surplice, &c. belonging to the church, that for the taking away, or for any damage done any

F. N. B. 91. K.
(a) Roll. Abr. 393.
(b) Cro. Eliz.

145. 179. any of these, they may (e) bring an action at law; and therefore (c) 5 Mod. 395. (f) the parson cannot sue for them in the spiritual court. 396. Ld. Raym. 337. (d) Roll. Rep. 57. (c) That the action must be for *bona parochianorum*, and not *bona ecclesiæ*. Mod. 65. *per Cur.* 2 Keb. 675. S. C. and S. P. *per Cur.* Vent. 89. S. C. and S. P. and the Court inclined accordingly; but said, the precedents were both ways. — Where they may sue at common law for damages, and in the spiritual court for the things in specie. Sid. 281. 2 Keb. 622. (f) Roll. Abr. 393. 2 Inst. 492.

Cro. Ja. 234. If two churchwardens sue in the spiritual court for a levy Yelv. 173. towards the reparation of their church, and have sentence to 2 Brownl. 215. recover, and costs assessed, and after, one of them releases, yet S. C. the other may proceed for the costs, &c.; for churchwardens have nothing but to the use of the parish; and the corporation consists of both; and one only cannot release or give away the goods of the church.

2 Hawk. P. C. Also, they have such a special property in the goods of the c. 23. § 44. church, that when they are stolen they may bring an appeal of (g) 2 Keb. 23. robbery for them: (g) they may also sue the offender in the Sid. 281. spiritual court *pro salute animæ*, but not to recover damages. 2 Inst. 492. 1 Keb. 743. Regist. 57.

Comp. Incumb. 381. But the churchwardens have no right to, or interest in, the freehold and inheritance of the church, which (h) belongs solely to the parson or incumbent.

wardens cannot grant a licence for burying in the church, that being the freehold of the parson. Cro. Ja. 366. Noy, 104. Yet the churchwardens, by custom, may have a fee for burying in the church, because the parish is at the charge of repairing the floor. Vent. 274. 3 Keb. 504. 523. 527. But the church-yard is a common burial-place for all the parishioners. Comp. Incumb. 381. (h) If the walls, windows, or doors of the church, be broken by any person, or the trees in the church-yard cut down, or the grass thereon eaten by a stranger, the incumbent shall have his action. 21 H. 7. 21. b. Bro. Trespass, 210. 38 H. 6. 19. 11 H. 4. 12. And so may his lessee, if the church-yard be let. 2 Roll. Abr. 337.

Vide 12 Co. Also, the seats in the church being fixed to the freehold, the 105. Hetl. 94. churchwardens (i) cannot dispose of them alone, nor can the S. C. Godb. churchwardens and rector jointly dispose of them without the 200. S. C. consent of the ordinary; and though such dispositions have been Moor, 878. made; yet it hath been always presumed that it was so done S. C. 2 Bulst. 150. Hob. 69. with the consent and approbation of the ordinary.

Comp. Incumb. 382. Salk. 167. pl. 7. 1 Wils. 326. (i) But by the custom of *London*, the churchwardens have the ordering of the seats there, for the parishioners are obliged to repair the chancel, as well as the body of the church. Comp. Incumb. 387, 388. 2 Roll. Abr. 288. Poph. 140. 2 Roll. Rep. 24. And there may be the like custom elsewhere, for the churchwardens to dispose of seats. Raym. 246. admitted *per Cur.* But the churchwardens must shew some particular reason why they are to order the seats, exclusive of the ordinary; for a general allegation, that they used to repair, which is no more than what they are obliged to by common right, is not sufficient. 2 Lev. 241.

Comp. Incumb. 382. But, as seats are erected for the more convenient attending of divine service, and as the parishioners are at the expence of erecting them and keeping them in repair, if any of them be taken away, though they are fixed to the freehold, yet the churchwardens, and not the parson, shall bring the action against the wrong-doer.

stranger in the church. Vide Noy, 108. Comp. Incumb. 387. Burn's E. L. tit. Church, § 14.

It is said to have been holden, that at common law a churchwarden may maintain an action upon the case for defacing a monument in the church.

Godb. 279.

That churchwardens themselves, nor any

others, cannot take down arms in windows, or deface grave-stones or monuments erected in the church or church-yard; and if they do, an action lies by the heirs or executors of the parties for whom they were erected. Roll. Abr. 625. Noy, 104. Godb. 200. Cro. Jac. 367. 2 Bulst. 151. *Ante*, tit. *Actions on the Case*, (F). But the ordinary may deface any superstitious picture. Noy, 104. [Nor can any ornaments be set up in the church without his consent. 1 Str. 576. But it must be exercised according to a prudent and legal discretion, which the court of the arches hath a right to look into, and correct. 2 Str. 1080.]

(C) Of their Power and Duty in making Rates in Matters relating to the Church.

THE churchwardens have no power to make any rate themselves, exclusive of the parishioners, their duty being only to summon the parishioners, who are to meet for that purpose, and when they are assembled, a rate made by the majority present shall bind the whole parish, although the churchwardens voted against it.

Vide Comp.

Incumb. 389.

But, if the churchwardens give the parishioners due notice, that they intend to meet for that purpose, and the parishioners refuse to come, or being assembled refuse to make any rate, they may make one without their concurrence; for as they are liable to be punished in the ecclesiastical courts for (a) not repairing the church, it would be unreasonable that they should suffer by the wilfulness and obstinacy of others.

Vent. 367.

Mod. 79. 194.

(a) By the civil and canon law, the parson is obliged to repair the whole church, and it is so in

all christian kingdoms but in *England*; for it is by the peculiar law of this nation, that the parishioners are charged with the repairs of the body of the church. Carth. 360. *per Holt*, Ch. Just. — The bishop cannot appoint commissioners to tax the parishioners, or make rates for repairing the church. 2 Mod. 8. 223. But the spiritual court may compel the parishioners to do it, and may excommunicate every one of them till it be repaired; but if any are willing to contribute, they are to be absolved till the greater part agree to make a tax. Comp. Incumb. 388, 389. [But it is remarkable, that the statute, or writ, *circumspecte agatis*, 13 Ed. 1. stat. 4. § 2., which seems the foundation of this ecclesiastical jurisdiction, is express, "*in quibus casibus alia pœna non potest infligi, quam pecuniaria*." If the question concerning the rate depend on the bounds of the parish, that matter must be decided at common law. Deg. 172.] Of the manner it is to be made, *vide* 5 Co. 67. Vent. 308. 2 Mod. 222. 254. Lit. Rep. 263. Poph. 197. Mod. 236.

The churchwardens in summoning the parishioners need not do it from house to house, but a general publick summons at the church is sufficient, and the major part of them that appear upon such summons will bind the whole parish.

Vent. 367.

Comp. Incumb. 389.

On a motion for a prohibition, it appeared, that the libel recited that *J. S.*, dean of, &c. had presented that the church and chancel of *D.* was out of repair, &c., and that the churchwardens of the said parish did make, or cause to be made, a certain rate upon the inhabitants thereof, towards the charge of repairing the said church and chancel; and that the churchwardens had accordingly repaired the church and chancel, and beautified the same with ornaments, and that *H.* was a parishioner of the said parish, and refused to pay his proportion of the said rate; and it being objected, 1st, That the churchwardens only could not make a rate;

Carth. 360.

Hawkins and

Rons. 5 Mod.

390. S. C.

Salk. 165. pl. 3.

S. P. Ld.

Raym. 59.

rate; 2dly, That the parson alone ought to repair the chancel; a prohibition was granted generally to the whole suit, though it was strongly insisted that the prohibition ought to go *quoad* the rate for repairs of the chancel only.

(D) Of their Power and Duty in making Presentments, and hindering Irreverence in the Church.

Vent. 114.

2 Vent. 42.

(a) That such promissory oath does not seem to be punishable as perjury. Keb. 522.

Hard. 364.

(b) Where the articles injoined the churchwarden to present filthy talkers, re-

vilers, and common sowers of sedition among neighbours; the Court held, that these general terms comprehended matters out of their jurisdiction; and that if the churchwarden had pleaded there *quod non tenetur respondere* as to those matters, and the plea had been refused, a prohibition ought to have been granted. Vent. 114. The S. P. as to sowing sedition among neighbours. Vent. 127. But, whether any person within his parish hath encroached upon the church-yard, is lawful, though matter of freehold. Vent. 127. Also, if the oath tendered has these general words, *viz. To make presentations according to the king's ecclesiastical law*; the particular articles, by way of direction, will not be sufficient grounds for a prohibition. Vent. 127. (c) But to present every person in the parish, does not include themselves. Vent. 127.

Hard. 364.

per Cur.

Also, if the ecclesiastical court proceeds against the churchwardens in matters not within their jurisdiction, an action on the case lies against them.

Cro. Car. 285.

291. Sid. 463.

Vent. 86.

And if the churchwardens maliciously present an innocent person for any crime, by which he is put to expence, or suffers in his good name or reputation, an action on the case lies.

Lev. 196. ad-

judged be-

tween Hall

and Tanner;

for though

they may pre-

sent it in the

ecclesiastical

court, yet they

are not bound

in the mean

time to permit such irreverence and indecency in the church. Saund. 13, 14. S. C. adjudged; and there said by the reporter, that the Court, taking it to be a great misdemeanor in the plaintiff, gave judgment against him, without regard to the exceptions to the defendant's plea. Sid. 301. S. C. and S. P. adjudged; Twisden only doubting upon the words of the canon, against wearing a hat, &c. *viz.* What hat intended? and said, they might appease a disturbance in the church; but laying hands on a man to pull off his hat, tends to the raising of a disturbance and breach of the peace. 2 Keb. 124, 125. S. C. adjudged.

Church-

Churchwardens may restrain and hinder any stranger not licensed from preaching in their church or chapel.

Comp. Incumb. 335.
Vide 2 Bulst 49.

(E) Of their Accounts; and herein of Actions brought by, or against them, and the Remedies they have when their Time is expired.

THE churchwardens, at the expiration of their year, are to give up their accounts to their (a) parishioners, and on refusal (b) may be proceeded against in the ecclesiastical court; or the (c) succeeding churchwardens may bring an (d) action of account against them at common law.

(a) Or to a select committee appointed by the parishioners according to the custom of

some parishes, who may allow their accounts, and such allowance shall discharge them from being called in question in the spiritual court, *Butt v. Wilkinson*, 2 Lutw. 1027. (b) By the succeeding churchwardens, either in the spiritual court, or by writ of account at common law. *Godb. 279. Roll. Rep. 71. 106, 107. 2 Keb. 6. 22. Sid. 281.* (c) But the parishioners cannot bring an action of account against them at common law, but must make new churchwardens, who may maintain the action. *Bro. Account, 71, 8 E. 4. 6. Bro. Corporations, 55. 4 E. 4. 6. Bro. Garden, 7.* || The st. 17 G. 2. c. 38. requires the churchwardens and overseers within fourteen days from the appointment of their successors, to deliver into their successors a just, true, and perfect account, &c., verified by oath, &c. The st. 50. G. 3. c. 49. directs the accounts to be submitted to two justices at a special sessions within the fourteen days appointed by the first act. The provision in the last act is cumulative, and not a substitution in lieu of that in the first act; so that if the overseer refuse to deliver in the account to his successors within the fourteen days, he may be committed under the first act by two justices for such refusal. *Lester's case, 16 East. 374.* || And though a parish prescribe to chuse two churchwardens, and that the persons so chosen shall continue in that office for two years; yet the parish may, notwithstanding the prescription, remove such wardens at their pleasure, and chuse new ones. 26 H. 8. 5. b. 13 Co. 70. *Comp. Incumb. 390. Vide 27 H. 8. c. 25. in Rastal*, that no churchwarden shall continue in his office above one whole year. (d) *Vide Sid. 307.*, where a churchwarden of *St. Martin's in the Fields* was indicted for taking a silver cup of one for the place of gallery-keeper, *colore officii, &c.*

If the churchwardens, by the consent and agreement of the parishioners, take a ruinous bell and deliver it to a bell-founder, and that he by their agreement shall have for the casting thereof 4*l.*, and shall retain it till the 4*l.* be paid; this agreement of the parishioners shall (e) excuse the churchwardens in a writ of account brought against them by their successors.

Roll. Abr. 121. pl. 9. 393. S.C. (e) But, whether they can plead it in bar to the account, or must set it forth in discharge before auditors, *vide Mod. 65. Vent. 88. S.C. 2 Keb. 675. S.C.*

If the churchwardens and parishioners make an assessment, and the churchwardens lay out the whole money, but before the whole is collected their time is expired, and new churchwardens are chosen, the former churchwardens, by having presented such parishioners as refused to pay before the determination of their time, may still proceed against them; otherwise the new churchwardens must collect such arrears, and reimburse their predecessors.

[It is said, the spiritual court hath no jurisdiction to order a rate to reimburse the preceding churchwardens, and a prohibition was granted after sentence, because upon the face of the order it appeared the ecclesiastical court had no jurisdiction: And by the whole court of King's Bench — There cannot be

Dawson v. Wilkinson, Ca. Temp. Hardw. 381.

be a rate made to reimburse the churchwardens; because they are not obliged to lay the money out of their own pockets.]

Batterley v. Cook, Pr. Ch. 42. 2 Vern. 262. S. C. In the argument, the cases of James v. Rich, Feb. 26 Car. 2. and Birch v. Barton, Tr. 2 W. & M. were cited as precedents of decrees having been made in such a case. So in Nicholson v. Masters, E. 1715, 4 Vin. Abr. 529. pl. 9. a decree made on a bill by executrix of a late churchwarden against ninety parishioners to be reimbursed what her testator had advanced in rebuilding a church steeple. So in Blackburne v. Webster, 2 P. Wms. 632., a decree made for a parish rate. But see Greenfield v. Reynall, 21st Nov. 1790 where Lord Thurlow doubted the authority of the last case. And see French v. Dear, 5 Ves. 547., where Lord Eldon considered such a jurisdiction as injurious, and distinguished a church rate for the repair of the church from a parish rate for reimbursement. But the bill in that case not being signed by counsel, it was ordered to be taken off the file, and the plaintiff to pay the costs.

Cro. Eliz. 145. 179. Leon. 177. Vide Dals. 105. 2 Brownl. 215. Kelw. 32. If goods belonging to the church are taken away, and the churchwardens for the time being neglect to bring an action, the succeeding churchwardens may, by virtue of their office, bring an action against the wrong-doer, but they must declare *ad damnum parochianorum*, and not *ipsorum*; though the old churchwardens, in whose time the fact was done, may lay it either way.

Dent v. Prudence, 2 Str. 852. Turner v. Baynes, 2 H. Bl. 559. Churchwardens cannot institute a suit at law in their own names after their year is out.

Churchwardens *de facto* may maintain an action against a former churchwarden for money received by him to the use of the parish, though the validity of their election to the office be doubtful, and though they be not the immediate successors of the defendant.||

2 Jones, 132. Gray and Day. Raym. 418. S. C. adjudged, though the sentence was given by a judge; but for this vide Hard. 194, 195, &c. [In such case he may have a prohibition. Nutkins v. Robinson, Bunb. 247. So, where they have passed their accounts at the vestry, Snowden v. Herring, *Id.* 289. Wainwright v. Bagshaw, 2 Str. 974. The spiritual court may compel the churchwardens to bring in their accounts, but hath no jurisdiction to settle them. If they presume to decide upon them, a prohibition will be granted, even after sentence allowing the accounts, and an appeal to the arches. Adams v. Rush, 2 Str. 1133. Leman v. Goulty, 3 Term Rep. 3.]

If *A.* was churchwarden of *B.*, and at the end of the year gave up his accounts to his successor, and yet *A.* is falsely and maliciously cited by *D.* into the ecclesiastical court, to render an account, and at the request of *D.* he is excommunicated for not rendering his account; an action lies against *D.*

By the 3 & 4 W. & M. cap. 11. "In all actions to be brought in the courts of *Westminster*, or at the assizes, for money mispent by churchwardens, the evidence of the parishioners,

“ rishioners, other than such as receive alms, shall be taken and
“ admitted.”

Churchwardens are comprehended within the purview of the statutes 7 Jac. 1. cap. 5. and 21 Jac. 1. cap. 12. as to pleading the general issue to actions brought against them, (a) and as to double costs when they have judgment. (a) But in an action on the case against a churchwarden for a false

and malicious presentment, though there be judgment for him, yet he shall not have double costs; for the statute does not extend to spiritual affairs. Cro. Car. 285, 286. Jones, 305. S. C.

[By 11 Geo. 2. c. 76. § 5. Churchwardens, &c. are required to carry hawkers of brandy, &c. before justices of peace, &c.]

COMMITMENTS.

- (A) What Kinds of Offenders are to be committed.
- (B) By whom.
- (C) To what Prison.
- (D) What is to be done previous to their Commitment.
- (E) What ought to be the Form of the Commitment.
- (F) At whose Charges they are to be sent to Prison.
- (G) To what Court the Commitment is to be certified.
- (H) By what Means the Party may be discharged from such Commitment.

(A) What Kinds of Offenders are to be committed.

ALL persons who are apprehended for offences not bailable, as also persons who neglect to offer bail for offences which are bailable, must be committed. 2 Hawk. P. C. c. 16. § 1.

Also, wherever a justice of peace is empowered to bind a person over, or to cause him to do a certain thing, he may commit him quousque, &c. if in his presence he shall refuse to be so bound, or to do such thing. 2 Hawk. P. C. c. 16. § 2.

(B) By whom.

2 Hawk. P. C. c. 16. § 3. **I**T is laid down by Serjeant *Hawkins* as a matter which seems agreed by all the old (a) books, that wheresoever a constable, or private person, may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person hath as much authority in cases of this kind as the sheriff, or any other officer, and may justify such imprisonment by his (b) own authority, but not by the command of another.

7. a. 7 E. 4.
20. a. 9 E. 4.
26. b. 27. a. b.
20 E. 4. 6. b.
49 H. 6. 17. b.
18. a. 5 H. 7. 4.
b. 5. a. 2 H. 7.
3. b. 11 Ed. 4. 4. b. 6. b. 7. a. b. (b) 5 H. 7. 4. b. 5. a. Fitz. False Imprisonment, 8.

2 Hawk. P. C. c. 16. § 3. **B**ut, inasmuch as it is certain, that a person lawfully making such an arrest (c) may justify bringing the party to the constable, in order to be carried by him before a justice of peace; and inasmuch as the statutes of 1 & 2 Ph. & M. cap. 13. and 2 & 3 Ph. & M. cap. 10., which direct in what manner persons brought before a justice of the peace for felony shall be examined by him, in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of 31 Car. 2. c. 2. commonly called the *habeas corpus* act, seems to suppose, that all persons who are committed to prison are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice, and opinions, is agreeable hereto; it is certainly most advisable, at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him.

ibid. (c) 9 E. 4.
26. b. 27. a.
10 E. 4. 17.
b. H. P. C.
91. 112.

H. P. C. 91.
112. Dalt.
c. 118.

2 Hawk. P. C. c. 16. § 4. **I**t is certain, that the (d) privy council, or any one or two of them, or (e) a secretary of state, may lawfully commit persons for treason, and for other offences against the state, as in all ages they have done.

(d) And. 298.
[Crofton's case, Vaugh.
142. Sid. 78.

Fitz-patrick's case, Salk. 103. The right of one or more lords to commit out of council, is extremely questionable; and indeed seems to have been denied in the case of the Seven Bishops, both by court and counsel on each side. 4 St. Tr. 310, 311. (e) The earliest instances that occur in our law-books, of commitments by a secretary of state, are in 2 Leon. 175. Hellyard's case; and 1 Leon. 70, 71. Howell's case; the former in Tr. 29 El., and the latter in Mich. 29 & 30 Eliz. These were both by Sir Francis *Walsingham*, who is described as one of the principal secretaries of the lady the queen, but with the addition of "and, &c." in the first; in the last expressly of the words, "and one of the privy-council;" so that he seemeth rather to have acted in that character, than as secretary. However, in Melvin's case, in the 4th of Car. 1., the next instance to be met with, the addition here mentioned is dropped, and the commitment is said to be simply by the *Lord Conway secretary of state*. There is no doubt, but that the power here asserted in this officer, was erroneous in its commencement; as hath been very satisfactorily proved by Lord *Camden*, in his argument in the case of *Entick v. Carrington*, 11 St. Tr. 316.: but there is also no doubt, as his Lordship observed, but that he is now in the full legal exercise of it: because there hath been not only a clear practice of it, at least since the Revolution, confirmed by a variety of precedents; but it hath been recognized and confirmed by several cases directly on the point. *Rex v. Kendall and Roe*, 5 Mod. 78. *Skin. 596. S. C. Ld. Raym. 65. S. C. 1 Salk. 347. S. C. 4 St. Tr. 559. S. C. The Queen v. Derby*, Fort. 140. *Rex v. Earbury*, 2 Barnardist. 293. 346. *Yaxley's case*, *Skin. 596. Carth. 291. Sir William Wyndham's*

ham's case, 3 Vin. Abr. tit. Bail. (H. a.) p. 7. Str. 2. S. C. Rex v. Lord Scarsdale and Lord Dupplin, 3 Vin. Abr. (H. a.) p. 8. Rex v. Harvey, Id. p. 9. Rex v. Florence Hensley, 1 Burr. 642. Rex v. Wilkes, 2 Wils. 150. 11 St. Tr. 302. S. C. Sayre v. Earl of Rochford, 2 Bl. Rep. 1165.]

But the king cannot commit, as is evident from the following case, which was upon an *hab as corpus*; wherein it appeared, the king had requested some of his ministry to commit the defendant to gaol, but they, not having evidence of the defendant's guilt, refused to grant any warrant; upon which his majesty, thinking the defendant guilty, called for a warrant, which he signed with his own hand, by which the defendant was committed to the custody of a messenger; and the warrant being taken notice of by the court of *B. R.*, and the whole matter being considered, the court gave their opinion, that the defendant should be discharged, because the warrant was under the king's own hand, and not under the hand of any secretary or officer of state, or justice of peace. And the reason given for this hath been, that the king having given all his executive power to his judges and justices of the peace, there is none left in him, the executive power being too mean and troublesome for his majesty; and if the king erred ever so much there is no remedy against him, but there is a remedy at law against any subject whatsoever.

See 2 Show.
Rep. 484.
pl. 445.

See Pref. to
Ld. Fortescue's Rep.

(C) To what Prison.

BY the 31 Car. 2. cap. 2. § 12. it is enacted, "That no subject
" of this realm, being an inhabitant or resiant of this king-
" dom of *England*, dominion of *Wales*, or town of *Berwick*
" upon *Tweed*, shall or may be sent prisoner into *Scotland*,
" *Ireland*, *Jersey*, *Guernsey*, *Tangier*, or into parts, garrisons,
" islands or places beyond the seas, which then were, or at any
" time thereafter should be, within or without the dominions of
" his majesty, his heirs or successors; and that every such im-
" prisonment is thereby enacted and adjudged to be illegal;
" and if any of the said subjects shall be so imprisoned, every
" such person or persons so imprisoned shall and may, for every
" such imprisonment, maintain, by virtue of the said act, an
" action or actions of false imprisonment in any of his majesty's
" courts of record against the person or persons by whom he or
" she shall be so committed, detained, imprisoned, sent pri-
" soner, or transported contrary to the true meaning of the
" said act, and against all or any person or persons that shall
" frame, contrive, write, seal, or countersign any warrant or
" writing for such commitment, detainer, imprisonment, or
" transportation, or shall be advising, aiding, or assisting in the
" same, or any of them; and the plaintiff in every such action
" shall have judgment to recover his treble costs, besides
" damages, which damages so to be given shall not be less
" than five hundred pounds; in which action no delay, stay,
" or stop of proceeding by rule, order, or command, nor no
" injunction, protection, or privilege whatsoever, nor any more
" than

" than one imparlance shall be allowed, excepting such rule
 " of the court wherein the action shall depend, made in open
 " court as shall be thought in justice necessary, for special
 " cause to be expressed in the said rule; and the person or
 " persons, who shall knowingly frame, contrive, write, seal,
 " or countersign any warrant for such commitment, detainer,
 " or transportation, or shall so commit, detain, imprison, or
 " transport any person or persons contrary to this act, or be
 " any ways advising, aiding, or assisting therein, being lawfully
 " convicted thereof, shall be disabled from thenceforth to bear
 " any office of trust or profit within the said realm of *England*,
 " dominion of *Wales*, or town of *Berwick upon Tweed*, or any
 " of the islands, territories, or dominions thereunto belonging;
 " and shall incur and sustain the pains, penalties, and forfeitures
 " limited, ordained, and provided in and by the statute of
 " provisors and premunire made in the sixteenth year of King
 " *Richard* the second; and be incapable of any pardon from
 " the king, his heirs, or successors, of the said forfeitures,
 " losses, or disabilities, or any of them."

(a) But none can claim a prison as a franchise, unless he have also a gaol-delivery; nor can the king grant to private persons to have the custody of prisoners committed by justices of the peace. And.
 345. Cro.
 Eliz. 829.
 9 Co. 119. b.
 Salk. 343. pl. 1.
 2 Hawk. P.C.
 c. 16. § 67.
 2 Ld. Raym. 767. 879.

By the 14 E. 3. cap. 10. it is enacted as followeth: " In the
 " right of the gaols which were wont to be in ward of the
 " sheriffs, and annexed to their bailiwicks, it is assented and
 " accorded, that they shall be rejoined to the sheriffs, and the
 " sheriffs shall have the custody of the same gaols as before this
 " time they were wont to have; and they shall put in such
 " under-keepers for whom they will answer." And this is confirmed by 19 H. 7. cap. 10. Also it is recited by 5 H. 4. cap. 10.
 " That divers constables of castles within the realm, being assigned justices of the peace by the king's commission, had, by
 " colour of such commission, used to take people to whom they
 " bore evil will, and imprison them within the said castles till
 " they have made fine and ransom with the said constables for
 " their deliverance;" and thereupon it is enacted, " That none
 " be imprisoned by any justice of the peace but only in the common gaol; (a) saving to lords, and others, (which have gaols,)
 " their franchise in this case."

20 E. 4. 6. b.
 Bro. Faux Imprisonment,
 21. 27.
 2 Hawk. P. C.
 c. 16. § 9.
 (b) 2 E. 4. 8. b.
 (c) 11 E. 4.
 4. b. 5. a.
 (d) 2 Hawk.
 P. C. c. 16. § 9.
 (e) Salk. 347.

Since this statute it hath been holden, that regularly no one can justify the detaining of a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously (b) sick, that it would apparently hazard his life to send him to the gaol; (c) or there be evident danger of a rescous from rebels, &c. (d) Yet constant practice seems to authorize a commitment to a messenger; and it is (e) said, that it shall be intended to have been made in order for the carrying of the party to gaol.

pl. 1. Skin. 596. pl. 9. S. P. [By 6 Geo. 1. c. 19. justices of the peace within their respective jurisdictions, may commit vagrants, and other criminals charged with small offences either to the common gaol, or house of correction, as they shall think proper.]

And it is said, that if a constable bring a felon to gaol, and the gaoler refuse to receive him, the town where he is constable ought to keep him till the next gaol-delivery.

Dalt. c. 118. Bro. Faux Imprisonment, 25. 2 Hawk. P. C. c. 16. §9.

If a person arrested in one county for a crime done in it, fly into another county, and be retaken there, he may be committed by a justice of the first county to the gaol of such county.

H. P. C. 114.
10 H. 4. 7
pl. 2. Fitz.
Escape, 8.
Dalt. c. 18.
Cromp. 172
2 Hawk. P. C.
c. 16. §8.

But by the better opinion, if he had before any arrest fled into such county, he must be committed to the gaol thereof by a justice of such county.

Dalt. c. 118.
H. P. C. 92.
11 E. 4. 4. b.
5. a. 13 E. 4. 8.
P. C. c. 16. §9.

Also it seems to be laid down as a rule by some books, that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the same county or not.

Keilw. 45.
22 E. 4. 34. b.
2 Hawk. P. C.
c. 16. §8.

Also, it seems, that the Court of King's Bench are not restrained by the said statutes, but may commit to such gaol as they shall think most convenient. ||This is now clear.||

[By 23 Geo. 2. c. 26. s. 11. and 24 G. 2. c. 55. If an offender, against whom a warrant shall be issued by a justice of peace of one county, shall escape into another, he may be apprehended by having the warrant indorsed by any justice of the county into which he shall so escape, and bailed in that county, if he be bailable; if not, or he cannot there find bail, he shall be carried back into the first county, and there committed or bailed.]

As prisoners ought to be committed at first to the proper prison, so ought they not to be removed thence, except in some special cases; and to this purpose it is enacted by 31 Car. 2. cap. 2. "That if any subject of this realm shall be committed
"to any prison, or in custody of any officer or officers whatsoever for any criminal, or supposed criminal matter, that the
"said person shall not be removed from the said prison and
"custody into the custody of any other officer or officers, unless
"it be by *habeas corpus*, or some other legal writ; or where the
"prisoner is delivered to the constable or other inferior officer,
"to carry such prisoner to some common gaol; or where any
"person is sent by order of any judge of assise, or justice of the
"peace, to any common work-house or house of correction; or
"where the prisoner is removed from one prison or place to
"another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire, or
"infection, or other necessity;" upon pain that he who makes signs or countersigns, or obeys or executes such warrant, shall forfeit to the party grieved one hundred pounds for the first offence, two hundred pounds for the second, &c.

2 Hawk. P. C.
c. 16. §10.

(D) What is to be done previous to their Commitment.

BY the 2 & 3 Ph. & M. cap. 10. it is enacted, "That any justice or justices, before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact, and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing, within two days after the said examination; and the same shall certify in such manner and form, and at such time, as they should and ought to do, if such prisoner so committed or sent to ward had been bailed, or let to mainprize, upon such pain as in 1 & 2 Ph. & M. c. 13. is limited and appointed for not taking or not certifying such examinations, &c." And it is further enacted, "That the said justices shall have authority to bind all such by recognizance or obligation, as do declare any thing material to prove the said manslaughter or felony, to appear at the next general gaol-delivery to be holden within the county, city, or town corporate, where the trial of the said manslaughter or felony shall be, then and there to be given in evidence against the party; and that the said justices shall certify the said bonds taken before them, in like manner as they ought to certify bonds mentioned in the said former act, &c."

2 Hawk. P. C. c. 16. § 12.
(a) Cro. Eliz. 829, 830.

A justice of the peace may detain a prisoner a reasonable time, in order to examine him; and it is (a) said that three days is a reasonable time for this purpose.

(E) What ought to be the Form of the Commitment.

|| 2 Inst. 52.
591. Dalt.
c. 125. H. P. C.
94. 2 Hawk.
P. C. c. 16.
§ 13. Rex v.

EVERY commitment must be in writing (b), and under the hand and seal, and shew the authority, of him that (c) made it, and the time and place, and must be directed to the keeper of the prison.

York and another, 5 Burr. 2684. (b) The commitments here spoken of mean commitments to the custody of sheriffs, gaolers, &c. There is no doubt but that a magistrate may by *parol* order an offender to be detained in custody, until he can make out his warrant of commitment; and the Court of B. R. is in the constant habit of directing commitments verbally, which are afterwards recorded. So, a magistrate, in the case of a breach of the peace within his view, may instantly order the offender to be taken into custody; otherwise, in the case of a sudden affray, all the powers of the king's commission might be in abeyance for the want of pen, ink, and paper. So, an order to detain in custody, under the 13 G. 3. c. 8. for killing game on a *Sunday* until after the return of the warrant of distress, may be by *parol*. Still v. Walls, 7 East, 533. (c) It may be made either in the king's name, and only tested by the justice, or in the justice's name. Dalt. c. 125. 2 Hawk. P. C. c. 16. § 14. Where a commitment in execution must be to the sheriff and not to the gaoler, *vide* 5 Mod. 21.

It may command the gaoler to keep the party in safe and close custody; for this being what he is obliged to do (a) by law, it can be no fault to command him so to do.

2 Hawk. P. C. c. 16. § 15.
(a) 8 Co. 100.
9 Co. 87.

Dalt. 118. Str. 3

It ought to set forth the crime with convenient (b) certainty, whether the commitment be by the (c) privy council, or any other authority; otherwise the officer (d) is not punishable by reason of such *mittimus*, for suffering the party to escape; and the Court, before whom he is removed by *habeas corpus*, ought to discharge or bail him; and this doth not only hold where (e) no cause at all is expressed in the commitment, but also where it is (f) so loosely set forth, that the Court cannot adjudge whether it were a reasonable ground of imprisonment.

2 Hawk. P. C. c. 16. § 16.
(b) H. P. C. 94. Dalt.
c. 125. 2 Inst.
52. 591.
(c) 16 Car. 1.
c. 10. Cro.
Car. 133.
507. 579.
2 And. 298.
cont. Roll.

Rep. 134. Leon. 71. (d) 2 Inst. 591. H. P. C. 109. Palm. 550. (e) Cro. Car. 579. Palm. 558. 2 Hawk. P. C. c. 16. § 16. (f) As, where one was committed for manifold contumacy to the high commission court. Roll. Rep. 245. Or for refusing to answer before them to certain articles. Roll. Rep. 220. 245. Or for insolent behaviour, and words spoken at the council-table. Cro. Car. 133. 579. 2 Bulst. 139, 140.

But a commitment for high treason or felony in general, without expressing the particular species, hath been holden good.

2 Inst. 52.
Cromp. 233. b.
Dalt. c. 125.
Sid. 78. And.
2 Inst. 591. cont.

298. Keb. 305. Palm. 558. 2 Hawk. P. C. c. 16. § 16. Vide 2

But now, since the *habeas corpus* act, it seems that such a general commitment is not good; and therefore where *A.* and *B.* were committed for aiding and abetting Sir *James Montgomery*, who was committed by a warrant of a secretary of state for high treason, to make his escape; on a *habeas corpus* they were admitted to bail; because it did not appear what species of treason Sir *James* was guilty of.

Skin. 596. pl. 9.
The King v.
Kendall and
Row, Salk.
347. S. C. pl. 1.
Ld. Rayn. 65.
5 Mod. 78.
S. C. [but a
commitment
for treason

generally is good. 2 Wils. 158.] || So is a commitment for *treasonable practices*. R. v. Despard, 7 T. Rep. 736. ||

It is safe to set forth that the party is charged upon oath; but this is not necessary; for it hath been resolved, that a commitment for treason, or for suspicion of it, without setting forth any particular accusation or ground of the suspicion, is good.

2 Hawk. P. C. c. 16. § 17.
Dalt. c. 125.
Cromp. 233.
2 Inst. 52. 591.
[Str. 2, 3.
Vin. Abr. tit.

Bail. H. a. p. 7. 2 Wils. 158. 11 St. Tr. 304.]

Every such *mittimus* ought to have a lawful conclusion, (g) *viz.* that the party be safely kept till he be delivered by law, or by order of law, (h) or by due course of law, or that he be kept till further (i) order, (which shall be intended of the order of law,) or to the like effect: and if the party be committed only for want of bail, it seems (k) to be a good conclusion of the commitment, that he be kept till he find bail: but a commitment (l) till the person who makes it shall take further order, seems not

2 Hawk. P. C. c. 16. § 18.
(g) 2 Inst. 52.
591. H. P. C.
94. Cromp.
233. Dalt.
c. 124.
(h) That the
omission of
these words

until he be delivered by due course of law, to be good: and it seems that the party, committed by such or any other irregular *mittimus*, may be bailed.
makes no nullity in the *mittimus* of a justice of peace, for they are no more than the law says. 3 Keb. 531. (i) Lev. 230. *cont.* Cro. Car. 558. (k) 6 Mod. 73, 74. 2 Ld. Raym. 978. 3 Salk. 91. pl. 1. 284. p. 12. 6 Mod. 73. Holt, 590. (l) 2 Inst. 52. 591. Roll. Rep. 220. Lev. 230. Cro. Car. 579. *cont.* 3 Bulst. 48, 49. Roll. Rep. 410.

Rex v. Barnes, [A commitment of one for carrying goods without an university
2 Str. 917. licence, "until he gives security to carry no more, and to observe
"the statutes of the university," is bad.

Rex v. Smith, So is a commitment generally to prison, not specifying what
2 Str. 934. gaol, or directed to any particular gaoler.]

Carth. 152, 153. Also, a commitment grounded on an act of parliament ought
adjudged, and to be conformable to the method prescribed by such statute; as
a difference where the churchwardens of *Northampton* were committed on
taken between the 43 Eliz. cap. 2., and the warrant concluded in the common
a commitment form, *viz. until they be duly discharged according to law*; but
as a criminal, and where one the statute appointing *that the party should there remain until*
is committed *he should account*, for want of such conclusion they were dis-
as contumacious: [in charged.

the first ease, the commitment must be until discharged according to law: in the last, until he comply.]

[Bracey's ease, So, where one *Bracey* was committed by the commissioners of
Salk. 348. bankrupts, for refusing to answer, and they concluded their war-
Ld. Raym. 99. rant, *viz. until he conform himself to our authority, and be thence*
S. C. 5 Mod. *delivered by due course of law*: and upon the return of a *habeas*
308. S. C. *corpus* he was discharged; for the statute only empowers them
Comb. 390. to commit until *he submit himself to be by them examined*.
S. C. Hollings-
head's case,
1 Salk. 351. S. P. Rex v. Nathan, 2 Str. 880. S. P. Miller's case, 2 Bl. Rep. 881. 3 Wils.
420. S. C.]

Carth. 291. So, where one *Yaxley* was committed by the Earl of *Notting-*
pl. 3. *Yaxley's* *ham, secretary of state*, by virtue of the 35 Eliz. for refusing to
case. answer, whether he was a *Jesuit, seminary, or a massing priest*:
and the conclusion of the warrant was, *there to remain until he*
shall be from thence discharged by due course of law; whereas
the words of the statute are special, *viz. until he shall answer*
unto the question; he was discharged on being asked these
questions, and answering them openly and directly in the
negative.

Rex v. Hall, [So, a commitment of a man as a rogue and vagabond under
3 Burr. 1636. 17 Geo. 2. c. 5. s. 7., for running away and leaving his wife and
children *to be maintained* by the parish, there to remain until he
shall be discharged according to the laws and customs of this
realm, was holden to be bad, because it did not contain a direct
allegation that the wife and children *were chargeable*, and because
the commitment directed by the statute is for a *limited* time,
whereas this was indefinite.]

Baxter's case, Mr. *Baxter* being committed by two justices of the peace of
Mich. 20 Car. *Middlesex* to *Clerkenwell* prison, was brought by *habeas corpus* to
2. in *C. B.* *C. B.*; the gaoler returns that he keeps him by virtue of a war-
rant

rant from the justices of the peace, in these words: *Whereas it hath been proved unto us upon oath, that Richard Baxter, clerk, hath taken upon him to preach in an unlawful assembly, conventicle, or meeting, under colour or pretence of exercise of religion, contrary to the laws and statutes of this realm, at Acton, where he now liveth, in the said county, not having subscribed the oath by act of parliament in that case appointed to be taken; and whereas we having tendered to him the oath and declaration appointed to be taken by such as shall offend against the said statute, which he has refused to take; we therefore send you herewith the body of the said Richard Baxter, strictly charging and commanding you, in his majesty's name, to receive him the said Richard Baxter into his majesty's said prison, and him there safely to keep six months, without bail or mainprize; and hereof, &c.* This return the Court held insufficient, the warrant being vicious throughout. First, There is nothing in the warrant to certify to the Court on what statute the justices proceeded. Secondly, Admit they did proceed on the statute 17 Car. 2. (which they must intend, if any,) yet the commitment is ill, for several reasons. First, It doth not appear that *Baxter* was guilty of any offence at all against this act. This law doth not forbid conventicles, nor injoin the taking of any oath, or subscribing any declaration, (nay, there is no such thing as a declaration in the act;) the preaching at conventicles is only one of the descriptions that are there given of such persons as are not to come within five miles, &c., and the taking of the oath is only allowed them as a remedy to secure themselves against the penalty of the law: the only offence then is, of persons so described, to come within five miles of a corporation, or the place where they have taken upon them to preach, &c. Now it doth not appear by the warrant that Mr. *Baxter* did either of these; it is only said that he took upon him to preach at *Acton*, where he now liveth; which last words are only the suggestions of the justices, and not any part of that which is proved unto them upon oath; as the crime intended to be punished by law must be. Secondly, It doth not appear that he preached, &c. since the act of oblivion, neither is there any other description given of him to make him the person intended to be restrained by the act; the time should have been expressed. Thirdly, It is not said who made the oath before the justices; so that the prisoner can have no remedy in case the oath were false. Fourthly, If his being at *Acton* were proved after, &c. yet it doth not appear how long he continued there; possibly he might be sent for before the justices, and committed immediately after his preaching, and then he could not be guilty of any residence punishable within this act: and for these reasons he was discharged.

[The legislature having given magistrates a power of examining a pauper touching his settlement, it seemeth that they must necessarily have, as incidental to such power, a power of committing to prison in case of his refusal to answer their questions: if so, a commitment "until he shall answer," is good. A com-

Rex v. Jackson, 1 T. Rep. 653.

Rex v. Judd,
2 T. Rep. 255.
Rex v. Rem-
nant, 5 T.
Rep. 169.

A commitment under 9 Geo. c. 22. for setting fire to a *parcel* of unthreshed corn, is bad, as not describing any offence within the act. So, is a commitment under the 7 Geo. 2. c. 21. "for having with force and arms made an assault on the prosecutor with intent feloniously to steal, take, and carry away from the person, &c.:" the words of this last act being that "if any person shall make an assault with an offensive weapon, or by menaces or in a forcible manner demand money, &c. from any other person, with a felonious intent to rob such person, he shall be guilty of felony."]

Rex v. Cooper,
6 T. Rep. 509.
Rex v. F.
Rhodes, 4 T.
Rep. 220.
Rex v. York
and Another, 5
Burr. 2684.

|| A commitment in execution by a magistrate, ought to state that the party was *convicted*: if it only set forth that he was charged on oath with the offence, it is insufficient. It should also state *before whom* he was convicted, and that the person convicting had *authority* to convict.

Rex v. J.
Brown, 8 T.
Rep. 26.

So, a commitment in execution of a rogue and vagabond under 23 Geo. 3. c. 88. should state that the defendant was apprehended with the implements of house-breaking upon him *at the time of his being apprehended*.

Rex v. Marks,
3 East, 157.
Vide R. v.
Judd, *ubi*
supra.

Though the warrant of commitment be informal; yet, if upon the depositions returned, the Court of B. R. see that a felony has been committed, and that there is a reasonable ground of charge against the prisoners, they will not bail, but remand them. And in this case, in order to prevent a similar application to another court or judge, they will not remand the prisoners in general terms to the former custody, but will by their rule discharge them from their imprisonment under the informal warrant, and then re-commit them regularly to the same custody.||

(F) At whose Charges they are to be sent to Prison.

And by the
statute of 27

G. 2. c. 3.

When any
person not
having goods
or money in
the county
where he is
taken suffi-
cient to bear
the charges of
himself and of
those who con-
vey him, is
committed to
gaol, or the
house of cor-
rection, by
warrant from

BY the 3 Ja. 1. cap. 10. it is enacted, "That all and every per-
" son and persons that shall be committed to the common or
" usual gaol, within any county or liberty within this realm, by
" any justice or justices of the peace, for any offence or mis-
" demesnour, having means or ability thereunto, shall bear their
" own reasonable charges for so conveying or sending them to
" the said gaol; and the charges also of such as shall be appointed
" to guard them to such gaol, and shall so guard them thither:
" and if any such person or persons, so to be committed, shall
" refuse, at the time of their commitment and sending to the
" said gaol, to defray the said charges, or shall not then pay or
" bear the same, that then such justice or justices of the peace
" shall and may, by writing under his or their hand and seal, or
" hands and seals, give warrant to the constable or constables of
" the hundred, or constable or tithingman of the tithing or
" township where such person or persons shall be dwelling
" and

“ and inhabiting, or from whence he or they shall be committed, or where he or they shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said person, so to be committed, as by the discretion of the said justice or justices of the peace, shall satisfy and pay the charges of such his or their conveying and sending to the said gaol; the appraisement to be made by four of the honest inhabitants of the parish or tithing where such goods or chattels shall remain and be; and the overplus of the money which shall be made thereof, to be delivered to the party to whom the said goods shall belong.”

And it is further enacted, “ That if the said persons so to be committed, shall not have, or be known to have any goods or chattels which may be sold for the purpose aforesaid, within the county or liberty, that then an indifferent tax or assessment shall be made by the constables and churchwardens, and two or three other honest inhabitants of the parish, township, or tithing where such offenders shall be taken or apprehended, the said taxation being allowed under the hand of one or more justice or justices of the peace, if there be such constables or churchwardens there inhabiting; and in default of them, by four of the principal inhabitants of the said parish, township, or tithing, where such offender shall be taken or apprehended; and if any so taxed or assessed shall refuse to pay their said taxation, then the justice or justices of the peace, by whom the said offenders shall be committed to prison, or any justice of the peace near adjoining, shall and may give warrant as aforesaid to the constable, tithingman, or other officer, there to distrain the goods of any so assessed, which shall refuse to pay the same, and to sell the same; and that such person or persons so authorized, shall have full power and authority so to distrain; and by appraisement of four substantial inhabitants of the said place, to sell a sufficient quantity of the goods and chattels of the person so refusing, for the levying of the said taxation; and if any overplus of money come by the sale thereof, the same to be delivered to the owner.”

a justice, then on application by the constable, or other officer, who conveyed him, to any justice for such county or place, [such justice] shall upon oath examine into and ascertain the reasonable expences, and shall, without fee, by his warrant, order the treasurer to pay the same; but in *Middlesex* the same shall be paid by the overseers of the poor.

(G) *To what Court the Commitment is to be certified.*

BY the 3 H. 7. cap. 3. it is enacted, “ That every sheriff, bailiff
“ of franchise, and every other person, having authority
“ or power of keeping of gaol, or of prisoners for felony, do
“ certify the names of every such prisoner in their keeping, and
“ of every prisoner to them committed for any such cause, at the
“ next general gaol-delivery, in every county or franchise where
“ any such gaol shall be, there to be calendered before the
“ justices of the deliverance of the same gaol, whereby they
“ may, as well for the king as for the party, proceed to make
“ deliver-

*Vide title
Habeas Cor-
pus.*

“ deliverance of such prisoners according to law, on pain to
 “ forfeit to the king, for every default there recorded, one
 “ hundred shillings.”

(H) By what Means the Party may be discharged
 from such Commitment.

Keilw. 34.
 3 Inst. 209.
 210.
 H. P. C. 94.
 2 Hawk. P. C.
 c. 16. § 22.

A PERSON legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any other but by the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose, by the justices of gaol-delivery.

Keilw. 34.
 H. P. C. 109,
 110. 114.
 2 Hawk. P. C.
 c. 16. § 27.

But, if a person be committed on a bare suspicion, without any appeal or indictment for a supposed crime, where afterwards it appears that there was none; as, for the murder of a person thought to be dead, who afterwards is found to be alive, it hath been holden that he may be safely dismissed, without any farther proceeding; for that he who suffers him to escape is properly punishable only as an accessory, where there can be no principal; and it would be hard to punish one for a contempt founded on a suspicion appearing in so uncontested a manner to be groundless.

COMMON.

4 Co. 37. a.
 2 Inst. 65.
 Vent. 387.
 (a) And therefore, if I have a right of common in another man's soil, and I grant it to A. reserving rent, if the rent be behind, I cannot distrain the beasts of A., because the right of common, which every man hath, runs through the whole common; and I cannot say that any particular part of the common is more mine than another. Co. Lit. 47. a. 142. a. 2 Roll. Abr. 446.

COMMON is a right or privilege which one or more persons claim to take or use in some part or portion of that which another man's lands, waters, woods, &c. naturally produce, without having an (a) absolute property in such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing on some agreement between lords and tenants, for some valuable purposes, which by age being formed into a prescription, continues good, although there be no deed or instrument in writing that proves the original contract or agreement.

(A) Of the several Kinds of Common: And herein,

1. Of *Common Appendant*.
2. Of *Common Appurtenant*.

3. Of Common in Gross.

4. Of Common pur Cause de Vicinage.

(B) Of the Interest of him who is Owner of the Soil,

(C) Of the Commoner's Interest in the Soil: And herein of the Remedies the Law gives him,

1. Against the Lord or Owner of the Soil.

2. Against the other Commoners: And herein of Admeasurement.

3. Against Strangers.

(D) Of Approvement and Inclosure.

(E) Of Apportionment and Extinguishment.

(A) Of the several Kinds of Common.

THE general division of common, according to some books, is (a) Of the nature into, 1st, *Common of pasture*, which is a right or liberty that one or more have to feed or fodder their beasts or cattle in another man's lands; 2dly, (a) *Common of turbary*, or a liberty of cutting turves in another's soil; 3dly, (b) *Common of piscary*, or a right and liberty of taking fish in another's fish-pond, pool, or river; 4thly, *Common of estovers*, which is a right of taking trees or loppings, shrub, underwood in another's woods, coppices, &c.; and 5thly, (c) A liberty, which in some manors the tenants have of digging and taking sand, gravel, stone, &c. in the lord's soil.

(a) Of the nature of this kind of common, and that it can only be appendant to an house, vide Tyrringham's case, 4 Co. 37. a. Of prescribing for it, vide Hayward v. Cunnington, Lev. 231.

Sid. 354. 2 Keb. 290. That an assise lies of it. John Webb's case, 8 Co. 48. That by a grant of a house *cum pertinentiis*, common of turbary passes, vide Beaufeley v. Brook, Cro. Ja. 189, 190. Solme v. Bullock, 3 Lev. 165. (b) That a man may prescribe to have *separalem piscariam*, and exclude the owner of the soil wholly from fishing; for he has still the profit of the soil and the water, &c. Co. Litt. 122. Vent. 391. Saund. 351. 2 Saund. 326. How it must be prescribed for, vide Hard. 407. (c) For this vide Co. Lit. 41. b.

But the word *Common* is usually understood of common of Co. Lit. 122. a. pasture, of which there are four (d) kinds; first, *Common appendant*; secondly, *Common appurtenant*; thirdly, *Common in gross*; fourthly, *Common pur cause de vicinage*. (e)

Vaugh. 255. (d) For shack in the county of Norfolk, which is a sort

of *common pur cause de vicinage* and the commencement thereof, vide Sir Miles Corbet's case, 7 Co. 5. (e) || The three first are in truth the only rights of common; for though common of vicinage is here reckoned among them, yet it is not properly a right of common, but is only an excuse for a trespass. If it were a right, it would prevent an inclosure, which (it has always been holden that) it will not. Willes's Rep. 322. ||

1. Of Common Appendant.

Common appendant of common right belongs to arable land Co. Litt. 122. for beasts that serve for maintenance of the plough; as horses a. 26 H. 8. 4. and

(a) But it must and oxen to plough the land, kine and sheep to compester it; be said to have and for such common there is (a) no need to prescribe. *
been time

out of mind. 4 Co. 37. Roll. Abr. 401. Cro. Car. 542. must be appendant time out of mind, Keilw. 129. b. Roll. Abr. 396. Fitz. Issue, 143. and cannot be created at this day. 26 H. 8. 4. 5 Ass. 9. Fitz. Assise, 134. Roll. Abr. 396.

* *Qu. de hoc*, for Lord Coke, in his commentary on the same section, 121. b., says, "Appendants are ever by prescription." [But this may be reconciled: for, an appendancy cannot be without prescription, the former always implies the latter; and, therefore, if one pleads common appendant, it is unnecessary to add the usual form of prescribing. Hargrave's note, 2 Co. Lit. 122. a.]

4 Co. 37.
2 Inst. 86.

As the lords of several manors, in which there were great wastes, used to portion out some parts of the arable lands to their tenants, which they were to till and plough, and were to hold in nature of socage; it was necessary, in support of tillage, which hath always been greatly favoured in the law, that the cattle employed in this service should have food and provender in some other parts of the manor; and this was usually assigned them in such wastes as were least fitted for improvement or cultivation.

Roll. Abr. 396.

4 Co. 37. a.
S. P. 2 Inst.
86. S. P.

Hence it is, that if before the statute of *quia emptores terrarum*, the lord of the manor had made a feoffment of parcel of the manor, to hold of him; the feoffee, as incident to the grant, should have common in the wastes of the lord.

37 H. 6. 34.
26 H. 8. 4. a.
4 Co. 37. a.
11 H. 6. 12.
Roll. Abr. 396.
2 Brownl. 298.
2 Inst. 85. 474.
(b) It cannot

This kind of common is regularly appendant (b) only to arable land; yet it may be claimed by that name as appendant to a manor, farm, a plough-land, or a carve of land, though it may contain pasture, meadow, and wood; for it shall be presumed to have been all originally arable land, though afterwards converted into meadow, pasture, &c.

be appendant to land which is approved within time of memory out of the waste of the lord. 5 Ass. 2. Bro. Common, 16. S. C. Bro. Ass. 116. S. C. Roll. Abr. 397. S. C.

(c) 37 H. 6.
34. 10 E. 4.
10 b. Roll.
Abr. 397.
Co. Lit. 122.
a. Willes's
Rep. 231.
(d) 14 H. 6.

(c) It can only be for such cattle as are necessary in tillage, as oxen and horses to plough the land, and cows and sheep to compester it; (d) and therefore a prescription to have common appendant for all manner of cattle is not good, because it comprehends goats, geese, and such like, which is more properly common appurtenant.

6. b. Bro. Common, 13. S. C. 37 H. 6. 34 S. C. Roll. Abr. 397. S. C. Old N. B. 26. 25 Ass. 8.

17 E. 3. 27. 34.
Roll. Abr. 399.
S. C.

Common appendant may by usage be limited to any certain number of cattle.

17 E. 3. 34.
b. Roll. Abr.
397. S. C.

A man may have common appendant for thirty cattle in one place, and to the same land common appendant also in another place for part of his said cattle, and so may take it where he pleases.

27 E. 3. 86.
Roll. Abr. 396.
S. C. (e) May

Common appendant (e) may be through all the year, saving at a certain time, in which the lord useth it.

be on condition or limitation; as *quamdiu* he pays so much, *tamdiu* or he shall be living in

in such a house to which the common is appendant. 37 H. 6. 34. Fitz. Trespass, 85. S. C. Bro. Common, 13. S. C. Roll. Abr. 397. S. C.

(a) So, it may be to common in the meadow, after the hay 17 E. 3. 26. carried off, till *Candlemas*. 34. Roll. Abr.

to common in the pasture, from the feast of *St. Augustin* till *All Saints*. 17 E. 7. 26. 34. Roll. Abr. 397. S. C.—So it may be to common two years after the corn cut and carried away, till it is resown, and every third year *per totum annum*. 22 Ass. 42. Roll. Abr. 397. S. C. Saund. 343. S. P. *Vide infra*, letter (C).

If an inhabitant of one parish hath common appendant in certain waste grounds which lie in another parish, he shall be assessed, and pay taxes in that parish where his farm lies, and not in that in which he hath common; for the common is only incident to it, and will pass by a grant of the farm; and is therefore to be considered as part of the farm, and the farm to be taxed the higher. Salk. 169. pl. 1.

Common appendant is so necessarily incident to the land, that it cannot be severed from it. And therefore if the land be divided never so often, every little parcel of it is entitled to common appendant. Per Willes C. J. Bennett v. Reeve, Willes's Rep. 230.

2. Of Common Appurtenant.

Common appurtenant can only be claimed by (b) prescription, and is a right of commonage for beasts, not (c) only commonable, (d) as horses, oxen, cows, and sheep, but likewise for beasts not commonable, as swine, goats, and geese. Co. Lit. 122. a. (c) || It may be claimed by grant made within time of memory. F. N.

B. 180. N. Sacheverill v. Porter, Cro. Car. 482. But being a profit *a prendre* in the soil of another, it cannot be claimed by custom. And one objection against claiming such a right by custom is, that it cannot be released; whereas, if it be annexed to the fee, it may. Gatewood's case, 6 Co. 59. b. Grimstead v. Marlowe, 4 T. Rep. 717. and Hardy v. Holliday there cited. || (c) A man may prescribe to have it for all manner of cattle. 15 E. 4. 33. Roll. Abr. 402. S. C. (d) These are commonable, and called *magna averia*, for which *vide* Cro. Ja. 580. 2 Roll. Rep. 173. Saund. 227.—If the lord licence a stranger *ad ponend. averia* into the common, this shall be intended of commonable cattle only, and not of hogs. 2 Mod. 7. *per North* Ch. J.—But, if the licence be for a particular time, it is otherwise. 2 Mod. 7. *per North*.

He that claims common by force of a prescription, as an inhabitant of a town, shall have no other cattle to common there, but what are (e) levant and couchant within the same town. 15 E. 3. 32. Roll. Abr. 398. || Cheedley v. Mellor, 1 Sid. 313. Weekly

v. Wildman, 1 Lord Raym. 406. || (e) What cattle shall be said levant and couchant, *vide* Noy, 30., where by *Coke* Ch. Just. so many cattle as the land, to which the common is appurtenant, may maintain in the winter, so many shall be said levant and couchant. Vent. 54. || So by Lord Raym. levancy and couchancy signifies only so many as the messuage or farm will by its produce maintain. Rogers v. Benstead, Cambr. Summ. Assiz. 1727, approved by Lee C. J. in Fulcher v. Seales; Norfolk Summ. Ass. 1733. Selwyn's Nt. Pri. 392, 3. || And so many beasts may be said levant and couchant upon a house as may be tied there, and are usually to be maintained in the house. 2 Brownl. 101. But *per* Vaugh. 253. Cattle cannot be levant on a messuage only. Yet in Salk. 169. pl. 2., prescription to have common for all beasts levant and couchant, as appendant to a cottage, is good; for a cottage contains a curtilage at least; and there is no difference between a messuage and curtilage as to this. Also a cottage, by statute, ought to have four acres of land. 6 Mod.

6 Mod. 114. S. C. 11 Mod. 53. pl. 29. 72. pl. 3. 12 Mod. 35. Ld. Raym. 726. And *Holt Ch. Just.* said, that he remembered the trial of an issue, where it was ruled by *Hale Ch. Just.* that foddering cattle in the yard was sufficient evidence of levancy and couchancy. *Emerton v. Selby.* Salk. 169. pl. 2. 6 Mod. 115. S. C. 2 Lord Raym. 1015. S. C. || It is certain that levancy and couchancy must be proved by shewing that the party claiming the right was in possession of some land whereon the cattle might be levant and couchant. *Scholes v. Hargreaves*, 5 T. Rep. 46. *Benson v. Chester*, 8 T. Rep. 396. The cases of a messuage and cottage above referred to, proceed upon the ground that after verdict, land shall be understood to be included in those terms. ||

Roll. Abr. 398. If a man claims common, by prescription, for all manner of
(a) It is naught upon a general demurrer.
|| *Cheadle v. Miller, Lev.*
196. 1 Sid. 313. S. C. 2 Keb. 108, 120. S. C. and it would seem still to be so, notwithstanding the statute 4 Ann. c. 16. for the averment of levancy and couchancy is material and traversable, *Emerton v. Selby.* 6 Mod. 115. *Robinson v. Raley*, 1 Burr. 316. the levancy and couchancy being the measure of the kind of common which is claimed by the plea. *Jenkin v. Vivian*, Pope 201. *Potter v. North*, 1 Saund. 352. *Hoskins v. Robins*, 2 Saund. 327. *Scholes v. Hargreaves*, *ubi supra*. But the want of such an averment is aided after verdict by the statute of jeofails, 1 Lev. *ubi supra*. *Miller v. Staples*, 1 Vent. 165. *Prance v. Tringer*, Cro. Ja. 44. *Bronge v. Moore*, Sty. 428. *Corporation of Derby*, 1 Mod. 7. *Corbyson v. Pearson*, Cro. Eliz. 458. *Stennel v. Hog*, 1 Saund. 225. *Mellor v. Spateman*, Id. 346. || (b) But, if a man prescribes for common for a certain number of cattle, as belonging to certain land, he need not aver that they were levant and couchant, || *Stevens v. Austin*, 2 Mod. 185. *Day v. Spooner*, Ro. Abr. 401. pl. 4. Cro. Ja. 27. because it is no prejudice to the owner of the soil, as the number is ascertained. *Richards v. Squibb*, 1 Lord Raym. 726. ||

22 Ass. pl. 84. It seems agreed, that if a man has a grant of common for
45 E. 325. b. a (c) certain number of beasts, the commoner may take the
11 H. 6. 26 b. beasts of a stranger, and put them upon the common, so that it
Vide Cro. Ja. exceed not the number.
15. 575.

(c) *Secus* of common *sans* number. Roll. Abr. 402. But he that claims the sole pasture of land may licence a stranger to put in his beasts. 2 Saund. 327.

Jones, 375. Also in case of a common appurtenant, it is said, that where
Cro. Car. 432. the number of the beasts to be commoned is certain, the commoner may grant over the commonage of part, and reserve the rest to himself.

22 Ass. 84. It is clear, that if a commoner borrows cattle to manure his
Roll. Abr. 396. land, he may use the common with them; for by the borrowing
402. S. C. he has a special property in them.
F. N. B. 180. b.
Skin. 138. S. P. admitted.

3. Of Common in Gross.

Co. Litt. 122. This is a right of commonage which must be claimed by deed
a. 2 Inst. 477. or prescription, and hath no relation to any land belonging to
What shall be the commoner: it may be for a certain number of cattle, or
sans

sans number; ||by which expression we are to understand the commoner's *own commonable cattle levant and couchant upon his lands*, of which as there may be in some years more than in others, the common is therefore said to be *sans number*, in contradistinction to stinted common, where a man has a right to put in only a certain number.

said common in gross, *vide* Roll. Abr. 402. Ben-
nett v. Reeve,
Willes, 232.
Both these
facts, viz. the

levancy and couchancy and the property may be traversed and put in issue; for they make but one entire title. Molliton v. Trevilian, Skin. 137. 2 Show. 328. S.C. Robinson v. Raley, 1 Burr. 316.

for it, and it is a tenement within the statute 13 & 14 Ch. 2. || Rex v. Der-
singham, 7. T.
Rep. 67.

Common in gross is a matter of tenure; a *præcipe* will lie He that hath common in gross for a (a) certain number of cattle, may put in the cattle of a stranger, and use the common with them.

1 H. 6. 22. b.
Roll. Abr. 402
S. C.

who hath common *sans* number in gross. 11 H. 6. 22. b. Roll. Abr. 402. S. C.

(a) So may he

Common appendant cannot be made common in gross, for that is for cattle levant upon the land, to which &c., and therefore it cannot be severed without extinguishment.

9 E. 4. 39.
26 H. 8. 4.
Roll. Abr. 401.
S. C. Cro.
Car. 542. S. P.

So, common appurtenant for cattle *levant and couchant* upon the land, cannot be made in gross.

Roll. Abr. 402.
Cro. Ja. 15.
S. C. But,

though it cannot by grant be severed from the soil, yet common appurtenant for a certain number of beasts may be granted over, *per Cur.* || So by Hale C. J. in Daniel v. Hanslak, 2 Lev. 67. It is said by Fitzherbert 26 H. 8. 4. that common appurtenant may be severed from the land to which it is appurtenant. ||

If A., and all those whose estate he hath in the manor of D., have had time out of mind a fold-course, ss. common of pasture for any number of sheep, not exceeding 300, in a certain field, as appurtenant to the said manor, he may grant over this fold-course to another, and so make it in gross; because the common is for a certain number, and by the prescription the sheep are not to be levant and couchant upon the manor, but it is a common for so many sheep appurtenant to the manor, which may be severed from the manor as well as an advowson, without any prejudice to the owner of the land where the common is to be taken.

Roll. Abr. 402.
Cro. Car.
432. S. C. ad-
judged and
stated, that it
was granted
over with par-
cel of the ma-
nor. Jones,
375. S. C. ad-
judged.

4. Of Common *pur Cause de Vicinage*.

Common *pur cause de voisinage* is but an excuse of trespass, and no man can put his beasts into the land in which he hath such common, but they must escape thither themselves, and either of the parties that have such neighbouring grounds (b) may inclose against the other.

Co. Lit. 122.
a. || Willes's
Rep. 322. ||
(b) That by
such inclosure
the common is
gone. 4 Co. 38.
Roll. Abr. 399. S. P.

But, if there be common *pur cause de voisinage* between two manors, and the lord of one manor inclose, yet he shall not bind

Roll. Abr. 399.

a copyholder of the same manor, but that he may have common *pur cause de vicinage* as he had before.

7 Co. 5. b.
Resolved per
Cur.

If there be common *pur cause de vicinage* between the towns of *A.* and *B.*, and *A.* have 50 acres of common, and *B.* 100 acres of common, the inhabitants of *A.* cannot put more cattle into their common than the 50 acres will depasture, without any regard to the common of *B.*; for the original cause of this common was not the profit of either town, but to prevent suits in open countries for reciprocal escapes from one field into the other.

2 Bulst. 87.

If there are two manors in one vill, the tenants of each may intercommon; and this is likewise called common *pur cause de vicinage*.

Bromfield
v. Kirber,
11 Mod. 72.

|| It was said by *Holt C.J.* that to give common of vicinage the commons must be next adjoining, that is, without any intermediate land.

Gullett v.
Lopes,
13 East, 348.

Where one of two adjoining commons, with common of vicinage, was inclosed and fenced off by the owner of the soil, leaving open only a passage for the highway which led over the one to the other; yet, as the separation was not complete, so as to prevent the cattle from straying from the one to the other by means of the highway, the common by vicinage still continued. ||

Roll. Abr. 399.

(a) || This is
merely the
dictum of
Littleton J.

Every common *pur cause de vicinage* is common (a) appendant; and therefore a man need not prescribe in a common *pur cause de vicinage*; but it is sufficient to say, that he and all those whose estate, &c. have used to intercommon *causa vicinagii*.

"quod, as *Brooke* observes, *nemo contra dixit neg. affirmavit.*" *Br. Tit. Comoner and Comen*, pl. 29. 7 E. 4. 26. But by *Wray C.J.* 4 Co. 38. common for cause of vicinage is not common appendant, but inasmuch as it ought to be by prescription from time whereof, &c. as common appendant ought, it is in this respect resembled to common appendant. And in the case of *Jenkin v. Vivian*, *Poph. 201.* *Latch*, 161. it was holden, that prescription is the ground of common *pur cause de vicinage*. ||

(B) Of the Interest of him who is Owner of the Soil.

Co. Lit. 122. a.

(b) Therefore
if the owner of
the soil grants
to another

THE lord of the soil hath such an interest therein, that it seems agreed, that a custom or prescription (b) totally to exclude him from all manner of profit is void, as unreasonable and against law.

common *sans number* there, yet the grantee cannot use the common with so many cattle that the grantor shall not have sufficient common for his cattle. 12 H. 8. 2 Roll. Abr. 396. 399. *Bridg. 5.* Roll. Rep. 365. *Saund. 245.* S. P. admitted. — But, where the lord shall, by prescription, be restrained to a certain number, *vide 2 Roll. Abr. 267. pl. 2.*

Co. Litt. 122.

a. And may
prescribe to
have *separalem*
pasturam, and

But one may prescribe or allege a custom to have *solum vesturam terræ* from such a day to such a day, and exclude the owner of the soil.

exclude the owner of the soil from feeding there. *Id. Ibid.*

[*North v. Cox*,
Vaugh. 251.
1 Lev. 253.
S. C. Potter v.
North, 1 Vent.

Also, it seems, by the better opinion, that a prescription for *sol. & separal. pastur.* at all times so as to exclude the lord from feeding there, is good; for this does not exclude the lord of all the profits; for he shall have the mines, trees, &c. and is not like

a pre-

a prescription for the whole common to exclude the lord, for that is repugnant. 383. 1 Saund. 350. S. C. 1 Lev. 268.

S. C. Hopkins v. Robinson, 1 Mod. 74. 2 Lev. 2. S. C. 2 Keb. 757. 842. 1 Ventr. 123. 163. S. C. Pollex. 13. S. C.]

The lord without prescription cannot agist the cattle of a stranger in the common. 30 E. 3. 27. Roll. Abr. 396.

But he may (a) licence a stranger to put in his cattle, if he leaves sufficient common for the commoners. 2 Mod. 6, 7. & vide 2 Mod. 275. (a) And if

the lord licence a stranger *ad ponend. averia* into the common, this shall be intended of comonable cattle only, and not of hogs; but, if the licence be for a particular time, it is otherwise. 2 Mod. 7. Per North. Such licence must be by deed. 2 Lev. 2. || 2 Saund. 328.]]

If the lord alien in fee the soil where the common is taken, saving his power of pasture, as lord, he shall have common there as lord; *aliter*, without any saving; but the alienance of the soil may depasture it, as the lord had done before. 18 Ass. 56. pl. 4. 18 E. 3. 43. Roll. Abr. 396.

If *A.* grant common to *B.* in a certain place, *A.* cannot afterwards erect a rick there; for by the grant the cattle of *B.* are to range over the whole place without restraint; and it shall not be in the power of *A.* to defeat his own grant. Cro. Ja. 271. Farmer and Grant. Yelv. 201. S. C. adjudged.

[The right of commoners in a common may be subservient to the right of the lord in the soil; so that the lord may dig clay pits there, or impower others to do so, without leaving sufficient herbage in the common, if such a right can be proved to have been always exercised by him. Bateson v. Green, 5 T. Rep. 411.

So he may, with the consent of the homage, grant part of the soil of the common for building, if he hath immemorially exercised such right. Folkard v. Hemmett, Sittings after Easter Term, 1776, C. B. 5 T. Rep. 417. a.

So, a custom, that the owners of ancient messuages, &c. within a manor have had assigned to them by the moss-reeve certain portions of the common to be holden by them in severalty for digging turves, &c. called moss-dales, and have inclosed and approved such moss-dales, (after clearing them of turves,) and holden them so inclosed in severalty, discharged from all right of common, is good.] Clarkson v. Woodhouse, 5 T. Rep. 412. n.

(C) Of the Commoner's Interest in the Soil: And herein of the Remedies the Law gives him.

A Commoner hath only a (b) special and limited interest in the soil; but yet he shall have such (c) remedies as are commensurate to his right, and therefore may distrain beasts damage-feasant, bring an action on the case, &c. but not being absolute owner of the soil, he cannot (d) bring a general action of trespass for a trespass done upon the common. (b) For the interest and power of a commoner, and the general learning thereof, vide Bridg. 10, 11.

Godb. 123. 2 Leon. 201. S. C. (c) Where he may maintain an assise, and what shall be a sufficient seisin for that purpose. Roll. Abr. 404. (d) 4 Mod. 187. Carth. 285. Skin. 432. 2 Salk. 637. admitted. 9 Co. 111. b.

12 H. 8. 2. A commoner cannot regularly do any thing on the soil which
 13 H. 8. 15. tends to the melioration or improvement of the common, as
 Sid. 251. cutting down bushes, fern, &c.
 Bridgm. 10.
 Godb. 182.

Roll. Abr. 405. Therefore if a common every year in a flood is surrounded
 2 Bulst. 116. with water, yet the commoner cannot (a) make a (b) trench
 S. P. Godb. in the soil to avoid the water; because he has nothing to do with
 52. S. P. the soil, but only to take the grass with the mouth of his cattle.
 Bridg. 10.,
 (a) Unless by
 special custom. Godb. 182. (b) For if he makes any thing *de novo* in the land, he is a tres-
 passer; but may amend and reform a thing abused; and therefore, if the land be full of
 mole-hills, he may dig them down. Brownl. 228. So, if there be holes dug in the common
 to the damage of the land, the commoner may put again the earth dug into its place.
 Brownl. 228. — Also, a commoner may scour a trench, as has been used to be done time
 out of mind, and as is done in the moors of *Somerset*. Sid. 251.

Lit. Rep. 38. Every commoner may (d) break the common if it be inclosed,
 & vide 1 Roll. and although he does not put his cattle in at the time, yet his
 Abr. 406. right of commonage shall excuse him from being a trespasser.
 (d) Where he
 may make one or more gaps to put in his cattle, if the common be inclosed, vide Golds. 117.
 2 Inst. 88. — May throw down the hedges. 2 Mod. 65. Brownl. 228. — If the lord makes
 a pond in the common, the commoners may let the water out. Brownl. 228.

2 Leon. 202, If a tenant of the freehold ploughs it, and sows it with corn,
 203. the commoner may put in his cattle, and therewith eat the corn
 growing upon the land: so, if he lets his corn lie in the field be-
 yond the usual time, the other commoners may notwithstanding put
 in their beasts.

But for the better understanding of the commoner's right and
 interest in the common, and of his remedies when his right is
 infringed, it may be necessary more particularly to consider,

1. *What Remedies he has against the Lord or Owner of the Soil.*

1 Burr. 266. If a commoner find conies on the soil spoiling the grass, he
 2 Wils. 51. cannot destroy or drive them off; nor, consequently, can he
 Roll. Abr. 405. destroy the burrows, which is, in effect, destroying the conies;
 pl. 2. Cro. but to the law the commoner must resort for his remedy, if
 Eliz. 876. he is aggrieved.
 Cro. Ja. 195.

29. It is (e) a general rule, that a commoner cannot distrain or
 (e) For which chase out the cattle of the lord or tertenant damage-feasant;
 vide 2 Leon. and (f) that if the lord surcharges the common, the (g) proper
 203. Yelv. remedy is an action on the case.
 104. 129. Cro.
 Ja. 208.

Brownl. 187. Godb. 182. (f) That the commoner may have an action on the case, F. N. B.
 125. 9 Co. 112. — And how such action is to be laid. Lutw. 107. (g) And therefore there
 can be no relief in equity where the Lord surcharges. 2 Vern. 116.

Roll. Abr. 405. If there is a custom, that a close ought to lie fresh and
 406. Trulack hained every second year till *Lady-day* after the corn cut and
 and White, ad- carried away; and J. S. hath used time out of mind to have
 judged, common in the said close after *Lady-day*, till it is sowed again
 [4 Burr. 2430. with corn, for his cattle levant and couchant upon a certain
 cited by the tenement, as appurtenant thereto; in this case, if the lord of
 the court and ad- the soil of the said close puts in his cattle into the said close
 mitted.] against

against the custom, when it ought to lie fresh and hained by custom, the said *J. S.* though he be but a commoner, (*a*) may take the cattle of the lord there damage-feasant, and justify in an action of trespass brought against him by the lord of the close where he took the cattle; for if the lord might eat the grass before the common is to be taken pursuant to the custom, the tenant would be defeated of all the benefit of his common. (*a*) So, where the lord by custom is stinted to a certain number of cattle, and yet he puts in more, Kenrick and Pargiter, *Yelv.* 129. Adjudged by three judges against two, who doubted, and inclined to think, that a custom and usage to distrain ought to have been alleged. *Cro. Ja.* 208. Brownl. 187. [See Lord *Mansfield's* observations on this case, 4 *Burr.* 2429, 2430.]—But how far the lord may be distrained to a certain stint, *vide* 2 *Roll. Abr.* 267.

(*b*) If (*c*) I have (*d*) common of estovers in the woods of *J. S.* and *J. S.* cuts part, or all the wood, yet I cannot take any part of this which is cut, (*e*) but shall be put to my assise, or case, as my estate is. (*b*) *Roll. Abr.* 406. *Cro. Eliz.* 826. *S. P. per Cur.* *Cro. Ja.* 257. *S. P. per Curiam.* *Roll. Abr.* 567. pl. 3. like point. *Yelv.* 188. *S. P. per Curiam.* Brownl. 220. *S. P. per Cur.* *Bulst.* 93, 94. *S. P.* admitted *arguendo.* (*c*) So, if one grants to me 1000 cords of wood, to be taken at my election, and the grantor, or a stranger, cuts down all, or part of the wood, I can take no part of that which is cut down. *Sir Thomas Palmer's case,* 5 *Co.* 25. *Cro. Eliz.* 820. *S. C.* *Noy,* 32. *S. C.* *Moor,* 691. pl. 955. *S. C.* *Yelv.* 188. cited. [*Woodson v. Newton,* 2 *Str.* 777. *S. P.* *Rackham v. Jesup,* 3 *Wils.* 332. *S. P.*] (*d*) But, if a man claims all the thorns, &c. growing on such a place, he may take them, though cut down by another. *Douglas and Kendall,* *Cro. Ja.* 257. adjudged. *Yelv.* 188. adjudged. Brownl. 219, 220. adjudged. *Bulst.* 93, 94. (*e*) *For this vide* 9 *Co.* 112. Brownl. 197. *Roll. Abr.* 108. pl. 22. *F. N. B.* 58. *Heb.* 43. *Yelv.* 188. 5 *Co.* 25.

¶ If the lord make a hedge round the common, or do any act that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary for letting himself into the common: but, if he can get at the common, and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, his remedy is by an action on the case, or by an assise, and he cannot assert his right by any act of his own. If his right be abridged by coney-boroughs, he cannot touch the soil to fill them up: nor, if trees be planted to an excess, can he cut them down. Cooper v. Marshall, 2 *Wils.* 51. 1 *Burr.* 259. *S. C.* *Sadgrove v. Kirby,* 6 *T. Rep.* 483. affirmed in the *Exchequer Chamber,* 1 *Bos. & Pul.* 13.

2. Against the other Commoners; and herein of Admeasurement.

The writ of admeasurement lies by (*f*) one commoner against (*g*) another; but, if the tenant surcharges the common, the lord shall (*h*) not have a writ of admeasurement against the tenant. (*f*) *F. N. B.* 125. *B. D.* (*g*) *Per* 2 *Inst.* 86. it lies only for and against such as have common appendant; but *Q. & vide* *F. N. B.* 125. *Roll. Rep.* 365. (*g*) Yet upon this suit all the commoners shall be admeasured. *F. N. B.* 125. (*h*) [*Vide Fitzh. tit. Admeasurement* pl. 12. 16.]

So, if the lord surcharge the common or approve without leaving sufficient, the tenant shall not have a writ of admeasurement against him, but an assise. *F. N. B.* 125. *D.* 126. *D.*

No writ of admeasurement lies against a commoner *sans nombre*, nor shall his (*i*) common be admeasured. *F. N. B.* 125. *D.* *Vide* *Ld. Raym.* 1187.

contr. (*i*) But the lord may distrain his cattle. *Saund.* 345.

22 Ass. pl. 65. One commoner (*a*) cannot distrain the cattle of another; for
 Style, 428. the right of commonage, which every commoner has, runs
 Yelv. 104. through the whole land.

2 Lutw. 1240. [4 Burr. 2426. 1 Bl. Rep. 673. S. C. And after admeasurement, a commoner may distrain the
 supernumerary cattle of a fellow-commoner. 3 Wils. 287. If *A.*, being possessed of land in
 a common field, and having a right of common over the whole field, and several other persons
 having a like right of common, enter into an agreement not to exercise their respective rights for
 a certain term of years, and each party covenants to that effect; if, during that term, the cattle
 of one of the persons, party to such agreement, come upon the land of *A.*, *A.* may distrain
 them; for this agreement is an extinguishment of the common *pro tempore*; and therefore,
 with regard to *A.*, the commoner is a stranger. *Whiteman v. King*, 2 H. Bl. 4.] (*a*) But, if
 a man has common for ten beasts, and he puts in more, the surplusage beyond the ten may
 be taken damage-feasant. 46 E. 3. 12. b. 2 Lutw. 1241. [Freem. 273. S. C. 9 Co. 112.]
 || But it has been determined that one commoner cannot distrain the cattle of another com-
 moner in this case. *Hall v. Harding*, 4 Burr. 2426. 1 Bl. Rep. 673. S. C. || [His relief is
 either by writ of admeasurement, or by action on the case. F. N. B. 125.]

3. Against Strangers.

15 H. 7. 13. A commoner may justify the taking of the cattle of a stranger
 14 H. 7. 3. damage-feasant upon the common, in his own name, for the
 9 Co. 112. b. interest which he has in the common.
 Bridg. 10.
 Roll. Abr. 320. 405. Yelv. 130. Godb. 185. Jenk. 144. But can have no action unless
 laid *per quod* his common was impaired. *Keilw.* 47.

3 Lev. 104. But in his avowry he must allege a particular damage; as, that
 Woolton and he could not have common *in tam amplo modo quo debuit & con-*
 Salter, ad- *suevit*, for without a particular damage (*b*), he can no more dis-
 judged. || Jack- *train* the beasts of a stranger, than bring an action upon the
 son v. Lave- *case*.
 rack, Vin. Abr.
 tit. Common
 (H. a.) pl. 43. S. P. (*c*) But *Rolle C. J.* was of a contrary opinion, because (by him) a com-
 moner hath an interest that authorizes him to distrain. *Bronge v. Merc*, Style, 428. ||

Greenhow v. || To an action on the case for injuring the plaintiff's right of
 Ilsley, Wil- common, the defendant pleaded that he dug turves under a
 les's Rep. 619. licence from the lord. The Court were of opinion that the de-
 fendant should have averred that there was sufficient common
 left for the plaintiff, and that it was not incumbent on the plain-
 tiff to reply it, as it was already alleged in the declaration. ||

2 Mod. 6. If in an action on the case brought by a commoner against a
 Smith and Fe- stranger, for putting his cattle in the common, *per quod commu-*
 verel, ad- *niam in tam amplo modo habere non potuit*, the defendant pleads a
 judged. licence from the lord to put his cattle there, but doth not aver
 there is sufficient common left for the commoners; this is not a
 good plea; for though it may be objected, the plaintiff may
 have replied specially, and shewn there was not enough, yet
 this being the very gist of the action, the defendant should have
 pleaded it.

Goe v. Cother, [To an action on the case by a commoner for digging, &c. where
 1 Sid. 136. &c. the defendant pleaded that he was lord of the soil, and that
 he had digged for coals, doing as little damage as possible to the
 herbage, and averred, that he had left a sufficiency of common;
 the

the plaintiff demurred, and shewed for cause, that the plea amounted to the general issue, and so thought the Court.

Trespass by the lord of a manor for destroying his peat, and filling up the holes out of which it was digged: the defendant justifies under a right of common over the waste appendant, &c., and that the plaintiff had digged this peat in some parts of the common, and laid it up in others, whereby the defendant was hindered from enjoying his common *in tam amplo modo*, &c.; the plaintiff replies, *de injuriâ suâ propriâ absque tali causâ*: the plaintiff cannot, upon this issue, give evidence, that there was a sufficiency of common left.]

D'Ayrolles v.
Howard,
3 Burr. 1385.

¶ For every feeding by the cattle of a stranger, it has been said, the commoner shall not have an action on the case, but the feeding ought to be such *per quod* the commoner common of pasture for his cattle *habere non potuit*; so that if the trespass be so small that he has not any loss, but sufficient in ample manner remains for him, no action lies for it. But this, which is the opinion of Lord Coke, not any part of the judgment of the Court, can only hold in cases of mere escapes of cattle into the common, without the knowledge of the owner, and driven off as soon as he has notice: but, if they are turned into the common, or permitted to depasture it, whether they belong to a stranger, or are the supernumerary cattle of a commoner, the commoner may have this action, in which it does not seem to be necessary for him to prove that he has sustained any *specifick injury*. For these acts are an infringement of his right; and if overlooked would be evidence of a using and exercising of the right by the defendant.

Mary's case,
9 Co. 113.

Atkinson v.
Teasdale, 2 Bl.
Rep. 817.
3 Wils. 278.
S. C. Wells v.
Watling, 2 Bl.
Rep. 1233.
Hobson v.
Todd, 4 T.
Rep. 73.

So, it has been holden, that a commoner may maintain an action on the case for an injury done to the common by taking away from thence the manure which was dropt on it by the cattle, though his proportion of the damage was found only to the amount of a farthing; at least the smallness of the damage was no ground for a nonsuit.

Pinder v.
Wadsworth,
2 East, 154.

And in these actions against a stranger or a fellow-commoner, the plaintiff may declare *generally* for the disturbance.

See cases
supra.

But if the lord, or a person putting in cattle with the lord's licence, be the defendant, there a *specifick injury* must have been sustained; and the plaintiff must allege in his declaration, and prove a particular surcharge.

2 Mod. 7.
Lutw. 107.

But, if the party claiming under a licence exceed it, he is then to be considered as a wrong doer, and the plaintiff may declare against him generally.¶

Greenhow v.
Isley, Willes's
Rep. 619.

(D) Of Approvement and Inclosure.

BY the order of the common law, there could be (a) no approvement, because the common issued out of the whole waste.

2 Inst. 85.
(a) But by the
common law,
the lord might
improve against any that had common appendant, but not against a commoner by grant.
2 Inst.

2 Inst. 474. || At common law, saith Mr. J. Lawrence, the lord might perhaps inclose against common appendant, which was not an express grant, but was exercised where the lord granted arable land to be holden of himself: but it does not follow that he could approve against his own grant, 1 Taunt. 447. Buller J. was of opinion the lord might at common law approve against common by grant, 3 T. Rep. 448. *sed qu.*||

(a) Which see explained, 2 Inst. 85, 86. Vaugh. 257. (b) So that it extends only to enable the lord to approve against his tenants, 2 Inst. 85. (c) So it may be tried in an action of trespass*, 2 Inst. 88. Godb. 117. Or if the lord inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure. 2 Inst. 88. (d) It extends not to common of piscary, turbary, estovers, &c. 2 Inst. 87. || Grant v. Gunner, 1 Taunt. 435. || But now by the statute of Merton (a), 20 H. 3. c. 4. " Because many great men of England, who have enfeoffed (b) knights and their freeholders of small tenements in their great manors, have complained that they cannot make their profit of the residue of their manors, as of wastes, woods, and pastures, whereas the said feoffees have sufficient pasture, as much as belongeth to their tenements; it is provided and granted, that whenever such feoffees do bring an assise (c) of novel disseisin for their common (d) of pasture, and it is knownledged before the justicers that they have as much pasture as sufficeth to their tenements, and that they have free egress and regress from their tenements unto their pasture, then let them be contented therewith, and let those of whom they have complained go quit, for that they have made their profit of their lands, wastes, woods, and pastures. But, if they allege they have not sufficient pasture (e) belonging to their tenements, or sufficient ingress or egress, as much as belongeth to their tenements, then let the truth be inquired by the assise; and if it be found by the assise that the same deforceors have in any thing disturbed them of their ingress or egress, or that they have not sufficient pasture, as before is said, then let them recover their seisin by view of the inquest: so that by their discretion (f) and oath the plaintiffs shall have sufficient pasture, and sufficient ingress and egress in manner aforesaid; and let the disseisors be amerced, and yield damages, as they were wont before this provision. But, if it be certified by the assise that the plaintiffs have sufficient (g) pasture and sufficient ingress and egress as before is said, then let the others make (h) their profit (i) of the residue (k), and go quit of that assise.||

But where there is common of pasture and common of turbary, or a right to dig sand, &c. in the same waste, the common of turbary, or right to dig sand, &c. will not prevent the lord from inclosing against the common of pasture, for they are distinct rights. Fawcett v. Strickland, Willes's Rep. 57. Com. Rep. 577. S. C. Shakespear v. Peppin, 6 T. Rep. 741. But, if the inclosure operates as an injury to these rights of turbary, &c. the commoner may have an action on the case for it. *Id. ibid.*|| (e) So that it extends not to common in gross. 2 Inst. 86. (f) So that if found they have not sufficient, the inquest shall find what is sufficient, that the lord may approve the residue. 2 Inst. 88. (g) And though, after it should prove insufficient, the improvement continues. 2 Inst. 87, 88. (h) By inclosure. 2 Inst. 87. And not by digging for coals, &c. Sid. 106. And if the lord makes a feoffment of part, his feoffee may inclose, for the feoffment in its nature was an improvement. 2 Inst. 87. || The owner of the soil, though not lord, may improve. Glover v. Lane, 3 T. Rep. 445. || (i) And thereby it is discharged of the common; and if the tenant purchase it, his common is not extinguished. 2 Inst. 87. (k) But the lord cannot approve the whole, leaving them sufficient in other lands. 2 Co. 25. b.

* This must mean trespass on the case.

(l) Though the person dwells in another town, if By the statute of West 2. cap. 46., the statute of Merton shall bind (l) neighbours, and such as claim common of pasture appurtenant to their tenements, but not such as claim common

by

by special grant or feoffment for a certain number, or otherwise. the towns and commons adjoin. 2 Inst.

474. — And if the lord hath common in the tenant's ground, the tenant may improve within this act. 2 Inst. 474. — Seems as if the common of the lord was reserved upon the first feoffment. 2 Inst. 475.

By occasion of (a) wind-mill, sheep-cote, dairy, enlarging of (a) These are a court (b) necessary, or (c) curtilage, (d) none shall be grieved but for example; for the lord may erect an house for the habitation of a beast-keeper. 2 Inst. 476. Lev. 62. (b) It must be shewn that it was done for his necessary residence. Nevil and Hamerton, Lev. 62. adjudged. Sid. 79. adjudged. Keb. 283. 314. (c) Whether necessary it should be an ancient one. Lev. 62. *dubiat*. Sid. 79. *dubiat*. And *vide* Keb. 283. 314. (d) Though there is not sufficient common left. 2 Inst. 476. Lev. 62.

And where any (e) having right to approve, levies dike or (e) It is not hedge, and (f) it is thrown down (g) in the night or other season, &c., and it cannot be known (h) by verdict of assise or jury necessary to set forth what estate the party has; for by whom, and the men of the town near (i) will not indict such as are guilty of the fact, the towns near adjoining (k) shall be the herbage the herbage only may inclose. Carth. 114. and *vide* 241. (f) The cutting down of timber is not within the act. Raym. 487. (g) If the prostration in the day or night was before the face of the owners, or so publick that the offenders might be known, it is not within the act. Lev. 108. A traverse taken accordingly. (h) For the inquisition, and other proceedings on this act, *vide* Cro. Car. 280. 440. 580. Jones, 307. Sid. 107. 212. Mod. 66. Carth. 241. 10 Mod. 157. Ld. Raym. 616. (i) No time being appointed, it shall be intended within a year and a day. 2 Inst. 476. Roll. Rep. 365. *Per* Cro. Car. 440., a convenient time. (k) The lord shall bring his action upon this statute against the towns bordering round about the town where the fact was done, and judgment shall be given, that they shall, at their proper costs, make the ditch, &c. 2 Inst. 477. Roll. Rep. 365. [(l) By stat. 6 Geo. 1. c. 16. the remedy provided by this act is extended to the owners of trees, &c. cut down, spoiled, &c. either by day or by night.]

By the 3 E. 6. cap. 3., the statutes of Merton and West. are confirmed, and treble damages given to the commoners that recover in such assise against the lord.

It hath been ruled in (m) Chancery, that a common which hath been inclosed for thirty years shall not afterwards be thrown open.

upon suggestion that an inclosure is an improvement within the statute of Merton, Chancery will continue an injunction till it be determined at law. || Weeks v. Staker, 2 Vern. 301. Arthington v. Fawkes, Id. 356. *Contr.* Constable v. Davenport, Ch. Rep. 259. Such a bill will lie upon the principle of avoiding multiplicity of suits, and should pray the establishment of the right. In these cases, referred to in Vernon, said Lord *Eldon*, the Court would have done a very strong thing in restraining even common of pasture till the trial, unless upon strong, probable, and pregnant evidence, that the commoner would not suffer in the mean time, and that the event would in all probability be, that there was sufficient common of pasture left. Hanson v. Gardiner, 7 Ves. 305. || Where it will decree an inclosure pursuant to an agreement, though opposed by two or three wilful tenants. Therveton v. Collier, Ch. Ca. 48. Rothwell v. Widdrington, 1 Vern. 456. Where an agreement to stint a common. Delabere v. Beddingfield, 2 Vern. 103. *sed contr.* Bruges v. Curwin, Id. 575.

|| If the common has been inclosed twenty years, the commoner cannot make an entry, but must bring an assise of common. ||

1752, cited by Lawrence J. in Hawke v. Bacon, 2 Taunt. 160.

[By

[By stat. 29 Geo. 2. c. 36. Owners of common, with the consent of the majority in number and value of the commoners; majority of the commoners, with the consent of the owners; any persons, with the consent and grant of the owners and majority of commoners, may inclose and hold in severalty, for the growth and preservation of timber and underwood, any part of the commons, for such time, in such manner, and upon such conditions as shall be agreed by them respectively; such agreement to be in writing, and signed by the parties, and enrolled by the clerk of the peace within three months after the execution of it; and to be binding upon all persons whomsoever, if not appealed against to the justices at sessions within six months after its enrolment.

If wood is destroyed, the offender may be punished according to 1 & 6 Geo. 1.; but if not convicted within six months, satisfaction shall be made by the adjoining parishes, as for dikes and hedges overthrown by the statute Westm. 2. Persons cutting, &c. wood upon commonable grounds shall be punished in like manner.

By stat. 31 Geo. 2. c. 41., it is provided, That if any recompence be agreed to be given for such inclosure, it shall be made to the persons interested in the right of common, in proportion to their respective interests; and not to the overseers of the poor, as was directed by § 2. of the preceding act: and the powers given to owners by that act may be exercised by tenants for life, or years, during their respective interests, with a proviso that nothing done by them shall have effect after the determination of their estates.

By stat. 13 G. 3. c. 81. it is enacted, That all tillage or arable lands, lying in common fields, shall be fenced, cultivated, and improved in such manner, and kept and continued in such course of husbandry, and cultivated under such rules, as three-fourths in number and value of the occupiers, with the consent of the owners and rector, impropiator or tithe owner, or their lessee, shall by writing under their hands direct and appoint; which rules shall not be binding for any longer term than six years, or two rounds, according to the ancient and established course of the parish. They may too postpone the opening of such common field lands for such reasonable time as they shall agree upon, and settle how long they shall continue open, and what number of cattle each commoner shall turn on. Cottagers however, or commoners without land, are not to be excluded from their usual right of common, unless they have agreed in writing upon some composition for it by an annual payment. But, if the commoners agree not to depasture the lands in common at the usual times, and allot what shall be deemed by a majority of such cottagers, as shall not have agreed to compound for their right of common, an equivalent common to be enjoyed exclusively by them, such cottagers shall use their right of common only over those parts of the common field lands which shall be so allotted them. Persons having a separate sheep-walk, or pasture for cattle,

cattle, are not to be deprived of their right without their consent.—Lords of manors, with consent of three-fourths of the commoners, may lease out one-twelfth part of any common or waste within such manor, the rent to be applied in draining, fencing, or otherwise improving the residue; and two-thirds of the commoners, with consent of the lords of the manors, may appoint the time when common pastures shall be broken and depastured, and when the same shall be shut and unstocked; reserving however a portion for such as may dissent.

If the majority of commoners agree upon a bye-law for stopping a trench, being a nuisance to the common, it shall bind all the commoners, though there be no custom to support it.] Moor, 579.

¶ See the statute of 41 G. 3. c. 109. which, in order to diminish in some degree the expence attending inclosure acts, consolidates certain provisions usually inserted in such acts, and facilitates the mode of proving the several facts usually required on the passing of them.¶

(E) Of Apportionment and Extinguishment.

COMMON appendant, because it is of common right, shall be apportioned by the commoner's purchase of part of the land in which he hath such common; but common appurtenant shall be extinct by the commoner's purchase of part of the land in which, &c.; both common appendant and appurtenant shall be apportioned by alienation of part of the land to which the common is appendant or appurtenant.

A release of common in one acre, is an extinguishment of the whole common. For this, and where the unity of possession of the whole land makes an extinguishment, vide 4 Co. 37. 8 Co. 136. Show. 350. 4 Mod. 365. Carth. 342.

A copyholder had common in his lord's waste; the lord grants and confirms the copyhold land and messuage to him and his heirs *cum pertinentiis*: it was resolved the common was extinct, for it was annexed to his customary estate by the custom; which estate being determined, the common is also gone, and cannot continue without words to that intent; and *cum pertinentiis* will not do; for the common was no appurtenant to the freehold estate granted by the lord.

But, if *A.*, as appurtenant to a certain messuage and twenty acres of land, hath common in the lands of *B.*, and after *B.* enfeoffs *A.* of the said lands in which, &c., *per quod* the common is extinguished; and after *A.* leases to *B.* the said messuage and twenty acres of land, with all commons, profits, and commodities thereto appertaining, *vel occupat. vel usitat. cum præd. messuagio*, this is a good grant of a new common for the time; for though it were not common in the hands of the lessor, yet it is *quasi* common used therewith, and although (*a*) it be not the same common as was used before, yet it is the like common; but yet because it was not there averred, that this common was therewith

Co. Lit. 122.
Hob. 235.
8 Co. 78.
Owen, 122.
4 Co. 37.

For this, and where the unity of pos-

Hob. 190. Cro.
Ja. 253. Yelv
189. Noy, 136.
2 Roll. Abr.
61. 2 Brownl.
210. Moor,
667. Cro. Eliz.
794.

Cro. Eliz. 570.
Bradshaw and
Eyre. 4 Mod.
364. S. C.
cited.

(a) So, if a copyhold messuage escheats, to which before common in the demesnes of the lord did belong, and the

lord by deed therewith used at the time of the lease, it was adjudged against grants it *per* the defendant who claimed the common. *nomina messuag. &c. & communiar. quarumcunque dicto messuag. spectant., &c. vel cum eodem messuag. usitat.* Worledge v. Kingswell. Cro. Eliz. 794. 2 And. 168. S. C.

Salk. 170. pl. 3. A copyholder that hath common of pasture in the wastes of 364. pl. 5. the lord out of the manor, hath the same, as belonging to his Crowther and land, and if he enfranchise the copyhold estate, still his common Oldfield. 2 Ld. remains; but, where a copyholder has common in the wastes Raym. 1225. within the manor, that belongs to his estate, and if the estate S. C. 6 Mod. be enfranchised, the common is extinct. 19. S. C.

Styant v. Also it has been ruled in equity, that if the lord of the manor Staker, 2 Vern. enfranchises a copyhold with all commons thereunto belonging 250. or appertaining, and afterwards buys in all the other copyholds, and then disputes the right of common with the copyholders he had enfranchised, and recovers at law; though the common be extinct at law, yet it shall subsist in equity, and the same right of common as belonged to the copyhold will be decreed.

CONDITIONS.

Co. Lit. 201. **BY** the word *condition* is usually understood some quality (a) By express (a) annexed to a real estate, by virtue of which it may words which be (b) defeated, enlarged, or created upon an uncertain event. is called a condition in fact; as, where a feoffment is made of lands, reserving rent payable on a certain day, upon condition, that if it be not paid on the day, the feoffor may re-enter, &c. Co. Lit. 201. Or implied by law, which is called a condition in law; as, if an office be granted to one, the law annexes, without express words, a condition, that the party shall duly and faithfully execute it, and that for misbehaviour the grantor may discharge him. Co. Lit. 233. a. (b) And *note*, that it is a general rule, that a condition which destroys or defeats the estate or grant, is to be construed strictly. Roll. Abr. 438. Co. Lit. 220.

Vide heads of Also, qualities annexed to personal contracts and agreements, Covenant and are frequently called *conditions*, and these must be interpreted Obligations. according to the (c) real intention of the parties, and are usually (c) If the con- taken most (d) strongly against the party to whom they are meant dition of an obligation be, to extend, lest by the obscure wording of his own contract, he that the should find means to evade and elude it. obligor shall make all the linen the obligee shall wear during his life, the obligee must deliver to the obligor the cloth of which it is to be made; for all contracts are to be interpreted according to the intent and subject-matter. Lev. 93. (d) If I covenant to deliver so many yards of cloth, and I cut it in pieces, and then deliver it. Raym. 464. If the condition of a bond be to pay 50*l.*, though it is not said of money, yet it must be so intended, and the obligor cannot tender fifty pounds weight of stone. Sid. 131., &c.

(A) By what Words created in a Deed.

(B) By what Words created in a Will.

(C) Of

- (C) Of the Manner of creating the Condition, and at what Time it must be annexed.
- (D) Where the Nature of the Thing will admit of no Condition, but must be absolute.
- (E) To whom the Condition may be reserved.
- (F) To whom it shall be said to extend to be bound by it.
- (G) What shall be said a Condition, and not a Covenant.
- (H) What shall be said a Condition, and not a Limitation, and how they differ.
- (I) Of Conditions precedent and subsequent.
- (K) Of void Conditions, being against Law.
- (L) Of repugnant Conditions.
- (M) Of impossible Conditions.
- (N) Of the Effect of a void, illegal, or impossible Condition.
- (O) Of the Breach of the Condition: And herein,
 - 1. *What shall be a Breach thereof.*
 - 2. *What the Party must do to entitle him to the Advantage thereof; and herein of Notice, Request, Tender, and Refusal.*
 - 3. *What shall be a Dispensation therewith.*
 - 4. *How far he, who enters for a Condition broken, is reinstated in his former Estate.*
- (P) Of performing the Condition: And herein,
 - 1. *What Persons may perform it.*
 - 2. *To whom it may be performed.*
 - 3. *At what Time it may be performed.*
 - 4. *At what Place it may be performed.*
 - 5. *What shall be said a sufficient Performance.*
- (Q) What shall excuse the Non-performance: And herein,
 - 1. *Of the Act of God.*
 - 2. *Of the Act of Law.*
 - 3. *Of the Act of the Party.*
 - 4. *Of the Act of a Stranger.*

(A) By what Words created in a Deed.

Co. Lit. 203. **M**Y Lord Coke says, that by inserting the very word *condition*,
(a) *Adeffectum*, or *sub conditione*, conditions are most properly created; but
ea intentione, there are also (a) other words, says he, that will do as effectually,
ad solvendum, as the word (b) *proviso*; but then it must not depend upon another
in the king's grants make a condition; sentence; also, the words must be those of the grantor, and com-
pulsory to enforce the grantee to do some act.

Roll. Abr. 407. 10 Co. 42. Hob. 231. 4 Leon. 70.—Where the words *si modo*, by the common law, make a
condition, though it is otherwise by the civil law, as in a licence from the archbishop to
accept another living, *modo sit* within ten miles of the former. *Vide* Jones, 394. Cro.
Car. 475. Owen, 152. (b) 2 Co. 70. b.

Roll. Abr. 407. It is said to have been adjudged, that a feoffment (c) *ea inten-*
Co. Lit. 204. *tionem* does not make a condition; and it is only a confidence or
(c) A man made a trust, unless an express re-entry be limited.

feoffment *ea intentione* that his wife should have an estate for life, the remainder to his
youngest son in fee, and the feoffee died without making such estate; it was resolved the
heir of the feoffor could not enter, for that there was no condition, but an estate executed
presently according to the intent. 4 Leon. 2.—If the king grants an advowson in fee, and
further, that the grantee may amortize this for the soul of the progenitors of the king; this is
but a licence, and not a condition. 43 E. 3. 34. Fitz. Condition, 7. S. C. Roll. Abr. 407. S. C.

Cro. El. 73. Recoverors to an use before 27 H. 8. cap. 10. leased by in-
adjudged. denture for ninety-nine years, and the lessee, by the same
2 Leon. 128. deed, covenanted with the recoverors to pay the rent to *cestui*
3 Leon. 225. *que use*, his heirs and assigns; *proviso semper*, that if *cestui que use*
S. C. By the report of make not his heir male his assignee, that then he shall pay his
which the *pro-* rent to the recoverors, their heirs and assigns; this (d) *proviso*
viso was that makes not a condition, but only abridges the covenant.
if the lessee should make his heir male his assignee, &c. Moor, 107. S. C. cited. (d) Where the word

proviso makes no condition, but only a qualification or explication of a covenant or grant.
Vide 2 Leon. 128. 3 Leon. 225, 226. Dyer, 222. 4 Leon. 70. 3 Leon. 16. Poph. 119.
Moor, 707. Goulds. 131. 2 Co. 72. a. And. 71, 72.

Roll. Abr. 410. If a man leases to a woman for forty years, upon condition
Sayer and that *si illa tam diu viveret & custodiret se ipsam* a sole widow, and
Hardy ad- should inhabit upon the premises; this is not any condition; for
judged. the word (e) *si* makes the intention uncertain, whether another
Poph. 99. S. C. thing was intended besides the cesser of the term, or the re-
adjudged, for entry.
none can

imagine what the conclusion should be; but it was agreed, that if the lease had been for forty years,
the conclusion should be; but it was agreed, that if the lease had been for forty years,
si tam diu sola viveret & inhabitaret upon the premises, the lease had determined by her
marriage or death. Cro. Eliz. 414. S. C. adjudged by three judges against one, for every
si ought to be answered with a *tunc*. Owen, 107, 108. adjudged. Goulds. 179. S. C.
adjudged. Moor, 400. pl. 525. S. C. adjudged. (e) But, if this word had been omitted, it
would have been a condition; or if *sub conditione quod* had been omitted, it would have been
a limitation. Goulds. 179.

Roll. Abr. So, if a man leases lands to another, *proviso si* the rent be
410. Moody arrear, this is not a condition, because the word *si* makes the
and Garnon, intention uncertain; for where the (f) *proviso* is hypothetical, it
Roll. Rep. 367. ought to be shewn what he would have.

S. C. Owen, 107. S. P. by two judges *arguendo*. Cro. Eliz. 414. S. P. by three judges against one *arguendo*.
(f) Where this being a proper word of condition, though put in an improper place, shall make
the estate conditional. 2 Co. 72. b.

If a man leases land to another, *proviso if the rent be behind, it shall be lawful for him to restrain, and not being sufficient, the ground to re-enter into the premises, and the same to have again in his former estate*, this is no good condition, for the words are not, that he shall restrain the goods upon the tenement; nor is it known what is intended by the word sufficient, *scilicet*, sufficient reparation, rent, &c., and the words, *the ground to re-enter into the premises*, are insensible.

Roll. Abr. 410.
Moodye and
Garnon, Roll.
Rep. 330. 367.
S. C. adjudged.
Bulst. 153,
154. S. C. ad-
judged. Moor,
848. pl. 1551.
S. C. adjudged,
because not

said what shall be restrained, nor who shall re-enter. Cro. Ja. 390. S. C. adjudged, and said, Coke held *restrain* to be the same as *distrain*.

If *A.* enfeoffs *B.*, upon condition that he shall render to *C.* and his heirs a yearly rent of 20s., and if *B.* and his heirs fail of payment thereof, that then *A.* and his heirs may enter; this is a good condition, for though a rent cannot be reserved to a stranger, yet yearly rent in this case (*a*) shall be intended of a yearly sum of 20s. in gross.

Lit. § 345.
Co. Lit. 213.
a. (*a*) If a man
grants a walk
in a forest,
provided the
grantee shall
not cut down

any trees *super præmissa*, though the soil is not granted, and *præmissa* hath properly a relation to the thing itself; yet since, in this case, it cannot have such construction, it shall be intended of trees growing within the walks. Cro. Eliz. 781. adjudged; and *vide* Moor, 526. Dals. 54. Moor, 52.

If *A.*, being seised in fee of the manor of *B.* and of divers lands in *C.* then in the possession of *D.*, for several years to come, makes a feoffment thereof to *E.*, to the use of himself in tail male, remainder to *F.* in tail male, &c.; provided that *E.* and the heirs male of his body, or *F.*, and the heirs male of his body, in whomsoever of them the inheritance in tail of *all the premises* shall happen to be, shall pay to the daughter of *A.* 200l., according to the last will of *A.*; and *A.* makes a letter of attorney to *J. S.* to enter into the manor of *B.*, and the lands in *C.*, and in his name to take possession and deliver it to *E.*, whereupon possession is given to *E.* of all but what was in the possession of *D.*, and *D.* never attorns, so that the lands in *C.* passed not; and after *A.* by will bequeaths 200l. to his daughter, and dies without issue; yet *F.* is not bound by this condition, because he hath not (*b*) *all the lands* according to the purport of the condition, which was, that he that had all should pay, &c., and a condition ought to be taken strictly.

Poph. 102,
103. Slan-
ing's case,
certified to the
chancellor ac-
cordingly, as
the opinion of
three judges.
(*b*) If a man
makes a deed
of feoffment
of lands in
several
counties, upon
condition the
feoffee shall
re-enfeoff him
of all the land
within twenty
days after the
date; if livery
is made but

of part within the twenty days, the condition is not broken, though all is not reconveyed within the twenty days, according to the letter of the condition, which is entire. Hob. 24.

If the condition of an obligation be in this manner, *viz. the condition of this obligation is such, that if the obligor shall appear coram domino rege apud Westmon. such a day, ad respond., &c., then the condition of this obligation shall be void, or else the same shall be in full power and virtue*; yet this is a good condition, for the sense is perfect without these last words, and they shall be rejected for their absurdity and repugnancy.

2 Saund. 78.
Mauleverer
and Hawxby,
adjudged for
the plaintiff
upon demur-
rer, the de-
fendant having
pleaded the

statute of 23 H. 6. c. 9. Sid. 456. S. C. Mod. 35. S. C. 2 Keb. 625. S. C. Ld. Raym. 38. S. P.

(B) By what Words created in a Will.

Vide tit.
Devises, Co.
Lit. 204. a.
Dals. 58.
Moor, 57.
pl. 162. Poph. 8. Cro. Eliz. 454. Owen, 92. Goulds. 75.

AS the intent of the testator chiefly governs in wills, such construction is always made of the words as will best support his intent, and therefore these words *ad faciendum, faciendoea intentione, ad effectum, &c.* in a will create a condition.

Roll. Abr. 410.
411. Cro. Eliz.
146. S. C. ad-
judged. Leon.
174. S. C. ad-
judged.
Goulds. 134.
Co. Lit. 236.
S. C. cited.

So, if a man seised of socage lands, having two daughters, devise them to one of the daughters, to have and to hold to her and her heirs, to pay to her sister a certain sum of money at a certain day; these words "to pay, &c.," make a condition; so that the other sister, if the money is not paid, may enter into a moiety for the condition broken, because otherwise she would be remediless.

Roll. Abr. 411.
and Lane, 56.
S. C. dubitatur,
& vide Lane,
78.

But, if a man devise lands to *B.* for life, paying to *C.* 6*l.* rent yearly, which he wills to be paid at two feasts half-yearly, and if it be arrear, that then it shall be lawful to *C.* to distrain; it seems this word *paying* makes not any condition, inasmuch as a distress is limited for non-payment thereof.

38 Ass. 3. Roll.
Abr. 410. S. C.
(a) For devises
to executors
for payment of
debts, vide

If a man devise lands to his (*a*) executor to sell, and (*b*) to make distribution of the money for his soul, and die; if the executor do not sell them, the heir may enter, for this creates a condition.

titles *Devises* and *Uses and Trusts.* (*b*) A man devises 5*l.* yearly out of his land to his younger son, towards his education in learning; this creates no condition, so that he shall have the rent, though not educated in learning. 2 *Leon. 154. 3 Leon. 65. and vide Dals. 116.*

(C) Of the Manner of creating the Condition, and at what Time it must be annexed.

Roll. Abr. 413.,
414. (c) Can-
not regularly
be reserved but by deed indented. Roll. Abr. 413. — But, if by deed poll, and the feoffor,
&c. gets into his custody, he may plead the condition against the feoffee, &c. Lit. sect. 375.
Co. Lit. 231.

CONDITIONS cannot be annexed to estates of inheritance, or freehold estates without (*c*) deed.

Roll. Abr. 412.

If a feoffment be made of two acres upon condition, and for breach that he may re-enter but in one, this is good.

34 Ass. 1.
Roll. Abr. 413.

If a man agrees with me to make a feoffment to me upon condition, and after makes a charter of feoffment without any condition, and after makes livery *secundum formam chartæ* without any condition, this is absolute without any condition; for the livery is not made according to the agreement, but according to the charter.

Co. Lit. 222. b.

But, if *A.* agrees to enfeoff *B.* in surety of payment of certain money, and after makes livery to him and his heirs generally, the estate is holden by some to be on condition, inasmuch as the intent of the parties was not changed, but continued at the time of the livery.

If a man makes a charter of feoffment to another, and in the deed there is no condition, but when the feoffor would make livery of seisin to him by force of the deed, he expressing the estate, makes livery and seisin to him upon condition, the feoffment is of like force as if no such deed had been made.

If a disseisee releases to his disseisor all his right, and at a day after, the disseisor by indenture grants, that if he pays so much at a day certain, the release shall be void; this is a void condition, (a) so as to revive the right to the disseisee.

not be defeated by subsequent defeasance. Co. Lit. 236. — But a release, may be defeated by indenture of defeasance made at the same time. Co. Lit. 236. 2 Co. 71. b.

Rents, annuities, warrantics, &c. (being inheritances (b) executory) may be defeated by a defeasance made at the time (c), or at any time after.

estate is executed, it is not to be defeated by condition or defeasance, unless contained in the same deed, or in another executed at the same time. 2 Saund. 48. (c) Cro. Eliz. 623. adjudged in case of a defeasance to a bond; for the law is clear, that an obligation, judgment, &c. may be defeated by a subsequent defeasance, and so is the common practice; for this vide Roll. Abr. 590.

If the condition of an obligation be to save harmless certain lands from all incumbrances made by the obligor; and upon the back thereof there be a memorandum written, that the condition shall not extend to the extent upon a certain statute acknowledged by the obligor (d); this being written before the sealing of the obligation, is an explanation thereof.

execution thereof, was holden good, Cro. Ja. 456. But for this vide 2 Roll. Abr. 22, 23. And where a proviso, inserted in an improper place, shall have reference to the estate and make it conditional, 2 Co. 72. b.

(D) *Where the Nature of the Thing will admit of no Condition, but must be absolute.*

A PARSON cannot resign upon condition, because it is a judicial act, to which no condition can be annexed, any more than an ordinary can admit, or a judgment be confessed upon condition.

The tenant cannot (e) attorn to the grant of a seignory (f) upon condition, because this is but a consent, and no interest passeth from him.

agree upon condition to a legacy. 4 Co. 28. b. (e) Because a bare assent without any interest. Co. Lit. 300. b. But a patron, in respect of his interest, may assent upon condition to charge the glebe of the parson. Co. Lit. 300. (f) Viz. Upon condition subsequent; secus, upon a condition precedent. Co. Lit. 274. So, a licence to alien cannot be upon condition subsequent; secus, as to a condition precedent, because in such case it is no licence till the condition be performed. Pop. 106.

A disseisee may release his right to the disseisor upon condition.

But a condition cannot be released upon condition.

Lit. sect. 359.
Co. Lit. 222. b.

43 Ass. 12.
Roll. Abr. 414.
Co. Lit. 236.
S. P. (a) For
inheritances
executed can-
not be defeated
by subsequent
defeasance. Co.
Lit. 236. — But
a release, may
be defeated by
indenture of de-
feasance made
at the same time.
Co. Lit. 236. 2
Co. 71. b.

Co. Lit. 237. a.
(b) But in case
of a feoffment,
&c., where the

Moor, 679.
Broke
Smith.
(d) Where a
condition,
written on the
back of a lease
before the exe-

ution thereof, was
holden good, Cro.
Ja. 456. But for
this vide 2 Roll.
Abr. 22, 23. And
where a proviso,
inserted in an im-
proper place, shall
have reference to
the estate and make
it conditional, 2 Co.
72. b.

Owen, 12.
Gayton's case.

Roll. Abr. 412.
Co. Lit. 300.
S. P. So, exe-
cutors cannot

Co. Lit. 274.
b. Kelw. 88.
S. P.
Co. Lit. 274.
b. 9 Co. 85. b.
S. P.

Co. Lit. 274. b. An express manumission of a villein cannot be upon condition, for once free, and for ever free.

Co. Lit. 274. Letters patent of denization of an alien may be upon condition precedent or subsequent.
But a naturalization by parliament cannot be upon condition, for it is against the absoluteness, purity and indelibility of natural allegiance. Co. Lit. 129. a.

Roll. Abr. 412. A man cannot release a personal thing, as an obligation upon and vide Roll. a condition subsequent, but the condition will be void, because a Abr. 940. a personal thing being once suspended, is perpetually extinguished.

Roll. Abr. 412. But a man may release a personal thing, as an obligation, or Barkley and such like, upon a condition precedent; for there the action is Parkes adjudged. not suspended till the condition performed; as, where the release was of an obligation with a *proviso*, that he who released might enjoy 120*l.* due by *J. S.*, at a day then to come, which being a condition precedent was adjudged good.

(E) To whom the Condition may be reserved.

Lit. § 347. CONDITIONS can only be reserved to the feoffor, donar, or Co. Lit. 214. lessor, and their heirs, but not to any stranger.

Roll. Abr. 407. Also, by implication, without express words, the law reserves 472. the condition to the heir of the feoffor, &c.; for, as he is prejudiced by the disposition, it is but reasonable that he should take the same advantages that his ancestor, whom he represents, might.

3 Co. 43, 44. If a man seised of lands in the right of his wife, makes a Co. Lit. 202. feoffment in fee upon condition, and dies, and after the condition is broken, the (a) heir of the husband shall enter; for a. S. P. 336. b. though no right descended to him, yet the title of entry by force S. P. (a) So, of the condition, which was created upon the feoffment, and if a man makes a feoffment in fee of lands in reserved to the feoffor and his heirs, descended. borough-eng-

lish, the heir at common law shall enter, but the younger son shall after enter upon him and enjoy, &c. Godb. 3. — By act in law a condition may be apportioned, in the case of a common person; as, if a man leases two acres, one of the nature of *borough-english*, and the other at the common law, upon condition, &c., and the lessor having two sons dies, each of them shall enter for breach of the condition. Co. Lit. 215. a.

Co. Lit. 11, 12. If a condition annexed to gavelkind lands be broken, the Lamb. 608. heir at common law shall enter; but, when the eldest son enters for the condition broken, the younger children shall enjoy the land with him.

Co. Lit. 202. If *cestui que use*, after the statute of 1 Rich. 3. c. 1., and before the statute 27 H. 8. c. 10., had made a feoffment in fee upon a. 215. a. condition, the feoffee should not have entered for the condition Moor, 212. broken, but the *cestui que use*. pl. 353. Leon. 298. Sav. 76.

Lit. § 348. If a man seised in fee makes a lease for life, rendering rent, Co. Lit. 215. b. and for default of payment a re-entry, &c., and after dies without heir, living the tenant for life, though the lord by escheat shall have the rent as incident to the reversion, and may distrain for it, yet he cannot enter.

Guardian in chivalry or socage, in the right of the heir, may Co. Lit. 215. b. take benefit of a condition by entry, or re-entry by the common law.

If tenant for life and the reversioner join in a feoffment, the Roll. Ab. 407. condition may be reserved to the lessee only, and by his re-entry he shall divest but his estate.

If *A.* enfeoff *B.* upon condition, that if the heir of *A.* pays to Co. Lit. 214. b. *B.*, &c. 20s., then he and his heirs may re-enter, this is a good condition, of which the heir of *A.* may take advantage, and yet *A.* himself never can.

If a man gives lands to his eldest son in tail, remainder to his Co. Lit. 379. a. second son in tail, &c., upon condition, that if the eldest son, or any of his issue, alien, the land shall remain to the second, &c.; the consequence of the condition, that the land shall remain to another is void, though upon such alienation the donor himself might enter.

(F) *To whom it shall be said to extend to be bound by it.*

IF an estate be made to a feme covert, she shall be bound by Roll. Abr. 421. the condition, because this does not charge her person, but Moor, 92. pl. 229. S.P.

So, if an estate be made to an infant upon an (*a*) express con- Roll. Abr. 421. dition, the infant (*b*) shall be bound to perform it. 8 Co. 44. b. S.P. (*a*) But,

where an infant shall be bound by a condition in law, or not, vide Co. Lit. 233. b. 234. a. 8 Co. 44. b. Hard. 11. Carth. 42. *Vide* head of *Infants*. (*b*) So, where an estate is devised to an infant, on condition, he is bound to take notice thereof, and perform the condition, 2 Lev. 21. 1 Mod. 86. 300. Vent. 200.

So, if an estate be made to another in fee, upon condition; Roll. Abr. 421. his heir, after his death, though he be within age, shall be Jones, 390. bound by the condition. Cro. Ja. 374. 3 Bulst. 58.

If a man devises land to *H.* his son, and to the heirs of his 5 Co. 68. Lord body, the remainder to *T.* and the heirs male of his body, upon Cheney's case. condition that he or they, or any of them, shall not alien, dis- Roll. Abr. 422. continue, &c.; this condition shall extend only to restrain *T.* S.C. Moor, and the heirs male of his body, and not *H.* or his heirs. 727. S.C.

If a man leases lands for years, upon condition that the lessee, Roll. Abr. 422. or his assigns, shall not alien the term to any but to one of his Cro. Ja. 398. brothers, and after the lessee aliens to one of his brothers; this S.C. adjudged. assignee is not within the condition, but he may alien to whom Dyer, 152. S.P. 2 Bulst. he pleases. 290. Roll. Rep. 68. 389. S.C. adjudged,

If a man devises part of his lands to his eldest son in tail, 2 Leon. 38. and the rest of his land to his younger son in fee; provided that Owen, 8. 55. neither of his sons shall sell or lease, before he comes to the Moor, 271. age of thirty years; and that if either of the sons shall, &c., S.C. the other son shall have his lands, &c.; the eldest son, before his age of thirty, leases, and the younger enters upon him, he shall

shall hold the lands discharged of the proviso; for that extends only to the immediate estate expressly devised, and not to the new estate arising upon the limitation.

2 Leon. 35. If a man devises land to his wife, during the minority of his son, upon condition that she shall not do waste, and dies; and the wife marries again, and dies, and after the husband commits waste, the condition is not broken.
Cob and Prior, adjudged.
Latch. 20.
S. C. adjudged, because a condition to avoid an estate shall be taken strictly.—And *per Moor*, 11. pl. 40. *Dyer*, 65. a proviso that the lessee shall not alien, extends not to his executors.

Vaugh. 31, 32. Tristram and Countess of *Battinglass*. If *A.* is tenant for life, with power, by a marriage-settlement, to make leases for twenty-one years, so long as the lessee, his executors or assigns, shall duly pay the rent reserved; and he makes a lease pursuant to the power; the tenant is at his peril obliged to pay the rent, without any demand of the lessor, because the estate is limited to continue only so long as the rent is paid.

Co. Lit. 163. b. If a gift be made in tail, on condition that the donee do not discontinue, and the donee have issue two daughters, and one of them discontinue; the donor shall enter and evict them both, because it was the original condition annexed to the whole estate, that no part of it should be discontinued.
[See *acc.* Sir W. Moore's case, 26 El. C. B. Hal. MSS. n. 4. 13th ed. Co. Lit. *ubi supra*.]

(G) What shall be said a Condition, and not a Covenant.

Co. Lit. 203. b. IF a man makes a lease for years, by (a) indenture, (b) provided always, and it is covenanted and agreed between the parties, that the lessee shall not alien; this is both a condition and covenant.
Roll. Abr. 408. (a) That the lessor may take it as a covenant or condition, but not as both. Dals. 8. (b) The word *proviso* sometimes amounts to a limitation, and sometimes to a covenant. Co. Lit. 203. b.

Roll. Abr. 408. If a man leases for years, and in the indenture there is (c) such a clause, *et non licebit* to the lessee *dare, vendere vel concedere statum & terminum suum alicui personæ sine licentiâ* of the lessor, (c) So, that the lessee shall *sub pœnâ forisfacturæ termini prædicti*, this is a good condition. continually dwell upon the house, upon pain of forfeiture of the said term and interest. Roll. Abr. 409. Co. Lit. 204. Godb. 99. So, that neither he, nor his assigns, grant, assign, or sell the land to any *præter*, &c. upon pain of forfeiture of the term. Roll. Rep. 68, 69. 2 Bulst. 290.—For being by indenture, they are the words of both parties. Cro. Eliz. 202.

Cro. Eliz. 604. But, if a man leases for years, and the lessor covenants that (d) Where a *proviso* was void, because no more was to be done by it than what might be done without. *Vide* Poph. 116. the lessee shall have house-bote, hay-bote, and plough-bote, without committing waste, upon pain of forfeiture of the lease, this is a covenant on the part of the lessor, and therefore no condition; and by *Anderson* and *Beamont* the covenant is no more than the law appoints; therefore that, and (d) all that is subsequent to it, is void.

Roll. Abr. 410. If a man leases lands for years, rendering rent, and the lessee Roll. Rep. 367. covenants to pay the rent, and not to do waste, and the lessor S. C. binds

binds himself in an obligation that the lessee shall enjoy the lands for the said rent, and doing according to the covenants of the said indenture; these words, (a) *for the rent*, make not a condition, because he hath other remedy for the rent, *scilicet*, upon the indenture of covenants.

(a) The lessor covenanted that the lessee, paying his rent, should enjoy the land.
4 Leon. 50.

By two judges against one, the covenant is conditional.—But Sid. 280., it is holden contrary *per Cur.*; and 2 Mod. 34, 35., it is adjudged *cont.*—So, if a man leases for years, excepting the trees, and liberty to fell and carry them away, *reparando sepes & implendo foveas*, the repairing the ditches, &c. is no condition, but a covenant upon which the lessee hath remedy by action. 2 Jones, 206. and *vide* March, 9. 2 Roll. Rep. 466.

If a man leases for years, rendering rent, and the lessee covenants to repair, &c. and after the lessor devises to the lessee for more years, yielding the like rent, and under such covenants as were in the first lease, yet this makes no condition; for though, after the first lease is ended, the lessee shall not be bound by the covenants, yet the will expressing that the lessee should have the lands, observing the first covenants, it shall not be taken to be a condition, by any intent to be collected out of the will; for covenants and conditions differ much.

Owen, 54. 92.
3 Leon. 33.
And. 230.
S.C. adjudged.
Gouls. 74.
S.C. Godb.
99. S.C.
Poph. 8. S.C.
cited Cro. El.
288. S.C. cited.

(H) *What shall be said a Condition, and not a Limitation; and how they differ.*

WORDS which properly create a *condition*, (b) are *sub conditione, ita quod, si contingat, proviso, &c.* for the non-performance of which, none but the *heir* at law can enter; and regularly, in case of a *condition*, the estate of the party is not determined without entry or claim.

Co. Lit. 203.
2 Co. 70.
2 Sid. 152.
2 Brownl. 68.
Gouls. 134.
(b) *Per* Lord
Coke, 10 Co.

35. Mary Portington's case; if there be express words of condition annexed to the estate, it cannot be construed a limitation. But this opinion has been denied to be law; and *per* Hale, C. B. Vent. 200., there is no other authority to support it: for, first, though the words be proper to create a condition; yet if, upon the non-performance thereof, the estate be limited over to another person, this shall be a limitation; for it shall not be in the power of the heir, by his not claiming, or entering, to defeat the interest of such person. Brownl. 65. Roll. Abr. 412. and Vent. 200., *per* Hale, it may properly be called a conditional limitation: secondly, if lands are given to the heir, upon condition, this, upon non-performance, shall be construed a limitation; otherwise no advantage could be taken of it; the benefit of conditions annexed to real estates belonging to the heir, as those to the personal estate do to the executor. Cro. Eliz. 204. Owen, 112. 2 Mod. 7. Lutw. 809. 3 Mod. 32.

Proper words of *limitation* are, *dum, dummodo, quamdiu, donec, quosque, ubicunque, usque ad, tandiu*, or so long as he shall pay such rent, or be abbot or parson, &c.; and in these cases the law (c) vests the estate in the *party*, without entry or claim: but he cannot bring a possessory action, as trespass, &c. without an actual entry.

Co. Lit. 236. b.
(c) 2 Mod. 7.
2 Ld. Raym.
750. 1 Bl.
Rep. 610.

So, if an estate be made to a woman (d) *dum sola fuerit*, this is a *limitation* which determines her estate upon marriage.

Co. Lit. 234. b.
Vaugh. 32.
(d) If a lease

be made to a woman for thirty years, *si tandiu viveret, & custodiret se ipsam* a widow, it determines by her death or marriage. Cro. Eliz. 414. Poph. 99. Moor, 400. Gouls. 179. and *vide* Roll. Abr. 411. 843. Owen, 107.

Roll. Abr. 411. If a man having three sons, devises his lands to the eldest, upon condition that he shall pay 20*l.* to each of the other two sons; and that if he fails in payment thereof to either of the sons, that then they may enter and have the land; this is a *limitation*; so that if the eldest does not pay the money, the two sons may enter into the land.

819. Moor, 644. Noy, 51. S. C. adjudged, and Owen, 8. 2 Leon. 38. Cro. Ja. 56. 592. Carter, 93. S. P. adjudged between Spittle and Davis.

Roll. Abr. 411, 412. If a man hath issue two sons, *ss. R.* the eldest, and *H.* the youngest, and also two daughters, and devises certain lands thus, *viz.* to *H.* in tail, when he comes to twenty-four years of age, upon condition that he shall pay to my two daughters 20*l.* a-year, at their full age; and if the said *H.* dies before twenty-four, then I will, that *R.* my son and heir, shall have the said land to him and to his heirs, he giving and paying to my said daughters the said money, in such manner as *H.* should have done, if he had lived; and if my said sons *H.* and *R.* (if the said lands come to the said *R.* by the death of *H.*) do not pay the said money to my said daughters, as aforesaid, then I will my said land shall remain to my daughters and their heirs for ever; and after the devisor dies; this is a *limitation* upon the estate of *H.* and not a condition; so that if *H.* does not pay the money to the two daughters, after his age of twenty-four years, and at the full age of the daughters, *R.* shall have it by way of *limitation*, and cannot enter as for a condition broken; because otherwise, if this should be a condition, it would defeat the portions given to the daughters, and the future devise to them, which is against the intent of the devisor. Adjudged in a writ of error *per totam Curiam*, and the judgment given to the contrary *in banco* reversed.

Roll. Abr. 412. If a man devises land to another in tail, upon condition that he shall not alien; and that if he dies without issue, it shall remain over to another in fee; and after the devisee aliens; yet he in the remainder cannot enter for the condition broken, but the heir at common law; for this is not a limitation but a *condition*.

Cro. Eliz. 204, 205. If a copyholder in *borough-english* surrenders to the use of his will, and after devises to his wife for life, remainder to his eldest son, (*a*) paying 40*s.* to each of his brothers and sisters, within two years after the death of his wife, &c. this is a *limitation*, and not a condition; for if it should be a condition, it would extinguish in the heir, and there would be no remedy for the money.

2 Leon. 114. S. C. Cro. Ja. 592. 3 Co. 21. 2 Brownl. 68. S. C. cited. (*a*) For this *vide* Stile, 294. 2 Sid. 152.

Tunstall v. Brachem
Ambl. 167.

|| Where a testator gave lands to *M. B.*, his sister, in fee, paying 100*l.* *per annum* to his wife for her life, and also several legacies to several of his nephews and cousins within twelve months after the decease of the wife; and several of the legatees died in the lifetime of the wife; Lord *Hardwicke* held that these legacies did not lapse, but were transmissible to the representatives; that there was a remedy at law for these legacies according to the above case of *Wellock v. Hammond*; that this was

a conditional limitation to *M. B.* until default in payment of the legacies, and then her estate would determine; one moiety of which would then be in her as heir at law, and the other moiety in the son of the other sister, who was dead, as co-heir, for which he might maintain an ejectment.

Where a testator devised his estates to the use of his son *A.* in tail; remainder to *B.* his daughter in tail; remainder to his daughter *C.* for life; remainder to her son *D.* and his heirs, upon condition that he pay to his elder sister, plaintiff's mother, 100*l.* at or soon after his being possessed of the estate; and in default that the estate should be to plaintiff's mother, &c. and *A. B. C.* and also the mother being dead, a bill was filed by plaintiff against *D.* in whom the remainder in fee was vested in possession as her executor, to have the 100*l.* raised, Lord *Hardwicke* decreed accordingly, saying, This is a conditional limitation and there is a legal remedy for raising the money: it is a condition subsequent as all conditions turned into limitations are: it is to be raised after *D.* comes into possession.||

Embrey v. Martin Ambl. 230.

If a copyholder in fee, in *borough-english*, having three sons, surrenders to the use of his will, and devises to his second son, upon condition to pay 20*l.* a-piece to his daughters and dies, this is a *condition*, and not a limitation; for there is no necessity to expound it otherwise, as where a man devises to his eldest son.

Cro. Ja. 56. *Curtis* and *Woolverston*, adjudged *per totam Curiam præter Williams*, who held it was a

limitation, and that the land should go to the youngest brother, who is inheritable by the custom; for that otherwise he would be prejudiced; and *vide Carter*, 171.

If *A.* devises lands to *B.*, provided that if *B.* marries without the consent of *C.* and others, or dies without issue, then to *D.*, &c.; this is a *limitation*, and not a condition, in respect the remainder is limited over to a stranger, and not to the heir: for though the words *proviso & si (a)* are express words of condition, it would be an unreasonable construction of the intent of the deviser, that *B.* should do an act by which the estate of *D.* should be forfeited.

2 *Lev.* 21, 22. *Williams* and *Fry*, adjudged. *Vent.* 199. *S. C.* adjudged by the name of *Fry* and *Porter*. *Raym.* 236. *Mod.* 86. *S. C.* adjudged.

(a) *Dyer*, 316. *dubatur.* *Leon.* 283. *dubatur.* 10 *Co.* 41. a. *cont.*; but in 1 *Ventr.* 203. (as in several other books) this opinion of *Coke* is taken notice of, and denied to be law. — [Words of an express condition shall not ordinarily be construed as a limitation: but, where an estate is to remain over for breach of a condition, which is by express words a condition, yet it ought to be intended as a limitation. *Per Holt.* 11 *Mod.* 61. *Page* and *Hayward*, 2 *Salk.* 570. *S. C.*]

If a man devises certain lands to *A.*, his heir at law; and devises other lands to *B.* in fee; and if *A.* molest *B.* by suit or otherwise, he shall lose what is devised to him, and it shall go to *B.*; these words make a *limitation*, and not a condition; for if it were a condition, it would descend on the heir, and then *B.* would receive no benefit by the breach of it.

2 *Mod.* 7. agreed by *Curiam.*

[*A.* devised lands to his second son, upon condition that he or his heirs should pay and satisfy to the testators six grandchildren (the children of the devisee) the sum of 90*l.*, to be equally divided among

Wigg v. Wigg, 1 *Atk.* 382. (b) A condition, properly so call-

ed, annexed to an estate, differs from what is called a conditional limitation in this, that it is

the proper effect of a condition to give title by the breach of it, to the grantor, or those claiming from him the reversion in the lands; a conditional limitation limits the estate over to a stranger; and in the case of a conditional limitation, the estate expires and determines of itself, without any act, as entry or claim, to be done or made by him who hath the expectant interest: whereas in the case of a condition properly so called, advantage must be taken of the breach of it by the activity of the grantor, his heirs or assigns. 2 Wooddes. 143, 4. *Conditional limitations* so far partake of the nature of conditions, as they abridge or defeat the estates previously limited; and they are so far limitations, as, upon the contingency taking place, the estate passeth to a stranger. Co. Litt. 202. b. n. 1. 13th edit.

among them, with a clause of entry and distress in default of payment of all or part.—This is not a mere condition (b), but a conditional limitation, there being an express limitation over to the legatees in case of non-payment, who were to enter and hold in the nature of tenants by *elegit*.]

Earl of Winchester v. Wentworth, 1 Vern. 402.

¶ Land was limited to the second son, subject to a proviso, that if the elder son should die without issue, the second should pay his sister 15,000*l.* within six months after the death of the elder, or in default thereof, the land should go to the sister and her heirs. The elder brother died without issue, and within three months afterwards the sister died, and the second son refused to pay the money. It was decreed that this should be taken as land, and go to the heir of the sister; and not as personal estate, and only a security for money, and go to her executor; otherwise the known and common difference between a limitation and condition would be destroyed.

Avelyn v. Ward, 1 Ves. 420.

One devised his real estate to his brother and his heirs, on this express condition, that within three months after his decease, he should execute and deliver to his trustee a general release of all demands, which he might claim on his estate or any part for what cause soever. But, if his brother should neglect to give such release, the said devise to him should be null and void to all intents, and in such case he devised the estate to *R. W.* his heirs and assigns for ever. The brother, the first devisee upon this condition, who happened to be the heir at law, died in the testator's lifetime. Lord *Hardwicke* held this devise to be, not a strict condition, but a conditional limitation, and that being so, it was not necessary that every particular fact should take place; that if in any event the first limitation could not take place, the subsequent should; and that it was clearly the intent of the testator, if no such release was executed, whereby the demand against his estate would exist, the estate should go over; and his lordship decreed accordingly.

Simpson v. Vickers, 34 Ves. 341.

E. S. devised all her freehold and copyhold estates at *H.* to her brother and heir at law *M. S.* his heirs and assigns for ever, upon this express condition, that he should within six calendar months next after her decease at his own expence make, execute, or deliver, or tender to her executor a good and valid release, receipt, or discharge for the legacy of 1000*l.*, bequeathed to him by the will of his brother *J. S.* (whose executrix the testatrix was) and also of all other claims and demands whatsoever upon the estate

estate of *J. S.* or upon her estate on account of her executorship or otherwise; declaring her will and intention that the said devised premises at *H.* should be accepted and taken by her brother *M. S.* in full satisfaction and discharge of the said legacy, and of all other such claims and demands as aforesaid: but, if he should refuse or neglect to comply with the said condition, she declared her will and intention to be, that at the expiration of the said six calendar months after her decease the said devise to him should become void; and she did in that case from and after the expiration of the said six calendar months give and devise all her said freehold and copyhold estates at *H.* to *S. M.* her heirs and assigns for ever; appointing her sole executrix. The testatrix died in *December 1794.* *M. S.* contested the validity of the will in the prerogative Court, and afterwards by appeal to the delegates; but probate was in *July 1798* granted to *S. V.* formerly *S. M.* *M. S.* then filed a bill against the executrix and her husband, stating that within six months after probate he had proposed to execute the release required by the testatrix, and to pay the costs, on having the estate at *H.* conveyed to him, and praying a conveyance accordingly. — By the Master of the Rolls — It is clear from the case of *Avelyn v. Ward*, that this is a conditional limitation, and not a mere condition: and being so, it seems to follow, that the event having taken place, the Court cannot possibly relieve. Though the estate is given over to the executrix, who would have been benefited by the release, yet it is a real estate, which she could not take as executrix; and therefore the circumstance, that she is so, makes no difference.||

[For the distinction between a *condition in deed* and a *limitation*, denominated by *Littleton* a condition in law, see 2 Bl. Comm. 155. *Fearne Cont. Rem.* 194. 400.]

(I) Of Conditions precedent and subsequent.

CONDITIONS precedent are such as must be punctually performed before the estate can vest (*a*); but on a condition subsequent, the estate is immediately executed; yet the continuance of such estate dependeth on the breach or performance of the condition.

Eq. Abr. 108.
[Co. Lit. 218.
Francis's Max.
Eq. 44.]
(a) || This
maxim, that
where the

estate is to arise upon a condition precedent, it cannot vest till that condition is performed, has been so strongly adhered to, that even where the condition is become impossible, no estate or interest shall grow thereon. *Harvey v. Aston*, 3 Atk. 376. Co. Litt. 206. *Roundell v. Curre*, 2 Br. Ch. Rep. 67. *Bertie v. Falkland*, 2 Vern. 333. || [If one party covenants to do one thing, the other *doing* another, it is a mutual covenant, and not a condition precedent. *Boone v. Eyre*, 2 Bl. Rep. 1312. But, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. *Duke of St. Alban's v. Shore*, 1 H. Bl. Rep. 270. There are no precise technical words required in a deed to make a stipulation a condition *precedent* or *subsequent*; neither doth it depend on the circumstance, whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other, according to the nature of the transaction. *Hotham v. E. I. Company*, 1 T. Rep. 645.] || So by Lord *Talbot* in *Robinson v. Comyns*, Ca. temp. Talb. 166. And Lord *Kenyon*, in *Porter & Shephard*, 6 T. Rep. 668, says conditions are to be construed

strued to be either precedent or subsequent according to the fair intention of the parties to be collected from the instrument, and technical words, if there be any such, should give way to that intention.||

3 H. 6. 7. b. As, if I grant, that if *A.* will go to such a place about my bu-
Roll. Abr. 414. siness, that he shall have such an estate, or that he shall have
10*l.* &c.; this is a condition precedent.

3 H. 6. 33. b. So, if I retain a man for 40*s.* to go with me to *Rome*; this is
Roll. Abr. 414. a condition precedent, for the duty commenceth by going to
Rome.

Roll. Abr. 415. So, if a man, by will, devises certain legacies, and then devises
Jones, 327. all the residue of his estate to his executor, after debts, legacies,
Cro. Car. 335. &c. paid and discharged; this is a condition precedent, so that
the executor cannot have the residue of the estate before the
debts and legacies are discharged.

Knight v. Ca- || So, where a man bequeathed 1000*l.* to *A.* to be paid to her as
meron, 14 Ves. soon as she should attain the age of twenty-one years, and in
369. case she should live to attain that age, and not otherwise, or
upon her marriage, which should first happen; provided she
should marry with the consent of his executors, and not
otherwise; but in case she should happen to die before she
should attain the age of twenty-one years, or be married without
such consent, then over; this is a condition precedent; and
by her marriage under age without consent, one of the exe-
cutors being dead, and the other resident abroad, is reduced
to the single contingency of her attaining the age of twenty-one
years.||

Cro. Eliz. 219. But, if a man devises a term to *A.*, and that, if his wife suffers
Jennings and the devisee to enjoy it for three years, she shall have all his goods
Gore, adjudged as executrix; but, if she disturbs *A.* then he makes *B.* executor,
per totam Cu- and dies; his wife is executrix presently: for though in grants
riam, though the estate shall not vest till the condition precedent is performed,
Anderson at yet it is otherwise in a will, which must be guided by the intent
first inclined of the parties; and this shall not be construed as a condition
cont. Leon. precedent, but only as a condition to abridge the power of being
229. S.C. ad- executrix, if she perform it not.
judged *per to-*
tam Curiam,
Anderson

changing his opinion. Winch. 115. S.C. cited.

Roll. Abr. 415. If *A.*, tenant for life, and *R.*, in reversion in fee, covenant to
Spring and levy a fine, and that it shall be to the use of *A.* and his heirs,
Cesar, ad- *si R.* does not pay 10*s.* to *A.* the tenth of *September* after; and
judged. Jones, if he does pay, then to the use of *A.* for life, and after to the
389. Winch. use of *R.* in fee; in this case this word *si*, &c. is a condition
103. S.C. subsequent, and not precedent; so that *A.* hath an estate in fee
till *R.* pays the 10*s.*, because there is a day limited for the pay-
ment of the 10*s.*, and the subsequent words explain the intent
to be a subsequent condition, *ss. And if he pays it, then it shall*
be to A. for life, and after to the use of R. in fee, which shews
the intent to be that *A.* shall have an estate in fee, till the 10*s.*
paid.

3 Lev. 132. A copyholder in *borough-english* surrenders to the use of him-
adjudged. self for life, and after to the use of his eldest son and his heirs,
if

if he lives to twenty one; provided and upon condition, that if he dies before twenty-one, it shall remain to the surrenderor and his heirs; though by the first words it seems to be a condition precedent, yet upon all the words taken together it is not, but a surrender to the use of the eldest son, to be defeated upon a condition subsequent.

¶ One bequeathed the residue of his personal estate to *J. S.* provided she married with the consent of his executors, (who were but executors in trust,) and if she should marry otherwise, then he gave it over to *J. N.* One of the executors died, after which *J. S.*, without the consent of the other, married; whereupon *J. N.* brought his bill for the residue. But by the Master of the Rolls — In the nature of the thing, and according to the intention of the testator, this could not be a condition precedent; for at that rate the right to the residue might not have vested in any person whatever for twenty or thirty years after the testator's death; since both the executors might have lived, and *J. S.* continued so long unmarried, during all which time the right to the residue could not be said to be in the executors, they being expressly mentioned to be but executors in trust. Besides, the bequest of the residue is first to *J. S.*, which, if the will had stopped there, would have been an absolute devise; so that the following condition annexed must be a subsequent, not a precedent one. And the rule of law is, that if there be a subsequent condition, which becomes impossible by the act of God, this excuses and discharges the grantee from the condition; for *lex non cogit ad impossibilia.*||

Peyton v. Bury, 2 P. Wms. 626.

If *A.* makes a lease for five years to *B.*, upon condition that if *B.* pays him 10*l.* within two years, that then he shall have a fee-simple in the lands, and makes livery and seisin to *B.* (a); this passeth the freehold immediately; and *B.* hath a fee conditional; because if the freehold was not to vest in *B.* till the condition performed, it would be difficult to determine in whom the freehold lay; for conditions may be inserted in such deeds as are perfected privately, which might prove greatly prejudicial to strangers.

Lit. § 350. Co. Lit. 216, 217. (a) But, if *A.* leases land to *B.* for five years, and *B.* enters, and after *A.* by deed grants to *B.* that if he pays to *A.* 10*l.* during the

term, that then he shall have the land to him and his heirs; this enures as an executory grant, by increasing the estate; but the fee-simple passeth not before the condition performed. Co. Lit. 217. b.

But in case of a lease for life, with such a condition, the freehold passeth not before the condition performed, because the livery may presently work upon the freehold.

Co. Lit. 217. b.

So, if a man grants an advowson, &c. (which lie in grant) for years, upon such condition, the grantee shall have no fee till the condition performed.

Co. Lit. 217.

If *A.* lease to *B.* for years, upon condition, that if *B.* pays money to *A.* or his heirs at a day, that *B.* shall have the fee, and before the day *A.* is attainted of treason and executed; now though the condition became impossible by the act and offence of *A.*, yet *B.* shall not have a fee, because a precedent condition

Co. Lit. 218. a.

(a) But it has been ruled in equity, where the condition of a bond was to settle certain lands, in such a manor, by such a day, though the obligor died before the day, and so the bond saved at law, yet the agreement should be executed in *specie*, and so decreed in Chancery, between Hotham and Ryland, Eq. Abr. 18.

Doe v. Lufkin, 4 East, 221. 11 Ves. 170. S. C. || On a demise by a copyholder for one year, and thence from year to year for the term of thirteen years more, *if the lord would licence, and so as the same should not be liable to forfeiture*; the licence of the lord is a condition precedent to the further term of thirteen years.||

Vern. 79. 167. Also, in equity, with respect to conditions precedent and subsequent, the prevailing distinction seems to be, to relieve against the breach or non-performance, whether the condition be precedent or subsequent, where a compensation can be made.

Chan. Ca. 89. Wallis and Grimes. Mod. 307. S. C. cited. As, if *A.* conveys lands to *B.* &c. and their heirs upon trust, that if *C.*, the son of *A.*, within six months after the death of *A.*, shall secure to trustees 500*l.* for the younger children of *C.*, then after such security given, to convey to *C.* and his heirs; and until the time for giving such security, in trust for the eldest son of *C.*; and in default of such security, to convey to such eldest son and his heirs; if *C.* dies before any such security given, yet this condition, though precedent, being only in nature of a penalty, the intent of the trust shall be regarded, which was to secure 500*l.* for the younger children.

Vern. 79. 167. Popham and Bamfield. (b) || The words of the devise, according to the Registrar's book, are "but in case the plaintiff's father should refuse by good assurance to settle two full third parts," &c. and the testator further declared "that from and after plaintiff's death without heir male, or after Sir Francis Popham's refusal to make such settlement as aforesaid, that his trustees should stand seised in trust for *Bampfild* and *Winter*, two of his trustees, and for one Sir John St. Barbe." || 2 Vern. 222. S. C. cited, as a case in which there was relief. 2 Vern. 338. S. C. cited as a condition which was relieved against. (c) That in all cases of forfeitures and breaches of a condition, some kind of

of compensation may be made; therefore this rule is to be extended no farther than where compensations have been allowed, and not to the forfeitures by a tenant for life, making a feoffment, levying a fine, suffering a recovery, wilful forfeitures by copyholders, &c. Preced. Chan. 570.

If a feme covert, having power by will to devise lands, devises them to her executors, to pay 500*l.* out of them to her son, provided that if the father gives not a sufficient release of certain goods to her executors, that then the devise of the 500*l.* should be void, and go to the executors, and after her death a release is tendered to the father, and he refuses; yet upon making the release after, the money should be paid to the son; for it was said to be the standing rule of the court, that a forfeiture should not bind where a thing may be done after, or a compensation made for it; as, where the condition is to pay money, &c., and though it is generally binding, where there is a devise over, yet here, it being to go to the executors, it is no more than the law implies.

2 Vent. 352.
Cage and Russell adjudged in Canc.

If a man devises lands to *J. S.* upon condition to pay 20,000*l.* to his heir at law, viz. 1000*l.* per ann. for the first sixteen years, and 2000*l.* per ann. after, till the whole should be paid, and the heir enters for the non-payment of one of the 1000*l.* per ann., *J. S.* shall be relieved upon payment of the 1000*l.*, together with the interest, from the time it became payable, without any deduction for taxes; the Court declaring, that wherever they can give satisfaction or compensation for the breach of a condition, they can relieve.

Salk. 156. pl. 7.
Grimston and Lord Bruce.
2 Vern. 594.
S. C.

If one having three daughters, devises lands to the eldest, upon condition that she, within six months after his death, pay certain sums of money to her two other sisters; and if she fail, then he devises the land to his second daughter, on the like condition, &c.; the Court may enlarge the time for payment, though the lands are devised over; and in all cases that lie in compensation, the Court may dispense with the time, though even in case of condition precedent.

2 Vern. 222.
Woodman and Blake.
|| In 2 Vern. 166. this case is differently stated. One having five daughters by deed settled his estate so,

that in case his eldest daughter should pay 6,000*l.* within three months after his and his wife's decease, to be equally distributed amongst his other daughters, then she should have the estate, being worth 10,000*l.* to be sold; if she failed, then the like power to another daughter, [and so on to his five daughters successively, R. L.] with power in the deed to alter or revoke the same. By will reciting his power to alter or revoke the deed, he devises that his eldest daughter shall have the pre-emption, and gives six months' time for payment of the money, [and in case she failed, then as in the said deed, R. L.] The eldest daughter, within the six months, made application to the trustees, that they would join in mortgage or sale for raising the money; and some difficulties arising about it, she, upon the expiration of the six months time for the payment of the money, exhibited her bill in this court, and being indebted to the now plaintiff *Woodman*, assigned [devised by her will, R. L.] her interest and right of pre-emption to him. The lords commissioners, by their decree in this cause, 21st of March 1691, declared, "that the plaintiff *Woodman* ought to be relieved, for that though the time for payment of the 6,000*l.* was elapsed, yet there was an interest and benefit in Mrs. *Dennys*, (the daughter for whom the time had been enlarged by the will,) which was not forfeited, and do therefore think fit and so order and decree, that the said plaintiff *Woodman* be let into the benefit of the said estate." Reg. Lib. B. 1691. fol. 687. See this case 1 Br. P. C. 127. and Colles. P. C. 74. where it is said this decree was reversed in the House of Lords. And Sir Thomas Man's case, cited by the Master of the Rolls, 2 Freem. 206. S. P. if not S. C. where it was resolved that the second daughter should have the land, for the eldest could have no relief. Mr. Raithby's note, 2 Vern. 167.||

So,

2 Vern. 366. Barnardiston and Fane. (a) *Vide* Vern. 456. where it was given as one reason, why the Court refused to relieve, that the

So, where one devised lands to *J. S.*, his kinsman, paying 1000*l.* a-piece to his two daughters, who were his heirs at law, and *J. S.* made default, and the daughters recovered in ejectment; yet *J. S.* was relieved, on payment of principal, interest, and costs; though it was insisted, that this was a condition precedent, and to the disinherison of the heir at law, and in favour of (a) a voluntary devisee.

party, who had not performed the condition, was a volunteer.

Skin. 285. The Earl of Salisbury and Bennet decreed Hil. 2 W. & M. by the lords commissioners. 2 Vern. 223. S. C. where it is said that the father treated with the Lord Salisbury about the marriage, though he died before it was had; and there decreed, that both parts of the condition need not have been performed, the father, by such treaty, having himself dispensed with it. But in 2 Vent. 365. S. C. which came on Pasch. 36 Ca. 2. it is said, erroneously, that my lord keeper was of opinion, that both parts ought to be observed.

A man having two daughters, devised to each of them 20,000*l.*, payable at the age of twenty-five years; but if they, or either of them, married before the age of sixteen; or if the marriage were without the consent of their mother and trustees, then they should lose 1000*l.* of the portion, which should go to his other children: one of them married before the age of sixteen, but with the consent of all the parties; and it was holden, that the time, being only a circumstance, might be dispensed with.

3 Chan. Ca. 129. Bertie and Lord Falkland. Salk. 231. pl. 9. S. C. where it is said, that the decree was reversed in the House of Lords. 2 Vern. 333. S. C. where it is said that the matter was ended there by compromise. || And so it would seem from the extract made by Mr. Raithby from the journals of the House of Lords, which is as follows: "Resolved, that the appellants have relief, and that Mrs. Bertie do enjoy the estate for her life; and ordered accordingly that the trustees, Sir William Witlocke and J. Grant, and their heirs, do forthwith convey all the manors, &c. of John Carey, devised to them, so that they may be assured to Eliz. Bertie, the appellant, for life, remainder to Lord Viscount Falkland and the heirs male of his body; remainder to the right heirs of the said John Carey for ever. And that there shall not be any account of the profits of the premises for the time past; and that Mr. Carey's goods shall go according to his will; and that so much of the order of dismission of appellant's bill, and of the decree on behalf of Lord Falkland, as is contrary to this judgment, be reversed." Journ. Vol. 16. p. 230, 236, 237, 238, 239, 240, 241. and see Colles. P. C. 10. ||

A. devised his lands to trustees for three years, and if within the three years there happened a marriage between *G.*, who was a distant relation, and of the same blood with the testator, and *W.* his niece and heir at law, then to *W.* for life, remainder to her first son, &c. in tail male, by *G.* to be begotten; but if the marriage should not take effect within the three years, or if the marriage should be before the years of consent, and not ratified when of competent age, then to *F.* in tail, who was likewise a remote relation of the testator, but not of the same blood: the marriage between *G.* and *W.* did not take effect, though several proposals were within the time made by her friends to his guardians, but not accepted by them; and though she herself had pressed the match as far as the modesty of her sex would permit. She afterwards married the plaintiff, and by her bill prayed the benefit of the devise; the condition being answered by her, to what she was capable of doing, having married a person, as was urged, equal in circumstances, &c. to *G.* but her bill was dismissed by the advice of *Holt* and *Treby*, Ch. Justices.

(K) Of void Conditions, being against Law.

IF a feoffment be made on condition to do a thing that is *malum in se*, as to kill or rob *J. S.* the estate of the feoffee is absolute, and a bond made on such condition is void; for the estate settled in the feoffee shall not be defeated, nor shall a bond be forfeited for the forbearance of such an action; and (a) an obligee is punishable for taking a bond to do a thing against law.

2 H. 4. 9. Co.
Lit. 206. b.
Roll. Abr. 418.

(a) 2 Vent. 109.

If a parson, on his being presented to a living, gives a bond, conditioned to resign, such condition may be lawful, and not against 31 Eliz. cap. 6. of simony; as, (b) if the condition be to restrain the incumbent from non-residence, a vicious life, or that he shall resign when the patron's son, kinsman, or friend become qualified to take the living.

Roll. Abr. 417.
Cro. Jac. 248.
274. Cro. Car.
180. Lit. Rep.
135. Hutton,
111. Jones,
220. 2 Keb.
445. Sid. 389.

Raym. 175. Comp. Incumb. 40, 41. (b) So, a bond conditioned for the payment of money to the son of the last incumbent, so long as he should continue a student in *Cambridge* unpre-ferred, &c. is good. Noy, 142.—So, where a patron took bond of his presentee, to pay 5*l.* yearly to the wife and children of the last incumbent. Earl of Sussex's case cited by Foster J. Noy, 142.—But Comp. Incumb. 39. these charitable resolutions, if any such there were, do not seem to be law.

But, if the condition be for a lease of the glebe or tithes, or a sum of money, this is clearly simony within the statute; and therefore the condition void, being against law.

Vide the au-
thorities *supra*,
and Comp.
Incumb. 39,

40. Comb. 394.—That the condition must be averred to have been entered into for a simo-
nial purpose. Vide Cro. Ja. 274. Hut. 110. Moor, 64.—And where a special averment
may be, that an obligation was made for a matter against law. Leon. 73. 203. Godb. 29.
2 Wils. 347.

Also, in equity it hath been ruled, that where a bond of resig-
nation is general, as to resign upon request, some special reason
must be shewn to require a resignation; for though such bonds
may in strictness of law be good, yet if they are made an ill use
of, as by extorting money from the incumbent, &c. (c) equity
will grant a perpetual injunction against them.

2 Chan. Ca.
399. Vern.
411. 131. Eq.
Abr. 86, 87.
[That such
bonds are bad
at law, was de-
termined by

the House of Lords in the great cause of *Ffytche v. the Bishop of London*, May 30th, 1783.
But see 4 Term Rep. 81. 359.] (c) That the ordinary may refuse to accept a resignation
made by the restraint of such bonds. Comp. Incumb. 31.

¶ It was determined by the Court of King's Bench, *Lawrence J. dubitante*, that at common law a general resignation bond of an office, in which the party has a freehold, is good. But upon a writ of error, the Court of Exchequer Chamber merely affirmed the judgment, declining to give any opinion upon this important point, as it did not sufficiently appear on the record that the office in question, which was that of schoolmaster, was such an office as ought, for the sake of the publick, to be deemed a freehold office.¶

Legh v. Lewis,
1 East, 391.
3 Bos. and Pull.
231.

Roll. Abr. 417.
Hob. 12. S. C.
Moor, 856.
pl. 1175.
Godb. 212.
Brownl. 65.
S. C. in which
last book it is
said to be otherwise,

If the sheriff of a county makes *B.* his under-sheriff, and takes a bond or covenant from him that he will not serve executions above 20*l.* without his special warrant, this is a void covenant, because it is against law and justice, inasmuch as when he is made under-sheriff, he is liable by the law to execute all process, as well as the sheriff is.

and where he voluntarily covenanted; and *vide* title Sheriff; and 2 Brownl. 282.

Hob. 12, 13.
Moor, 856. pl.
1175. Godb.
212. Brownl.
65. resolved
per Curiam.

But, if an under-sheriff covenants with the high-sheriff to discharge and save him harmless from all escapes of prisoners arrested by the under-sheriff, or any by him appointed, this is a good covenant; for since the high-sheriff transfers his authority, it is but reasonable he should take security for the faithful execution of it; and there is nothing intended against law, but rather to prevent than connive at escapes.

Cro. Eliz. 529.
Lee & Ux. v.
Colshill.
2 And. 55. S. C.
adjudged, be-
cause the obli-
gation is one
entire act and
deed of the

If *A.*, being a custom-house officer by patent, makes *B.* his deputy, and covenants *inter alia* to surrender the old patent, and procure a new one to *B.* and himself before a day, and that if *B.* dies before *A.* that *A.* shall pay 300*l.* to the executors of *B.*, and gives bond for the performance thereof; admitting these covenants void (*a*) *per* 5 Ed. 6. cap. 16. the whole bond is void, though some of the covenants are not void or illegal.

party. 3 Co. 82. S. C. cited. (*a*) So, where a sheriff takes a bond for a point against 23 H. 6. c. 9. and also for a just debt; the whole bond is void, according to the letter of the statute; for a statute is a strict law; but the common law divides according to common reason, and having made that void which is against law, lets the rest stand. Hob. 14. Moor, 856. pl. 1175. Godb. 213. 10 Co. 100. Latch. 143. Mod. 35. 2 Brown 282. Vent. 237. Carter, 230. 2 Wils. 351.

Cro. Eliz. 872.
Moor, 115. pl.
259. 242. pl.
379. 2 Leon.
210. 3 Leon.
217. March,
191. Owen,
143. And
there said by
Anderson, that
he might as
well bind him-
self that he
would not go
to church.

As to bonds entered into in restraint of trade, it seems to have been always admitted, and hath been frequently adjudged, that a bond restraining trade in general, as that a person shall not follow such a trade in any part of the kingdom, is void; the reasons whereof are, that such bond tends to a monopoly, and is against the publick good; deprives the party of his means of livelihood; enables masters to lay hardships upon their servants, apprentices, &c.; tends to oppression; and is attended with immediate and apparent damage to the one side, only to free the other from the fear of a distant damage that may or may not happen: but it seems to be now agreed, that a condition restraining trade in a particular place, if done fairly, and upon a good and lawful consideration, and, with no ill intention, is good. Also, it seems to be now settled, that there is no (*b*) difference between a bond and a promise in these cases, *viz.* that a bond should be void, and a promise good; but that the true distinction in these contracts, whether by bond, covenant, or promise, is between those entered into upon a just, fair, and reasonable consideration, and those entered into upon no consideration, or a vicious one; that the former will be good, the latter void.

(*b*) The difference formerly holden was, that in covenant or promise, all being to be recovered in damages, the jury may assess them in regard to the consideration; but otherwise of a bond; because then the whole sum must be recovered, be the damages or consideration never so small. 3 Lev. 242.

And therefore where *A.* and *B.* living in the same town, and being both mercers, *A.* desired *B.* to buy his old goods, which *B.* did, at such a price, upon condition that he would not follow his trade within the said town; this was holden a lawful contract; 1st, Because it was a voluntary restraint, and the rule is *volenti non fit injuria*. 2dly, That it was made upon a valuable consideration, the use of his trade being compensated by the price given him for his old goods. 3dly, That the agreement was neither *malum in se*, nor *malum prohibitum*. 4thly, That a man may bind himself not to live in such a place, and by consequence not to trade there. 5thly, That these kind of bonds are very frequent in *London*.

So, where the condition of a bond was, that whereas *A.* had taken the shop of *B.*, who was a baker, for the term of so many years, and had given *B.* so much money for it, the condition of the obligation was such, that if, during the term aforesaid, *B.* should not exercise the trade of a baker within the (*a*) parish where the shop was, that then the bond should be void, otherwise to remain in full force; and this was holden a good bond.

Nainby, 2 Str. 739. 3 Br. P. C. 349. S. C. Davis v. Mason, 5 Term

Cro. Ja. 596.
Jon. 13.
March, 77.
2 Roll. Rep.
201. Jolliffe v.
Bride.

10 Mod. 27.
85. 130. 1 P.
Wms. 181.
S. C. Fort. 296.
S. C. Mitchel
v. Reynolds.
(a) [So of a
street.
Comb. 122.
Chesman v.
Rep. 118. S. P.]

So, if the condition of a bond is, that the obligor shall not buy any sheeps-trotters of any person of whom the obligee had bought or should buy, this is void, being a restraint of trade, and tending to a monopoly.

Show. 2.
Comb. 121.
Thompson and
Harvey ad-
judged. Holt,
674.

If the condition of an obligation be, that the obligor shall be always ready to give evidence, and to testify the truth in any of the king's courts, in all things which shall be demanded of him, &c. and that he shall not hurt, endanger, or molest the obligee in his lands or goods, *ratione alicujus rei*, this is a good condition, and not against law; for as to the first part, if he had not been obliged thereto, he had been compellable by law; and by the last part it shall be intended that he shall not hurt, &c. tortiously, but not to restrain him from pursuing the obligee for felony, or other just cause.

Cro. Eliz. 705.
Dobson and
Crewadjudged
upon demurrer
without argu-
ment.

If *A.* is imprisoned for felony, and *B.* bound by recognizance to prosecute, if *B.* after gives bond to *C.* conditioned that *B.* will not give evidence against *A.* the condition is against law, and the bond void.

Vent. 109.
Mason and
Watkin, ad-
judged upon
the first open-
ing; and the

Court recommended it to Serjeant *Paulet*, who was a judge in *Wales*, where the plaintiff lived, to have him prosecuted for taking such bond.

[To a bond with condition to indemnify against a note; the defendant pleaded that it was given as a consideration for not appearing to give evidence on a prosecution for perjury: it was adjudged on demurrer, after two arguments in the Court of C. P., that the plea was good.]

Collins v.
Blantern,
2 Wils. 341.

Condition to do a thing which will be maintenance, is void; as to save harmless from such an appeal of robbery, as *B.* hath against him.

18 E. 4. 28.
Roll. Abr. 417.
Carter, 229.
Allen, 60. S. P.

43 E. 3. 6. Lease for life, upon condition, that if the lessee marries with-
 Roll. Abr. 418. out licence, he shall re-enter, is a good condition. (a)
 (a) So is a con-
 dition to renounce an administration. 15 E. 4. 30. Roll. Abr. 417.

Roll. Rep. 334. If the condition of an obligation be, not to sell the apparel
per Coke. of the wife, this is good; though it was objected it was against
 law, because against the liberty of the baron.

Roll. Rep. 334. So, if a man gives bond to a stranger, conditioned for the pay-
 Co. Lit. 206. ment of (b) 20*l.* yearly to his wife, this is good.

(b) But, if the
 condition be to enfeoff his wife, it is void because against a maxim in law, and yet the bond
 is good. Co. Lit. 206. b.

(L) Of repugnant Conditions.

Co. Litt. 223. **A** CONDITION upon a (c) feoffment in fee not to (d) alien, is
 10 Co. 38. b. void because it is repugnant to the estate.

(c) So, on a
 grant or devise. Co. Lit. 223. — But he may be restrained for a particular time, or from
 alienating to a particular person. Larges's case, 2 Leon. 82. & 3 Leon. 182. Muschamp's
 case, Bridg. 132. || or except to certain persons. Doe v. Pearson, 6 East. 173. || (d) So, a
 condition that the wife shall not be endowed, or the husband be tenant by the courtesy is
 repugnant. 22 E. 3. 19. b. Roll. Abr. 418. 6 Co. 41. S. P.

Dav. 34. Roll. So, of a condition upon a feoffment in fee, that his daughters
 Abr. 418. shall not inherit; for this is repugnant to the estate, and an at-
 tempt to establish a different kind of inheritance than is allowed
 of by law.

10 Co. 39. But a gift in tail, on condition that the donee shall not discon-
 Lit. § 362. tinue, or alien in fee-tail, or for (e) life is good; for these are tor-
 Co. Lit. 223. tious acts, which may well be restrained by condition.
 Moor, 39.

pl. 126. Vent. 322. Cro. Eliz. 35. Leon. 292. (e) Either for the life of another or his
 own life; for, though an estate for his own life be lawful, yet the condition is good, because
 the reversion is in the donor. Co. Lit. 223.

(f) Hob. 170. But (f) a liberty inseparable from the estate cannot be re-
 strained by proviso. Hence it is, that an estate tail hath (g) five
 (g) For which
vide Co. Lit. essential incidents, none of which can be taken away by any con-
 224. 6 Co. 41. dition. 1st, To be dispunishable of waste. 2dly, that the wife
 1 Co. 86. shall be endowed. 3dly, That the husband shall be tenant by
 9 Co. 128. b. the curtesy. 4thly, That tenant in tail (h) may suffer a common
 Moor, 601. recovery. 5thly, That collateral warranty, (whether with or
 633. 1 Co. 14. without assets, if made before 4 Ann. c. 16.,) or lineal with
 a. 85. a. 10 Co. assets, may bar it.
 38. b. Cro. Ja.
 697. Jones,
 58. Vent.

322. Ambl. 379. (h) And according to 10 Co. 38. b. Roll. Abr. 418. cannot be restrained
 from making a lease, within 32 H. 8. c. 28. or levying a fine, within 4 H. 7. c. 24. But Co.
 Lit. 223. b. *cont.* for the power of making leases is not incident to his estate, but given to him
 collaterally by the statute.

2 Vern. 233. **A**. made a settlement of his lands on his son in tail, but took
 Freeman and a bond from him not to dock the entail: on a bill to be relieved,
 Freeman. it was ruled in equity, that the bond was good, and the bill dis-
 missed with costs, though the alienation was made by the issue;

for if the son had not agreed to give the bond; the father might have made him only tenant for life.

But, where *A.* gave lands to *B.* in tail, remainder to *C.* his brother in like manner, and made them enter into recognizances to each other not to alien; it was decreed in chancery, that these recognizances should be delivered up and cancelled, as creating a perpetuity.

Moor, 809, 810. Pool's case adjudged, by the advice of *Coke Ch.* Just.

So, where *A.* settled his land upon his daughter in tail, and took a bond from her not to commit waste, the daughter levied a fine, and committed waste, and the bond being put in suit, equity relieved against it.

2 Vern. 351. Jervis and Bruton.

A gift in tail, upon condition that the donee may alien for the profit of the issue is a good condition.

46 E. 3. 4. b. Co. Lit. 224. S. P.

If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is a good condition, (*a*) because such alienation is prohibited by law, and regularly (*b*) what is prohibited by law, may be prohibited by condition.

Co. Lit. 223. b.

upon condition that they shall not alien, this is good to restrain any alienation by deed, because such alienation is tortious and voidable, but to restrain their alienation by fine, is repugnant and void. Co. Lit. 224. a. (*b*) As the alienation of an infant, or of a bishop without his chapter. Co. Lit. 224. a.

(*a*) So, if a feoffment be made to baron and feme,

(*c*) If *A.* hath issue two sons *B.* and *C.* and (*d*) covenants to stand seised to the use of himself for life, remainder to *B.* in tail, remainder to *C.* in tail, &c. provided that if *B.*, &c. or any of the heirs male of his body shall alien, &c. the uses to him limited shall cease only in respect of him, as if dead, &c. this *proviso* is repugnant, impossible and against law; for the estate of the tenant in tail doth not cease by his death, but by his death without issue.

1 Co. 84. a. Corbet's case adjudged, though *B.* had no issue at the time of the breach of the condition.

2 And. 134. S. C. adjudged. (*c*) Sir Anthony Mildmay's case, S. P. 6 Co. 40. adjudged. Moor, 632. pl. 868. the Court divided. Hob. 170. cited Chölmely and Humble, S. P. adjudged. Moor, 592. pl. 799. adjudged. And. 346. adjudged 1 Co. 86. a. cited. (*d*) So, in case of a devise, Germin and Astcott, Moor, 364. pl. 495. adjudged and agreed by all the judges of *England*, that the *proviso* was repugnant. And. 186. debated, but no judgment. 2 And. 7. adjudged by all the justices. 4 Leon. 83. adjudged *cont.* But 1 Co. 85. cited to have been adjudged, as in Moor and And. and *vide* Cro. Ja. 696. Jones, 58. Godb. 102. Moor, 543. pl. 721. and *vide* Poph. 97. Brownl. 45. God. 351. 2 Roll. Rep. 467. 477. 484.

Moor, 601. pl. 831. S. C. adjudged. Moor, Cro. Eliz. 379. (*d*) So, in case of a devise, Germin and Astcott, Moor, 364. pl. 495. adjudged and agreed by all the judges of *England*, that the *proviso* was repugnant. And. 186. debated, but no judgment. 2 And. 7. adjudged by all the justices. 4 Leon. 83. adjudged *cont.* But 1 Co. 85. cited to have been adjudged, as in Moor and And. and *vide* Cro. Ja. 696. Jones, 58. Godb. 102. Moor, 543. pl. 721. and *vide* Poph. 97. Brownl. 45. God. 351. 2 Roll. Rep. 467. 477. 484.

If a man makes a feoffment in fee, provided that the feoffor shall have the profits, this condition is void, (*e*) because it is repugnant to the grant.

7 H. 6. 43. b. Co. Lit. 206. S. P. and *vide* Cro. Eliz. 35.

107. (*e*) So, if there be a lease to three during their lives, provided that one shall not take the profits during the life of the other two. 2 Leon. 132. adjudged, and *vide* Hob. 170. Bulst. 42.

If a man grants a rent-charge out of the manor of *D.* (in which the grantor hath nothing) with a *proviso* that it shall not charge his person; (*f*) though the repugnancy doth not appear in the deed, yet the *proviso* is void, else it would take away the whole effect of the grant.

Co. Lit. 146. a. (*f*) So, if he grants a rent out of land to which he hath title, without a clause of

distress, provided that it shall not charge his person, this is void and repugnant, if he gives not seisin upon the grant. 6 Co. 58. b.

Co.Lit. 146. a. If a man grants a rent-charge out of land to another for life, provided it shall not charge the land, though the grantee might notwithstanding charge his person, yet the *proviso* is repugnant, because the land is expressly charged.

Co. Lit. 146. b. If a man grants a rent-charge out of land to another for life, 6 Co. 41. b. provided it shall not charge his person, and the grantee dies, his S. P. (a) This executors may bring debt for the arrears: (a) for they cannot must be understood a distrain, because the estate in the rent is determined, and the case put at *proviso* cannot leave the executor without remedy. common law,

for the executors of such tenant for life may at this day distrain, *per* 32 H. 8. c. 37.

Co. Lit. 378. b. If a man makes a lease for years, upon condition that if the 1 Co. 84. lessor grants over his reversion, the lessee shall have a fee, if the Jones, 59. and lessor grants his reversion by fine, the lessee shall not have a fee; *vide* Moor, for when the fine transfers the fee to the conuzee, it would be 450. absurd and against reason, that the same fine should work an estate in the lessee.

Lev. 77. If an obligation is conditional for the payment of 7*l.* by 2*s.* Vernon and Alsop, ad- *per* week till 7*l.* is paid, and that if he fails of payment of the judged upon 2*s.* at any of the days on which it ought to be paid, that the demurrer to the defendant's plea, obligation shall be void, else remain in force; this condition that he did not shall be taken distributively *reddendo singula singulis, viz.* that if pay 2*s.* at one of the days. he pays the 7*l.* the obligation shall be void, but that if he fails in Raym. 68. S.C. payment of the 2*s.* at any of the days, it shall be in full force; means it may be made good. for the obligation shall not be taken to be of no effect, if by any adjudged, because the condition is senseless, and therefore the obligation is single. Sid. 105. S.C. ad- judged, and that the obligation was single, and the condition repugnant and void.

Jones, 180. If the condition of an obligation be, *That if the obligor shall die Eaton and without issue, that then if he by his last will, or otherwise in his Butler, ad- life-time, shall lawfully assure and convey certain lands to the judged per totam Curiam; obligee and his heirs, that then the obligation shall be void, &c.* cont. Doderidge. This condition is not repugnant, but shall be construed according to the intention of the parties, to be collected out of the Palm. 553. words of the condition. S.C.

2 Salk. 463. [If the condition of a bond state that the defendant is truly Wells v. indebted, and that the bond shall be void if the obligor do not Treguson, pay, and performance be pleaded on the ground of the literal Dougl. 384. expression; the plaintiff shall have judgment; for when the condition (b) That it is recites a debt, and after lays an obligation not to pay it, is just to supply mistakes in conditions of it is in that (b) repugnant and void.] bonds. 2 Show. 16. and *vide* 39 H. 6. 10. Roll. Abr. 419.

(M) Of impossible Conditions.

Co. Lit. 206. IF the condition of a bond be impossible at the time of the Sav. 96. Leon. making thereof, as for the obligor to go to *Rome* the next 189. 14 E. 4. 3. day, the bond is single, for it is the same as if there were no Bro. 155. condition at all; and a feoffment on condition that the feoffee

go to *Rome* on a day, is absolute, for the condition is repugnant to the feoffment; but, (a) if an estate be to arise, or a duty to commence on a precedent condition that is impossible, they can never have effect.

(a) As if a man leases for life upon condition that if he goes from the church of

St. Peter in *Westminster*, to the church of St. Peter in *Rome*, within three hours, to have a fee, which is impossible; yet because it is precedent, no fee can accrue. Co. Lit. 206. Roll. Abr. 420.

If a woman makes a feoffment to a man that is married to another, upon condition that he shall marry her, this is a good condition, for his wife may die, and then he may marry her. Bro. tit. Condition, 119.

If the condition of an obligation be, that the obligor shall assign to the obligee a commission of bankrupts, this is an impossible condition, and therefore void, and the obligation single, for it is impossible to assign the commission. But *quære*. Roll. Abr. 419.

If the condition be *quod debet plueré cras*, this is a good condition; for though the obligor is not certain thereof, yet if he will take this upon himself, and run the hazard, he may at his peril, for this is not impossible of itself. 22 E. 4. 26. Roll. Abr. 420.

So, for the same reason, if the condition be, that the pope shall be at *Westminster*, to-morrow, this is a good condition. 22 E. 4. 26. Roll. Abr. 420.

If the condition of an obligation be to sustain and maintain an house in sufficient repair, and so to leave it at the end of the term; though at the time of the entry into the bond the timber was so rotten that it was impossible to sustain and maintain it in repair, yet the obligation is good. Sav. 96. Wood and Avery adjudged. 2 Leon. 189, S. C. adjudged, because tried by his own act; impossibilities.

but the law never binds men to

(N) Of the Effect of a void, illegal, or impossible Condition.

IF a feoffment be made, on condition that the feoffee shall (b) go to *Rome* on a day, the estate of the feoffee is absolute, and the condition void and repugnant. Co. Lit. 206. (b) Where the condition must be performed as near the intent of the parties as may be. Co. Lit. 219.

So, if the condition of a feoffment, &c. be possible at the making thereof, and afterwards become impossible by the act of God, yet the estate of the feoffee shall remain. Co. Lit. 206. a.

As, if the condition of a feoffment, &c. be, that the feoffor, &c. shall appear in such a court next term, and the feoffor die before, the estate of the feoffee, &c. (c) is absolute because executed, and not to be redeemed back but by matter subsequent. Co. Lit. 206. a. (c) If the condition be, that the feoffee, before such a day, shall re-

infeoff the feoffor, and before the day the feoffee die, his estate is absolute, because when the condition becomes impossible by the act of God, within the time limited by the mutual agreement of the parties, the feoffee is discharged; but *quære* of this case, for by the express intent of the feoffment, the feoffee is but an instrument to re-convey the land of the feoffor. *Vide* Co. Lit. 219. a.

If the condition of a bond be impossible at the time of the making thereof, as for the obligor to go to *Rome* the next day, Co. Lit. 206. the

the bond is single, for it is the same as if there were no condition at all.

Co. Lit. 206. a.

(a) Where the condition of a bond was to settle certain lands in such

a manor by such a day, and the obligor died before the day; though the bond was saved at law, yet Chancery decreed an execution *in specie*. Eq. Abr. 18.

(O) Of the Breach of the Condition : And herein,

1. *What shall be a Breach thereof.*

Hob. 24.

IF a man makes a deed of feoffment of lands in several counties, upon condition the feoffee shall re infeoff him of all the land within twenty days after the date, if livery is made but of part within the twenty days, the condition is not broken, though all is not conveyed within the twenty days, according to the letter of the condition, which is entire.

Roll. Abr. 427.

Curtis and Marsh. And. 42. 90. S. C. Moor, 425.

S. C. adjudged, that the first grant was a breach of the

condition, because every division and severance of the house and land is within the words and intent of the condition.

If a man leases an house and land, upon condition that the lessee shall not parcel out the land, nor any part thereof, from the house, and after the lessee leases the house and part of the land to *A.* and after leases the residue of the land to *C.* this is a breach of the condition; for by the word *parcelling*, is intended a division or separation of the land from the house; and if the first grant be not a forfeiture, the second is.

Roll. Abr. 427. adjudged.

If a lessee of a house covenants not to lease the shop, yard, or other thing belonging to the house, to one who sells coals, nor that he himself will sell coals there, and after he leases all the house to one who sells coals, he hath broken the condition.

Moor, 823.

If a man makes a feoffment in fee of lands in five counties, upon condition to re-assure; if the re-assurance is made of the lands in four counties, but not in the fifth, the condition is broken for the lands in that county only.

Lit. Rep. 94.

105. 128.

King *Henry VIII.* granted lands to *A.* and his heirs, provided that he and they *perpetuis futuris temporibus invenirent & sustinerent duos capellanos in ecclesia parochiali de W. ad orandum pro anima* H. 8. his heirs and successors, & *ad celebrandum divina servitia & curam animarum parochianorum*; and *A.* conveyed the lands to *B.* and his heirs, who appointed two chaplains, one of which was not resident, but neglected his duty: this is a breach, for the estate was tied with the condition, into whose hands soever it came, and *B.* ought not only to have found chaplains, but also to have taken care that they had been such as would have done their duty.

2 Jones, 195.

Nash and Ashton adjudged.

If two men, upon sale of their wives' lands, covenant that they and their wives have good right to convey lands, and to make further assurance; if one of the women is under age, this is

is a breach, for she hath not power to convey the estate according to the covenant.

If a man leases for life, upon condition that the lessee shall not do any waste, and after the lessee suffers the house to fall for want of covering and reparation, which is not any act of doing, but a permission; yet it seems that the condition is broken, for the words are, *any waste*, and such waste is within the statute of *Gloucester*, which speaks of doing waste; and it seems, that the permission of the house to fall may properly be called doing waste.

Roll. Abr. 428.
2 Inst. 145.
Owen, 92.
S. P. adjudged.

But, if a man lease land, upon condition that the lessee shall not do waste, and after a (a) stranger do waste, yet this is not any forfeiture, because a condition shall be taken strictly.

Roll. Abr. 428.
Baspoole and Long, adjudged by

three judges. Leon. 64. S. P. 4 Leon. 39. S. P. (a) So, if the condition of an obligation, be that I shall not continue such an action, and my attorney, without my privity, continues it, this is no breach. Cro. Ja. 525. *per Doddridge* and *Houghton*. 2 Roll. Rep. 63. By *Montague* and *Houghton*, *cont. Doddridge*, who said, the act of my attorney is my own act.

If a man makes a feoffment in fee, reserving rent, upon condition if the rent be behind, and no distress be found upon the premises, to re-enter; if the rent be behind, and no distress but a cupboard in a house locked, so that the feoffor cannot come at it; this is a forfeiture; for when the place is not open to the distress, it is all one as if there had been no distress there.

Roll. Abr. 428.
adjudged upon a special verdict.

A. made a feoffment in fee to the use of himself and his heirs, and 21 H. 8. devised the use to B. his younger son, and the heirs male of his body, remainder to C. his eldest son in fee, provided B. or any of his issue should not discontinue or (b) alien, but only to make a jointure for a wife; and B. after the statute of 27 H. 8. c. 10., leased for three lives, pursuant to the statute of 32 H. 8. c. 28., and after levied a fine *sur conuzance de droit come ceo*, &c., with proclamations, to the use of himself and his wife, and the heirs male of their two bodies, the remainder to himself in tail male, the remainder to the right heir of A.; this was a breach of the condition, for he might have made an indefeasible jointure by fine *sur grant & render*; but by this fine the tail created by the devise is docked; and if he had issue by a former wife, they should not inherit.

Leon. 298.
Rudiard and Miller adjudged, tho' it was averred this fine was levied to make a jointure to his wife. Sav. 76, 77. S. C. adjudged, because other uses are limited by the fine than what were before, *viz.* the fee is limited to the

heirs of A., whereas it was before limited to C. (b) What shall be said an alienation. 2 Leon. 82. 3 Leon. 182.

If there be lessee for years, upon condition not to devise it to any body but only to his sons or daughters, and he devise it to (c) a stranger, and die, and his executor never consent to the devise; yet (d) this is a forfeiture; because he hath (e) done all (f) that was in his power to pass it by the will, and hath put it in the power of his executor to execute it.

Roll. Abr. 428.
Cro. Ja. 74, 75.
S. C. and S. P. by three judges against one.

(c) So, if he devises it to his executors, and

they accept the same only as executors. 3 Leon. 67. 4 Leon. 5. — So, if he devises it to his executors for payment of debts. Roll. Abr. 428, 429. (d) A woman covenants not to do any act to discontinue or countermand an action, and after she marries, *per quod*, &c. this is a breach. Goulds. 59. (e) Q. If extended upon a judgment or recognizance against him

And.

And. 124. 3 Leon. 3. (*f*) *Secus*, if he devises it, if the lessor will assent; for there nothing passes till the assent of the lessor obtained. Cro. Eliz. 60.

Roll. Abr. 429. If lessee for years, (*a*) upon condition not to alien without the assent of the lessor, makes his executor, and (*b*) devises it to him, and the executor enters generally, the testator not being indebted to any body, this is a forfeiture of the condition.

a devise is no breach of such covenant. (*b*) Where a devise shall be a breach of a condition not to alien. Dyer, 45. b. Taunton's case. Owen 14. Cro. Eliz. 330. Goulds. 49. 184. Poph. 106. and *vide* Cro. Eliz. 60. So, where the condition is, that the lessee shall not alien during his life, and he devises it, for the devisee shall be said to be in by assignment made by the deviser in his life-time. Dyer, 45. 4 Co. 119.

Roll. Abr. 429. If there be a grantee of a reversion upon condition not to grant it over to *J. S.* by his deed, and he grant the reversion to *J. S.* by his deed; though the lessee never attorns, yet this is a forfeiture, because he hath done his endeavour to grant it, and put it in the power of a stranger to perfect it.

Hob. 304. If the condition of an obligation be, that he shall not be aiding and assisting to *E.* in any action to be prosecuted against *L.* the obligee, and after the obligor joins in a writ of error with *E.*, and another against *L.*, upon a judgment in trespass against them three, which is apparently erroneous; this is not any breach of the condition, for this is not properly an action, but a suit to discharge himself of a tortious judgment, in which they ought all to join.

8 Co. 91. If a man devises lands, upon condition that if he does not (*c*) permit the executors of *F.* to take the goods that then were in the house, the estate should be void, &c.; (*d*) a denial by parol is not any breach of the *proviso*, but it ought to be an act done, as shutting the door against the executors, or laying his hands on them to resist them, or such like acts; so that by reason of any such act he did not permit them to take or carry the said goods according to the *proviso*.

coming upon the land with staves, and prohibiting the obligee by word, was adjudged a breach. Anders. 131. (*d*) Jones, 169. and *vide* Roll. Abr. 434. pl. 12. Bulst. 139.

Leon. 92. If *A.* leases lands to *B.* for years, and devisees it to his wife as long as she continues a widow, and if she marries, that her son shall have it; and *B.* dies; and *A.* by (*e*) feoffment conveys the land to the wife, and covenants, that from thence it shall be clearly exonerated *de omnibus prioribus bargainis, &c. & aliis oneribus quibuscunque*, and after the wife marries, and the son enters; this is a breach; for the term not being extinct by the acceptance of the feoffment, the land continues charged with this (*f*) possibility.

(*f*) Tenant in tail of rent, purchases the land out of which it issues, and makes a feoffment thereof, and covenants that it is free from all former incumbrances; this is a charge, though not *in esse*, but in suspense; for if tenant in tail dies, his issue may distrain, and then the covenant is broken. Owen, 7. But *vide* Co. Lit. 389. a.

Co. Lit. 221, If the party who is bound to perform a condition disables himself, this is a breach; as, where the condition is, that the feoffee shall

shall re-enfeoff or make a gift in tail, &c. to the feoffor, and the feoffee, before he performs it, makes a feoffment or gift in tail, or lease for life or years *in presenti* or *futuro* to another person, or marries or grants (a) a rent-charge, or is bound in a statute of recognizance, or becomes professed; in all these cases the condition is broken, for the feoffee has either disabled himself to make any estate, or to make it in the same plight or freedom in which he received it, and being once disabled he is ever disabled, though his wife should die, or the rent, &c. should be discharged, or he should be deranged, &c. before the time of the re-conveyance.

Roll. Abr. 447.
5 Co. 21. a.
(a) Though the grantee brings a writ of annuity by which the land is discharged *ab initio*. Co. Lit. 222. a.

But, if feoffee, upon condition to re-enfeoff, is disseised, and after takes (b) wife, or binds himself in a statute, &c.; this is no disability, for that during the disseisin the land is not charged with it; so that if the wife die, or the conuzee release, &c., and after the disseisee enters, he may perform the condition.

Co. Lit. 222. a.
2 Co. 59. b.
S.P. (b) A feme sole enters into a bond, conditioned that

she should from time to time, and at all times, upon request do all such acts for the assuring of lands, &c. at the charge of the obligee, and after marries; and whether this was a breach, Hard. 463. *dubitatur*. It was said, that by the marriage, her husband had a possibility of being tenant by the curtesy, and that now an assurance could not be made without fine, and so the obligee must be at a greater charge than intended.

If there be feoffee upon condition to re-enfeoff, or to infeoff a stranger, and after another recover the land against him by (c) default, yet till execution sued the condition is not broken, as before execution he is not disabled, for perhaps he will never sue execution; and if he sue execution after he has made the feoffment, according to the condition, the feoffor may re-enter for the condition broken.

Roll. Abr. 447.
S.P. Bro.
Condition. 26.
(c) *Secus*, if upon a feigned title. Co. Lit. 222. b.

If a man makes a feoffment upon condition, if the feoffor or his heir pay money before a certain day, &c., and the feoffor is (d) attainted of treason, and executed before the day, yet if his heir is restored before the day, he may perform the condition, for that the condition may be performed at any time before the day.

Co. Lit. 221. a.
(d) So, if the feoffor enters into religion, and before the day is de-raigned. Co. Lit. 221. b.

If A. leases to B. for twenty-one years, and covenants at any time during the life of B., (e) upon surrender of the old lease, to make a new lease, and after A. leases to a stranger, he hath disabled himself and broken his covenant.

5 Co. 20. 21.
Sir Anthony Scot and Main, adjudged.

Moor, 452. pl. 619. S.C. Cro. Eliz. 450. 479. S.C. adjudged; and after affirmed upon a writ of error. Poph. 109, 110. S.C. adjudged; and said, that admit the lease to the stranger was to begin at a day to come, yet the obligation is presently forfeited. (e) So, if the lessee assign his old lease, he disables himself from taking benefit of the covenant. Bulst. 22.

2 And. 18. S.C.

2. What the Party must do to entitle him to the Advantage thereof; and herein of Notice, Request, Tender, and Refusal.

If a lease be made reserving rent, and that for the non-payment the lessor may re-enter, there must be an actual demand made previous to the entry, otherwise it is tortious; because such condition of re-entry is in derogation of the grant; and the estate

Co. Lit. 201.
b. 202. a.
Hob. 207.
5 Co. 56.
Dyer, 51.
at Hob. 331.

Plow. 70.
7 Co. 56.
Vaugh. 32.

at law being once defeated, cannot be restored by any subsequent payment.

Hutt. 42. 114.
Hob. 207. 331.
7 Co. 56. b.

So it is, if there be a *nomine pœnæ* given to the lessor for non-payment, the lessor must demand the rent before he can be entitled to the penalty: or, if the clause be, that if the rent be behind, the estate of the lessee shall cease and be void; in these cases there must be an actual demand made; because the presumption is, that the lessee is attendant on the land to save his penalty and preserve his estate, and therefore shall not be punished without a wilful default; and that cannot be made appear without a demand be proved, and that it was not answered: (a) and the demand in these cases must be made on the land at the very day prefixed for the payment, and it must be alleged expressly to have been so made in the pleading.

(a) 20 H. 6. 30,
31. Roll. Abr.
458. Doe v.
Wandlass,
7 T. Rep. 117.

Hob. 207.
Hutt. 13. 23,
2 Roll. Abr.
426. Moor,
883.

But, where the remedy for recovery of the rent is by distress, there needs no demand previous to the distress, though the deed says, that if the rent be behind, *being lawfully demanded*, the lessor may distrain; but the lessor, notwithstanding such clause, may distrain when the rent becomes due. So it is, if a rent-charge be granted to A., and if it be behind, *being lawfully demanded*, that then A. shall distrain, he may distrain without any previous demand; because this remedy is not in destruction of the estate, for the distress is only a pledge for the payment of it, and the very taking of the distress is a legal demand.

(b) Plow. 70.
Kidwelly's
case. (c) 4 Co.
73. Moor, 408.
Cro. El. 415.
435. 536.

Where the remedy for non-payment of rent was by way of entry, it was (b) formerly holden, that if the rent was made payable at any place off the land, no demand was necessary; because the money being to be paid off the land, was looked upon as a sum in gross, which the tenant had at his own peril undertaken to pay: but (c) this opinion hath been entirely exploded: for the place of payment doth not change or alter the nature of the service, but it remains in its nature a rent, as much as if it had been made payable upon the land.

Dyer, 686.

But, where the power of re-entry is given to the lessor for non-payment, without any further demand, there it seems that the lessee hath undertaken to pay it, whether it be demanded or not; and there can be no presumption in his favour in this case, because by dispensing with the demand, he hath put himself under the necessity of making an actual proof that he was ready to tender and pay the rent.

Vaugh. 31, 32.

Also, as to the necessity of a demand of the rent, there is a difference between a condition and a limitation: for instance, if tenant for life (as the case was by marriage-settlement, with power to make leases for twenty-one years, so long as the lessee, his executors or assigns, should duly pay the rent reserved) makes a lease pursuant to the power, the tenant is at his peril obliged to pay the rent without any demand of the lessor; because the estate is limited to continue only so long as the rent is paid; and therefore, for the non-performance according to the limitation, the estate must determine.

If *A.* levies a fine of lands to *B.* to the uses of a certain indenture, in which is contained this proviso, that if *A.* pays or tenders 20*l.* during his life, at the font-stone in the church of *S.* to *B.*, that then it should be to the use of *A.* in fee; a tender of the said sum at the said place is void, if he (*a*) gives not notice to *B.*, that he or his deputy may be there to receive it, (*b*) because no day certain was appointed.

8 Co. 92. S. C. cited. 2 Bulst. 144. S. C. cited. (*a*) But, if at any time he meets him at the place, he may tender the money. Co. Lit. 211. Cro. Eliz. 14. (*b*) Yelv. 37. Cro. Ja. 9, 10. Co. Lit. 211. a. Cro. Eliz. 298. 13 Co. 2. Like point; and *vide* Roll. Rep. 373.

Roll. Abr. 449. adjudged by three justices. Moor, 602. Like point certified by the judges to the Chancellor for law.

If *A.* is bound to *B.*, upon condition that *C.* shall enfeoff *D.* on such a day, *C.* must seek *D.* and give him notice thereof, and request him to be upon the land at the day, to receive the feoffment.

Co. Lit. 211. a.

If *A.* leases his lands for forty years, rendering rent, and devises the reversion to *J. S.* in tail, &c. provided that *B.* and his wife shall have the rent to their own use till *J. S.* comes of age, upon condition that *B.* and his wife, within three months after his death, enter into a bond to his overseers for the payment of 34*l.* *per annum*, in such penalty as his overseers shall advise; and *A.* dies, *B.* and his wife must give notice of this to the overseers, and at their peril procure them to advise, &c.

Winch. 26. Trehern and Claybrook.

A. made a deed of feoffment of lands in several counties, dated the 15th of October, 4 Mar., upon condition the feoffee should re-enfeoff him of all the lands within twenty days after the date of that deed; and yet because *A.* made his feoffment but of part, within the twenty days, it was holden, the condition was not broken, though all was not re-conveyed within the twenty days, according to the letter of the condition, which is entire; for it was the fault of *A.* it was not conveyed, without which it could not be re-conveyed.

Hob. 24. cited to have been resolved 26 Eliz.

If *A.* leases to *B.* for twenty-one years, and covenants at any time during the life of *B.* upon surrender of the old lease, to make a new lease for the residue of the term; and after *A.* leases to a stranger; though *B.* by the words of the indenture ought to do the first act, *viz.* make a surrender, yet because *A.* hath disabled himself to make a new lease, *B.* shall not be obliged to surrender his old lease without possibility of a new lease, but may bring covenant, without making any surrender.

5 Co. 20, 21. adjudged. Moor, 452. S. C. adjudged that covenant lay without making any request, tho' by the covenant the new lease was to be

made upon request. Cro. Eliz. 450. Poph. 109. S. C. adjudged.

So, if a man covenants to enfeoff *J. S.* upon request, and after enfeoffs another, *J. S.* may have covenant, without making any request.

5 Co. 52. resolved *per Cur.*

If the condition of an obligation be (*c*) to levy a fine to the obligee, he is not (*d*) bound to levy it if the obligee (*e*) does not sue a writ of covenant against him.

18 E. 3. 27. Roll. Abr. 458. 5 Co. 21. and *vide* Roll. Abr.

422. S. P. cont. (*c*) So, if the condition be, that a stranger shall levy a fine to the obligee Hutt 48. Winch. 30. — So, if the condition be to acknowledge a judgment to *J. S.* he must sue out an original. Winch. 30. Hutt. 48. (*d*) Where the obligor or covenantor hath disabled himself, the obligee, &c. may bring an action without, &c. 5 Co. 21. Moor, 452. Cro. Eliz. 450, 479. Poph. 109. (*e*) Where the condition is to pay all costs that shall be stated

stated by two arbitrators, by the obligor and obligee to be chosen; the obligee must choose an arbitrator before he can shew any fault in the obligor. Vent. 71.

Lev. 93. Ofes and Thornhill, adjudged, it not appearing the obligor was a sempstress or such a person as used to make linen and find the materials. (a) As if a tailor is bound, or promises to make a suit of clothes for me, I ought to deliver him the cloth because it is usual, and not for him to provide it. Lev. 93. *per Curiam*. — But, if a shoe-maker is bound to make me a pair of shoes, he is also bound to find the leather, because that is usual. 1 Lev. 93. *per Cur*.

Roll. Abr. 461. Lane, 78. (b) But, if a man devises lands to his wife for life, so long as she shall be effectually ready to demise it to his heir at 50*l.* paid yearly, when she shall not dwell on it herself; yet if she goes and lives at another place, the condition is not broken without a tender and refusal to lease. Moor, 626. pl. 860.

Poph. 102. If *A.* conveys lands to *B.* in tail, upon condition that *B.*, and the heirs of his body, shall pay to the daughter of *A.* 200*l.*, or so much thereof as shall be unpaid at the death of *A.*, according to the intent of the will of *A.*, and after *A.* by will devises to his daughter 200*l.*, viz. 100*l.* to be paid that day twelve-month next after his death, and the other 100*l.* that day twelve-month next after, &c., and dies; *B.* is not bound to pay the 200*l.* without demand; for the payment, by the indenture, is referred to be according to the will, and the 200*l.* was devised as a legacy, which ought to be paid upon demand, and not at the peril of the executor; and therefore the nature of the payment is altered by the will.

3. What shall be a Dispensation therewith.

Co. Lit. 52. b. Roll. Abr. 453. If a lease for years be made upon condition not to alien without licence, and after the lessor licence the lessee to alien, and die before any alienation, yet the lessee may alien; for the death of the lessor is not any countermand; for this was executed on the part of the lessor as much as it could be.

Roll. Abr. 471. 4 Co. 120. a. So, if a man leases land upon condition that the lessee shall not alien the land, nor any part thereof, and after he aliens part, with the assent of the lessor, he may after alien the residue without his assent; for all the condition is gone by this; for it cannot be divided or apportioned.

4 Co. 120. a. Noy, 32. Cro. El. 816. Roll. Abr. 471. So, if *A.* leases land to three, upon condition, that they, or any of them, shall not alien without licence of the lessor, and afterwards one aliens with his assent; this discharges all the condition as to the other two.

If (a) lessee for years hath execution by *elegit* of a moiety of the rent and reversion against the lessor, where the lease is upon condition, this is a suspension of all the condition during the time of the extent; and though but a moiety of the rent is extended, yet the entire condition is suspended.

Moor, 22. pl.
75. adjudged.
(a) So, if a stranger hath execution by *elegit*.

Moor, 71. pl.
193. Dals. 72. Moor, 91. and *vide* 4 Leon. 28.

If a man makes a feoffment in fee upon condition to re-enfeoff, and the feoffor after disseises the feoffee, and leases for years, this is a dispensation with the condition during the term.

2 Co. 59. adjudged.

If a man leases for years, upon condition to be performed on the part of the lessor, and before the time of the performance of the condition he leases to a stranger for years, by indenture, the condition is not suspended or destroyed, but may be performed notwithstanding; for it is an estoppel only between the lessor and the second lessee.

Cro. Eliz. 665.
Owen, 116.
S. C.

But, if a man makes a feoffment upon such condition, and after levies a fine to a stranger, the condition is gone.

Cro. Eliz. 665.
per Cur.

If a condition be to recover certain land of *J. S.* and thereof to enfeoff another who is party to the obligation; if he to whom the feoffment is to be made, accept a feoffment of the land before any recovery had by the other, he hath dispensed with the condition.

Roll. Abr. 453.

4. *How far he, who enters for a Condition broken, shall be reinstated in his former estate.*

It is laid down as a rule, that he who (b) enters for a condition broken, shall be in the same (c) estate he was before; and therefore shall avoid all mesne charges and incumbrances.

Co. Lit. 202.
Roll. Abr. 474.
same rule.

(b) He that will take advantage of a condition, must enter if he can; if he cannot, he must claim; for a freehold, whether it lie in grant or livery, cannot cease by condition without entry or claim, though the words are, *proviso that if he do not pay, &c. that then the estate shall cease and be void*, whether the conveyance were by feoffment, bargain and sale, or devise, &c. (c) A remainder is granted upon condition, and after the particular estate determines, and the condition is broken, the grantor shall have the land in possession. A condition or limitation annexed to an estate ought to destroy the whole estate.

Co. Lit. 202.
Roll. Abr. 474.
same rule.
(b) He that
will take advantage of a condition, must enter if he can; if he cannot, he must claim; for a freehold, whether it lie in grant or livery, cannot cease by condition without entry or claim, though the words are, *proviso that if he do not pay, &c. that then the estate shall cease and be void*, whether the conveyance were by feoffment, bargain and sale, or devise, &c. Co. Lit. 218.
(c) A remainder is granted upon condition, and after the particular estate determines, and the condition is broken, the grantor shall have the land in possession. 2 Roll. Rep. 60. —
A condition or limitation annexed to an estate ought to destroy the whole estate. 1 Co. 86. b. 6 Co. 40. b.

As, if a feoffment is made to *A.* upon condition for the non-payment of certain rent to re-enter, and *A.* dies, leaving a wife; after which the condition is broken by the heir of *A.*; the feoffor shall re-enter, and defeat the title of dower that accrued to the wife of the feoffee.

22 E. 3. 19.
Fitz. Condition, 12. S. C.
Roll. Abr. 474.

If a man makes a feoffment, gift or lease, reserving rent, with a condition that, if the rent be behind, it shall be lawful for the feoffor, &c. and his heirs into the land to re-enter; in these cases, if the rent be not paid according to the deed, the feoffor or lessor may enter into the lands, and hold them in his former estate, because the feoffment or lease was not absolute, but defeasible by the non-performance of the condition.

Lit. § 325.
Co. Lit. 201,
202.

But, where a feoffment is made of land, reserving rent, upon condition that, if the rent be behind, it shall be lawful for the feoffor

Lit. § 327.

feoffor and his heirs to enter and hold the land, and take the profits till he be satisfied and paid the rent behind; this is not a condition absolutely to defeat the estate; but the feoffor in this case shall, upon his entry, only hold the land as a pledge, or in the nature of a distress, till the rent be paid him, and the profits shall not go into the account of the rent, but shall be applied to his own use, that by such perception the tenant may be obliged the sooner to pay the arrears of rent.

Co. Lit. 203.

But, if the condition had been, that, if the rent be behind, the lessor shall re-enter, and take the profits thereof until he be satisfied; there the profits shall go into the account of the rent; and consequently, when the profits received are equivalent to the arrear of rent, the lessee may re-enter, and hold it under the former lease.

Cro. Ja. 5 II.
Co. Lit. 203.

And though part of the rent be paid him before re-entry, yet if the whole be not satisfied he may enter for any part that is arrear; because the condition is to enforce the payment of the whole rent; and therefore he may take advantage for non-payment of any part thereof.

Roll. Abr. 474.

Lessee for life and the reversioner join in a feoffment upon condition reserved to the lessee; if he enter for breach thereof, this shall not defeat the entire estate.

Co. Lit. 202. a.
336. b. 8 Co.

44. a. S. P.

(a) So, if a man seised of lands as heir on the part of his mother, makes a feoffment in fee upon condition, and

If a man seised of lands in right of his wife, makes a feoffment in fee upon condition, and dies; and after the condition is broken, and the heir of the feoffor enters (a), it is impossible he should have the same estate which the feoffor had at the time of the condition made; for that was in the right of his wife, which was dissolved with the coverture, and therefore when the heir hath entered for the condition broken, and defeated the feoffment, his estate vanisheth, and presently the estate is vested in the wife.

dies; the heir on the part of the father, who is heir at common law, shall enter for the condition broken; but the heir on the part of the mother shall enter upon him, and enjoy the land. Co. Lit. 12. b.

Co. Lit. 202. a.
1 Co. 133. b.
S. P.

If *cestui que use* after the statute of 1 R. 3. c. 1. and before the statute 27 H. 8. c. 10. had made a feoffment in fee upon condition, and had after entered for the condition broken, though at the time of the condition made he had but a bare use, yet by his feoffment the whole estate and right being divested out of the feoffees, he should have been seised of the whole estate in the land.

Co. Lit. 202. a.

Tenant in special tail hath issue; his wife dies, and he makes a feoffment in fee upon condition; the issue dies; the condition is broken; the feoffor re-enters; he shall be only tenant in tail after possibility of issue extinct, though when he made a feoffment he had an estate-tail.

Co. Lit. 224. a.

If a man makes a gift in tail to A., the remainder to A. and his heirs, upon condition that he shall not alien; the condition is good, so as to restrain any discontinuance of the estate-tail, but as to the fee-simple it is void and repugnant; and therefore some

are

are of opinion that this is a good condition, and that it shall defeat the alienation (a) for the estate-tail only, and leave a fee-simple in the alienee.

(a) By special words the condition may extend to the

particular estate, or to the remainder only. Co. Lit. 230. b.

If the father surrenders copyhold lands to the use of the son in fee, upon condition that he shall perform certain covenants, and the son after admittance surrenders to the use of A. in fee, upon condition that if the son pays ten pounds the surrender shall be void; and the son pays not the 10*l.*, nor performs the covenants, and the father enters, and dies seised, and the lands descend to the son, yet A. cannot enter upon him; for by the entry of the father both the surrenders were defeated, and the son may confess and avoid the estate of A.

Cro. Eliz. 239. adjudged.

A man being entitled to be tenant by the curtesy, makes a feoffment in fee upon condition, and enters for the condition broken, and then his wife dies; he shall not be tenant by the curtesy; for though the estate given by the feoffment was conditional, yet his title to be tenant by the curtesy was absolutely extinct by the feoffment.

Co. Lit. 30. b.

Tenant by homage ancestrel makes a feoffment in fee upon condition, and enters for the condition broken: it shall not be holden by homage ancestrel again, for the right of the prescription and privity of estate were interrupted for the time: so, (b) if a copyhold escheats (c), and the lord makes a feoffment in fee upon condition.

Co. Lit. 202. a. b. (b) Co. Lit. 103. a. 202. b. (c) For notwithstanding the entry for the condition broken, the

seignory is extinct, for that was exclusively extinct by the feoffment. Co. Lit. 30. b.

If tenant for life makes a feoffment in fee upon condition, and enters for the condition broken, he shall be tenant for life again, but subject to the forfeiture; for though the estate is reduced, yet the forfeiture is not purged.

Co. Lit. 202. 252. a. Roll. Abr. 856.

If the conuzee of a statute, &c., or he that hath lands till such a sum levied, surrenders to the reversioner upon condition, and after enters for the condition broken, and performs the first condition, he shall not hold over after the extent incurred, or such time as the money might have been levied.

4 Co. 82. 2 Roll. Abr. 479.

If lessee for life or years, upon condition to have a fee if, &c. grants his estate upon condition, and after enters for the condition broken, and performs the first condition, perhaps the fee will accrue, for the possibility was not absolutely destroyed; and when he enters for the condition broken, he is in of his old estate.

8 Co. 75. b.

If a man makes a feoffment in fee of a manor upon condition, and the feoffee grants estates by copy, and then the condition is broken, yet the grants by copy shall stand good, for he was *legitimus dominus pro tempore*, and the copyholder doth not claim his estate out of the lord's, but by custom; and if the grants were made after the condition broken, yet it is all one, for till entry the feoffee hath a lawful estate, and the feoffor may waive the advantage of the condition broken. But, if a lease be made of

Dyer, 344. a. 4 Co. 24. a. Co. Cop. 82. 88.

a ma-

a manor for years, on condition to be void upon the breach of a certain condition, and the condition is broken, no voluntary grants made afterwards shall bind the lessor, because the estate of the lessee is void; but, if it were for life, &c., then the grants were good.

(P) Of performing the Condition: And herein,

1. *What Persons may perform the Condition.*

Lit. § 337.

Co. Lit. 208. a.

IF a man makes a feoffment in fee, upon condition to be void if the feoffor pays a certain sum of money to the feoffee, and the feoffor dies before payment, his heir cannot pay it, because the time of payment is past; for the condition being general, if the feoffor pays, &c., it is as much as to say, if the feoffor during his life pays.

Lit. § 337. Co.

Lit. 208. b.

209. a. (a) So

may his exe-

cutors or administrators,

because they represent the person of their testator.

Lit. § 337.

Co. Lit. 208, 209. a.

But, when a day of payment is limited, and the feoffor dies before the day, his (a) heir may tender the money, because the time of payment was not past by the death of the feoffor.

Eq. Abr. 106.

107. Marks

and Marks.

1 Str. 129.

S.C.

(b) Though a condition in strictness of law, is not devisable, yet, since the statute of *Uses*, the devisee may take benefit of it by an equitable construction; and in this case *B.* might have released or extinguished the condition. Eq. Abr. 107. per Lord Chancellor.

J. S. having issue three sons, *A.*, *B.*, and *C.*; *A.* dying in his life-time, having issue only a daughter; *J. S.* devised certain lands to his wife for life, and after her death to his son *C.* and his heirs; provided that if *B.* do, within three months after the death of my wife, pay to *C.*, his executors or administrators, the sum of 500*l.*, then the said lands shall come to my son *B.* and his heirs; the wife lived several years, and during her life *B.* died, leaving *J. D.* his heir, who not being heir at law to the testator, the question was, Whether he could now, after the death of the wife, perform the condition? And though it was objected, that this being a condition precedent, and merely personal in *B.*, who had neither *jus in re*, nor *ad rem*, and could (b) not therefore devise, release, or extinguish the condition, and, consequently, that his heir could not perform it after his death; yet it was holden, and so decreed, that the possibility of performing this condition was an interest or right, or *scintilla juris*, which vested in *B.* himself, and, consequently, such right, possibility or interest descended on his heir, and, according to *Littleton supra*, may be performed by him.

Co. Lit. 219.

b. (c) So, if

C. dies before

the day, *A.*

may pay it.

Co. Lit. 219.

If *A.* mortgages his lands to *B.*, upon condition that if *A.* and *C.* pays 20*s.* at a day to *B.*, that then he shall re-enter; (c) *A.* dies before the day, *C.* may pay the money, &c., and yet the letter of the condition is not performed.

Co. Lit. 219. b.

But, if *A.* had been living at the day, and would not have paid the money, but had refused to pay it, and *C.* had tendered it, *B.* might have refused it.

Roll. Abr. 420.

The court di-

vided, viz.

If *A.* and *B.* levy a fine to the use of *A.* in fee, if *B.* does not pay 10*s.* at *Michaelmas* after, and that if he doth then pay the

the said 10s. that then it shall be to the use of *A.* for life, and after to *B.* in fee, and after *B.* dies before *Mich.*; it seems the heir of *B.* may pay the 10s., for this is not more personal, being the payment of money, than in the case of *Littleton* upon a mortgage.

Croke and *Jones*, that it was personal; but *Brampston* and *Berkley* cont. *Jones*, 390. S. C. and

the Court divided accordingly. *Winch.* 103, 104. 116. 118, 119. with the arguments at large, but no judgment; and *vide* Co. Lit. 205. that the heir may perform it. [After covenant to stand seised to the use of *B.* and his heirs, with proviso of revocation on payment to *B.* and his assigns; *B.* dies; he may tender to the heir, and revoke. *Allen's* case, *Ley.* 55. b. *Hal.* MSS.]

If a man devises land to his daughter at her age of eighteen years, and that his wife shall take the profits to her own use till his daughter comes to eighteen, provided she keep and bring up his daughter at school, &c., and dies; and the wife marries again, and dies; the interest in the lands accrues to the husband; for the keeping and education of the child is not of such particular privity, but it may be effectually performed by another.

Hob. 285. adjudged. *Hutton*, 36. S. C. adjudged.

If two are enfeoffed to re-enfeoff, if one refuses to re-enfeoff, the other cannot perform the condition by a feoffment of the whole.

49. E. 3. 16. b. *Roll.* Abr. 421. S. C.

If the condition of an obligation be to pay a less sum; if (a) my servant, by my command, tenders it to the obligee, this is sufficient.

2 H. 6. 3. b. *Roll.* Abr. 421. S. C.

(a) So, if a stranger tenders for and by the assent of an infant above fourteen. *Moor*, 222. pl. 137. *per Curiam*.

(a) So, if a

If a man makes a feoffment in fee by way of mortgage, upon condition to be void upon payment of money by the feoffor at a day, if a stranger of his own head tenders the money, the feoffee is not bound to receive it.

Lit. §. 334. *Watkin* and *Astwick*, S. P. tho' tendered for an infant. *Leon.* 34.

agreed *per Curiam*. *Moor*, 222. pl. 3. 61. admitted *per Curiam*. *Cro.* *Eliz.* 132. said by *Coke* to be adjourned. *Owen*, 34. S. P. *per Coke*.

But, if the feoffee accepteth it, this is a good satisfaction, and the mortgagor or his heirs, agreeing thereto afterwards, may re-enter; but the mortgagor may disagree thereto if he will.

Co. Lit. 206. b. 207. a.

Guardian (b) in socage, or by knight-service, may upon such mortgage tender money in the name of the (c) heir.

(b) Co. Lit. 206. b. *Watkin* and

Astwick, S. P. 1 *Leon.* 34. agreed *per Curiam*; but it being found that the tender was made by his mother, and that he was within age generally, it was presumed he was above fourteen, and out of her custody. *Owen*, 137. agreed, but found as before, *Moor*, 222. pl. 361. admitted *per Curiam*; but found the mother was not guardian in socage. *Owen*, 34. S. C. cited to have been adjudged, that the tender of the mother was not good, because it did not appear within the verdict of what age the infant was. (c) But, if the heir be an idiot, a stranger of his own head may tender the money for him. Co. Lit. 206. b.

If *A.* enfeoffs *B.*, upon condition that *B.* shall pay money at a day, and *B.* before the day enfeoffs *C.*, now *C.* hath an interest in the condition, and may tender the money at the day for the safeguard of his estate.

Lit. §. 336. Co. Lit. 207. b. 5 Co. 96. b. S. P. cited.

And so also may *B.*, being party and privy to the condition.

Lit. §. 336. Co. Lit. 207. b.

2. *To whom the Condition is to be performed.*

Co. Lit. 210. If a man bargains and sells lands with a *proviso*, that, if the
 Dyer, 180, *vendor*, before such a day, pay so much money to the *vendee*, his
 181. 5 Co. 96. heirs or assigns, the sale shall be void; the *vendee* before the
 day makes his executors, and dies, and the *vendor* tenders the
 money to the executors, this is not good, because the word
assigns must be understood to be assigns of the land in its pri-
 mary and original signification; and where there is an express
 provision to whom the tender and payment is to be made, the
 executor is excluded; for *expressum facit cessare tacitum*.

Co. Lit. 210. But, if a man makes a feoffment in fee, upon condition that
 5 Co. 96, 97. the *feoffee* shall pay 20*l.* to the *feoffor*, his heirs or assigns, here
 the primary signification of the word *assigns* fails, because there
 can be no assignment of the land of which he hath enfeoffed an-
 other; and since the original sense of the word fails, lest it should
 be wholly insignificant, the secondary sense of the word is to be
 taken, *viz.* the assignees in law, which the executors are *quoad*
 the personal estate; and therefore the payment is good either to
 the executor or heir.

5 Co. 96. Cro. If the condition be to pay the money to the *feoffee*, his heirs or
 Eliz. 384. assigns, and he make a feoffment over, it is in the election of
 Moor, 708. the *feoffor* to pay the money to the first or second *feoffee*, be-
 pl. 989. cause by the words he may pay it either to him or the assignee:
 Gouls. 177. so, if the first *feoffee* dies, in this case he may pay it to his
 Poph. 100. (a) If the con- (a) heir or the assignee for the same reason; nor is he obliged to
 dition be to take notice of the validity of the second feoffment, to which he
 pay to the is a stranger.
feoffee his
 executors or

assigns, and the *feoffee* makes his sons executors, and dies, and administration is committed
 during their minority, it is the safest way to pay the money to the executors, or one of
 them, for the administrator is but a bailiff to them. 3 Leon. 103

Lit. § 339. If a man makes a feoffment in fee by way of mortgage, upon
 Co. Lit. 209. b. condition to be void upon payment of the money by the *feoffor*
 at a day, if the *feoffee* dies before the day, the money shall
 be paid to the executors, and not to the heirs of the *feoffee*, be-
 cause it shall be intended the estate was made by reason of the
 loan of the money, or for some other duty.

Lit. § 339. But, if the condition be, that if the *feoffor* pays, &c. to the
 Co. Lit. 209. b. *feoffee* or his heirs, if he dies before the day, the payment ought
 5 Co. 97. to be made to his heir, and not to his executors; for *designatio*
 Brownl. 66. *unius est exclusio alterius*.

S. P. adjudged. If the condition of an obligation be to pay 10*l.* per annum,
 Hetl. 115. after the death of the obligee, to the executors of the obligee,
 Lit. Rep. 156. for the use of his children, and he die without making any exe-
 S. C. cutors, the money shall be paid to his administrators.

Cro. Ja. 244. If *A.* pawns a jewel to *B.* for 25*l.*, but no certain time is ap-
 Sir John Rat- pointed for the redemption thereof, and after *B.* being sick, his
 cliff and Davis, wife in his presence, and with his assent, delivers it to *C.*, and
 adjudged. *B.* dies; the money must be paid to the executors of *B.*, and not
 Yelv. 178. S. C. to *C.*, because by the delivery of the fene, with the assent of the
 adjudged; baron, there passed no interest, but a custody only.
 and said, it
 would be so

even if he delivered over upon a consideration; that it was not like a mortgage, for that there he that hath the interest ought to have the money. *Bulst.* 29, 30. S.C. adjudged, though it appears that *B.* wished *C.* to keep it safely, till the money was paid; but by *Fleming*, Ch. Just. it had been otherwise if *C.* had paid the money, &c. *Noy*, 157. S.C.

If the condition be to lease certain lands for three lives to the obligee or his assigns; and after the obligee demand a lease to be made to three strangers for their lives, he ought to make it them accordingly, otherwise the condition is broken; for here, by the word *assigns*, is intended *assigns by nomination*, for he cannot have other assigns, inasmuch as the estate is not assignable before he hath it. *Roll. Abr.* 421. *Roll. Rep.* 373. *3 Bulst.* 168. *Bridg.* 39. S.C. and S.F.

If a man be bound in 20*l.*, upon condition to pay 10*l.* to such person as the obligee shall name by his last will, and after the obligee name no person by his will, the obligor is not bound to pay it to his executors, because the condition hath reference to his nomination. *Roll. Abr.* 421. *Pease and Stileman v. Mead*, Hob. 9. *Godb.* 192. S.C. adjudged; and

per Coke, there is a diversity where the condition is to pay 10*l.* to the assignee of the obligee, and where to the obligee or his assigns; for in the last case, it vests as a duty in the obligee, and shall go to his executors. *Moor*, 855. S.C. adjudged. [The conusee of a fine leases to the conusor for 99 years, with condition, if the lessee pays to the lessor, his heirs and assigns, that the uses limited to the conusee and his heirs, by an indenture, should cease: the lessor dies. *Lord Nottingham* was of opinion, that the uses should not cease by payment to the administrator of the lessor, because he may be an assignee in deed as here. 11th May 1679. *Sir Andrew Young*. *Lord Nottingham's MSS. notes*. — Upon a fine, the use of land was limited to *A.* for 80 years, with a power to *A.* and his assigns to make leases for three lives, to commence after the determination of that term. *A.* assigned over to *B.*; *B.* died, having made his will, and appointed *C.* his executor. *C.* assigned over to *D.*; *D.* in pursuance of the power, made a lease for life. The question was, whether *D.* was such an assignee of *A.* as to have power to make this lease; or, whether it should extend only to the immediate assignees of *A.*? The doubt in this case was the greater, as there had been a descent upon an executor. The case of *Pease and Stileman* was cited, where it was said that an executor or administrator should not, in some cases, be said to be a special assignee. But all the court seemed to incline to the contrary, and that *D.* should be called an assignee well enough for the purpose of making the leases in question, and that so should any person who came to the estate under the first lessee, though there should be twenty mesne assignments. And afterwards, in the *Michachmas* term following, judgment was given accordingly. *Howe v. Whitebanck*, 1 Freem. 476. Co. Lit. 210. a. note 1. 13th edit.]

If *A.* seised in fee by indenture enrolled, covenants with *B.* that if *B.* pays to *A.*, his heirs or assigns 400*l.* at a day, that then *A.* and his heirs shall stand seised to the use of *B.* and his heirs; and *A.* devises to his wife during the minority of his son, and dies; the money shall not be paid to the wife, for she is not assignee; the reversion being in the heirs of *A.* 5 Co. 97. *Leon.* 252.

But, if *A.* had made a lease for life, the remainder to another in fee, the lessor for life had been an assignee. 5 Co. 97.

And it was said that if *A.* had conveyed over his whole estate in part, yet so long as *A.* had any part remaining, the tender ought to be made to him. 5 Co. 97. a.

If the condition of an obligation be to pay 10*l.*, &c., it is a good performance if he pays it to his (a) deputy. 42 E. 3. 13. b. *Roll. Abr.* 421.

(a) A bond was conditioned for the delivery of forty pair of shoes at *Holbourn Bridge*, within a month, to *J. S.* a common carrier, for the use of the obligee, and *J. S.* did not come to *London* within the month, but the obligor delivered them to his porter; and it was adjudged a good performance, for that the delivery to the man was a delivery to the master, within the intent of the condition. 2 Mod. 309.

Moor, 68.

pl. 183.

(2) Where the condition is

to pay money to baron and feme, it may be pleaded to have been paid to the baron only.

Gouls. 73. and *vide* 2 Sid. 41.

If the condition of an obligation is to pay 20*l.* to the obligee, and other the parishioners of *D.*, it (*a*) may be paid to any two of them.

3. *At what Time it may be performed.*

Lit. § 337.

Co. Lit. 208.

If a man makes a feoffment in fee, upon condition that the feoffor, upon payment of such a sum of money to the feoffee without limitation of time, should re-enter, the feoffor hath time during life to pay the money to the feoffee during his life; but, if either die before that time is elapsed, which is set by the parties for the performance of the condition, the feoffment is absolute: but, if the payment were to be made to the feoffee, his heirs or executors, then the feoffor hath time during life.

2 And. 73.

But, if the condition be, that the feoffee shall pay money to the feoffor, it must be paid in convenient time, for it is not reasonable the feoffee should have the benefit of the land without payment.

Co. Lit. 208. b.

6 Co. 30. b.

If the condition of an obligation be to do a local act to the obligee, to which the concurrence of the obligor and obligee is necessary, as to make a feoffment, &c., (no time being limited) the obligor hath time during his life to perform it, if not hastened by request.

Co. Lit. 208. a.

6 Co. 30. b.

Hard. 10. S. C. and S. P. cited.

But, though the condition is local, yet if it may be performed for the benefit of the obligee in his absence, as the acknowledgment of satisfaction upon record, &c., it ought to be done in convenient time.

Co. Lit. 208. a.

209. b.

(b) Which in no manner

concerns the obligee, feoffor, &c. nor is for his benefit.

When by the condition the obligor, feoffor, feoffee, or stranger, is to do a sole (*b*) act or labour, as to go to *Rome*, &c. he shall have time during life, and cannot be hastened by request.

6 Co. 31. a. b. Leon. 125.

Co. Lit. 202.

2 Co. 80. a.

S. C. cited.

The Lord *Clifford* held, &c. *in capite*, and the king licensed him to alien to *B.* and *C.*, so that they should give the same to my Lord *Clifford* and the heirs of his body, the remainder over; and the Lord *Clifford* according to the licence enfeoffed *B.* and *C.*, and before any reconveyance the Lord *Clifford* died; and it was adjudged his heir might enter; for if they should make the estate to the issue of the Lord *Clifford*, the king might seize for want of a licence, and that in default of the feoffees.

6 Co. 31. Co.

Lit. 208.

(c) Roll. Abr. 436. S. C. and

several cases

there cited to this purpose.

When the act, by the condition of an obligation to be done to the obligee, is of its own nature transitory, as payment of money, delivery of charters, and the like, and no time limited, it ought to be performed in (*c*) convenient time.

Roll. Abr. 436.

Cro. Eliz. 798.

So, if the condition of an obligation be to pay a less sum, and no day of payment limited, he ought to pay it presently, *scilicet*, within a convenient time.

If the condition of an obligation be to pay a certain sum to a stranger, without limiting any time, this ought to be done (a) in convenient time. Roll. Abr. 437 (a) So, where the condition was, in convenient time to assure the land for the maintenance of a school, and the devisee did not do it in eight years, Co. 25. b. it was adjudged a breach.

If the condition of an obligation be to pay so much to a stranger such a day; if he pays it before the day, (b) this is a good performance, (c) because payment before contains payment at the day. Roll. Abr. 440. (b) Co. Litt. 212. a. Cro. Car. 284. Cro. Ja. 435. Moor, 367. pl. 502. and vide 2 Sid. 78. (c) And upon *solvit ad diem*, such payment may be given in evidence. Moor, 267. Cro. Eliz. 142. And. 198. Sav. 96. Owen, 45. Dyer, 222. Godb. 10 Moor, 47. adjudged.

[But, after a breach the defendant cannot plead his being ready to pay; as, where in debt on a bond, conditioned to save a parish harmless concerning a bastard child, which the defendant was forced to father, he pleads *non damnificat.*; the plaintiffs reply, that the child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l.*; defendant rejoins that he was ready to repay the money, and save the parish harmless; upon this they demurred and had judgment, because the rejoinder is a departure; for the defendant ought to have taken issue upon the child's being ready to starve; for if the plaintiffs were once at expence about the child, and were actually damnified, the defendant's being ready to pay the money will not save the condition of the bond.] 2 Saund. 80. 1 Sid. 444. 1 Mod. 43. 2 Keb. 612 619. Richards v. Hodges. See 4 Ann. c. 16. § 12.

If a devise be to A., upon condition that he pays the debts of the testator, he must pay them in a convenient time, otherwise the condition is broken; but, where lands are devised to be sold for that purpose, the devisee is not obliged to pay the debts before he can find a purchaser for the lands. Roll. Abr. 437.

If A. conveys a manor, to which an advowson is appendant, to J. S. in fee, upon condition that J. S. shall re-grant the advowson to A. for his life, and if it happens not to be void in his life, then one turn to his executors; though in this case J. S. hath all his life to regrant it, if he be not hastened by request, and the church do not become void in the mean time, yet if the church become void during his life, before any request, the condition is broken, because the feoffee cannot have all the effect which was intended him by the regrant, which was to have all the presentations during his life. 2 Co. 78. Lord Cromwell's case. 2 And. 69. Moor, 472. S. C. Co. Lit 222. And. 17 Moor, 105. S. P.

If A. enfeoffs B. the first of May, upon condition that he shall grant to A. an annuity or rent during his life payable yearly at Michaelmas, and the Annunciation; in this case the feoffee hath not time to do it during his life, but he ought to do it (d) before the first of the said feasts, for otherwise A. cannot have all the advantage of the rent intended him by the condition. Co. Lit. 208. b. Moor, 472. Gouls. 117. 2 Co. 79. (d) Where one is to grant a reversion, he may do it any time during

his life, if it so long continues a reversion, if he be not hastened by request. Lev. 44.

Co. Lit. 208.

(a) But, if the condition be to be performed to the party himself only, who is to take advantage of the breach of the condition, the feoffee is not bound to do it before request. Roll. Abr. 439 Moor, 472.

Co. Lit. 208. b.

6 Co. 31. a.

S. P. Vide

Perk. 756.

cont. || But

the text seems

to be law.

If *A.* be bound to *B.* that *C.* shall enfeoff *D.*, *C.* has time during his life to do it, unless he be hastened by request; and if *C.* make a tender thereof, and *D.* refuse, the bond is saved; for the obligor undertakes not to do any act himself, but his intent is to engage for the readiness of a stranger to do an act to another who shall be intended to be a friend of the obligee, and under his influence; but in the said case if the condition were, that *C.* should enfeoff *D.* on such a day, *C.* must seek *D.* and give him notice thereof, and request him to be on the land at the day.

Co. Lit. 219. b.

If the condition be to make a gift in tail to the feoffor, the remainder to a stranger in fee; the feoffee has time during his life to do it, because the feoffor who is party and privy to the condition, is to take the first estate.

Roll. Abr. 439.

6 Co. 31.

(b) But, if not

hastened by request, he hath time during his life, because the feoffor, who is privy to the condition, is to take jointly with her. Co. Lit. 219. Hetl. 59. But, if the baron dies, the feoffment must be made to the wife without request. Hetl. 56.

2 Co. 3. Man-

ser's case.

Roll. Abr. 440.

S. C.

If the condition of an obligation be, that whereas *A.* the obligor hath conveyed lands to *B.* the obligee, if *A.* the obligor, and *C.* his son, shall do all acts and devices for the better assurance of these lands to *B.*, which shall be devised by *B.* or his counsel, then the obligation shall be void; and after *B.* devises and tenders a release to be sealed by *A.* and *C.* his son, and *A.* presently seals, but *C.*, because he was not lettered, nor could read it, prays *B.* to deliver it to him, to shew to some man learned in the law, who may inform him whether it was according to the condition; and if it was according to the condition, he would seal it; this is a breach of the condition, because he did not require the writing to be read to him, and he was bound to take conuzance of the law, whether it was according to the condition, and shall not have reasonable time to shew the writing to his counsel learned in the law, to be instructed by them.

Roll. Abr. 424.

2 Co. 3. Leon.

62. 2 And. 53.

Moor, 182.

S. C.

(c) But, where

If the condition be to make such assurance, &c. to the obligee as the obligee shall devise, and after the obligee devise an indenture, &c., and tender it to him, and he require time to shew it to his counsel, to be advised thereupon, which is denied to him; yet if he does not seal it (c) presently, the condition is broken,

broken, because the condition is peremptory, *scilicet*, to be performed presently.

counsel. 4 Leon. 190. Cro. Eliz. 9. Roll. Abr. 441. Moor, 143. — That if the condition be to make such assurance as his counsel shall advise, his counsel ought to draw and engross it, &c. Moor, 595.

If the condition of an obligation be, if the obligor do at all times hereafter within the space of one month, when he shall be required, make such further act and acts, assurance and assurances, as the obligee shall by his counsel demand, for the recovery of one annuity of 30*l.* due from *J. S.*, then the obligation to be void; in this case if the (*a*) obligee do not demand any further assurance within the month after the making of the obligation, yet the obligor is bound to make further assurance within a month after request made after the month past since the making of the obligation; because the first words, *scilicet*, at all times hereafter, are without limitation; and the other words, *within one month, when he shall be required*, refer to the request, *scilicet*, he shall have a month for the making thereof after request; for the most benign construction shall be made to make this agreement effectual; for this is not like a common assurance, by which it is covenanted to make further assurance within seven years, because the use in such case hath interpreted it, that he shall not be troubled beyond seven years.

the words shall be taken most strongly against the obligor. *Lawson v. Widdrington*, Lev. 85. Raym. 61. but said by *Windham*, admitting the obligee is to give warning, and omits it, yet the money is not lost, but shall be paid on any three months' warning. *Terry v. Ward*. 1 Lutw. 409. S. P.

If the condition be to do a thing within a certain time, he may perform it the last day of the time appointed.

If upon a mortgage a tender be made of the money at the place, at any time of the day specified in the condition, and the mortgagee refuse, the condition is saved for ever, and the mortgagor need not stay at the place appointed till the last instant of the day, because by the express letter of the condition, the money is to be paid on the day indefinitely; nor needs there be any new tender afterwards within convenient time, because by the words of the contract both parties ought to acquiesce.

If the condition of an obligation be, to deliver to the obligee twenty quarters of corn the twenty-ninth of *February* next following the date, and the next *February* hath but twenty-eight days, he is not bound to deliver it till a leap-year.

If an obligation bear date the 1st of *May*, and the condition is to pay a sum of money the 15th day of *May* next ensuing, this shall have relation to the day, and not to the month, so as to be payable the 15th day of *May* following, and not to 15th of *May* next come twelvemonth, being (*b*) a fortnight after the date.

the next day, the Court held, that it should have relation to the month.

a man shall have time to advise with his

Roll. Abr. 441. Wentworth and Wentworth, Stile, 241. S. C. adjudged.

(*a*) If the condition of an obligation is to pay 5*l.* upon the 10th of *January* next, on three months' warning, the obligor must pay the money upon the 10th of *January* next, giving the obligee three months' warning; for

8 H. 4. 14.

Plow. 173.
5 Co. 114.
Co. Lit. 206.
7 E. 4. 3.
9 H. 6. 12.
22 H. 6. 37.
47 E. 3. 26.

Leon. 101. adjudged.

Cro. Ja. 646. adjudged; but a writ of error being brought, the parties compounded. (*b*) But, where being payable Cro. Ja. 677

Roll. Abr. 442.
Price v. Coa.
2 Roll. Abr.
251. S.C.

So, where an obligation was made the 17th day of *November*, and the condition was to pay 5*l.* the 21st of *November* following, and 5*l.* the 20th of *December* next after, it was holden, that the first 5*l.* ought to be paid the 21st day of *November* next ensuing, and that it referred to the day, and not to the month.

Hill. 5 Geo. 2.
in *B. R. Ket-*
tle v. Jones.

But it hath been lately adjudged, that a bond dated 12th *May* with condition to pay a certain sum on the 13th of *May* next following, should have relation to the month, and not to the day; for it is said, the month following as well as the day following, which the present month cannot be, and therefore the money not payable before the 13th of *May* come twelvemonth; for these contracts are to be construed *secundum subjectam materiam*, and the meaning of the parties.

Co. Lit. 47.

If a man enters into a bill obligatory, for the payment of several sums of money at (*a*) several days, an action of debt will not lie till the last day is past.

292. b. 3 Co.
22. a. 128. b.
Cro. Ja. 505.

Cro. Car. 241. (*a*) If to pay 20*l.* in manner following, viz. 10*l.* at one day, and 10*l.* at another day, debt lies not till after the last day, because one entire duty; but, if a man binds himself to pay *J. S.* 10*l.* at one day, and 10*l.* at another day, after the first day debt lies for 10*l.* because it is in itself a several duty. Owen, 42. [See *acc.* *Coates v. Hewitt*, 1 Wils. 80. *Rudder v. Price*, 1 H. Bl. 547.]—So, if *A.* makes a bill to *B.* for the payment of 20*l.* viz. 10*l.* &c. and thereby covenants and grants with *B.* that if he makes default in either of the said payments, he will then pay what of the whole shall be unpaid; after default of the first day, debt lies for the whole. Leon. 208. adjudged.

Co. Lit. 292.

So, upon a contract, debt lies not till all the days of payment are past; for where there is but (*b*) one contract there can be but one debt, and, consequently, but one action of debt for the recovery of it.

3 Co. 22. 4 Co.
94. 5 Co. 51.
S. P. (*b*) But,
if a recogniz-

ance be to pay money at five several days, after the first day of payment execution lies for the sum that then ought to be paid; for it is in the nature of several judgments. Co. Lit. 292. b. And the law is the same of such a covenant or promise to pay money, &c.; for as often as the money is not paid according to the covenant and promise, so often is there a breach of the covenant or promise, and, consequently, so often an action lies. Co. Lit. 292. b.

Hob. 178.

Roll. Abr. 785.
Saund. 286.
S. C. cited.

If a bill of debt be brought against an attorney upon three several obligations, and upon demand of oyer it appears by the condition of one of the obligations, that the day of payment thereof is not yet come: after a verdict for the plaintiff, upon conditions performed being pleaded, and costs and damages given, though the plaintiff cannot have judgment for this obligation, of which the day of payment is not yet come; yet upon his release of costs and damages, he shall have judgment for the other obligations.

Mich. 7 G. 2.
Webb v. Di-
vile.

If by bond, money be payable by instalments, and in such manner, that the non-payment of a particular sum, at a particular day, makes a forfeiture of the whole bond; and accordingly, for the nonpayment of such sum, there is a verdict for the plaintiff, finding it the deed of the party; though in strictness the whole bond is forfeited, yet upon the defendant's bringing into court all that the master shall hold to be due, and letting the verdict stand as a security for future payment, the Court will by rule stay all further proceedings on the bond.*

* *Vide* statute 8 & 9 W. 3. c. 11. § 8.

4. *At what Place it may be performed.*

If a place be limited and agreed on by the parties where the condition is to be performed, the party who is to perform it is not obliged to seek the party to whom, &c. elsewhere, nor is he to whom it is to be performed (a) obliged to accept of the performance elsewhere.

Roll. Abr. 445, 446.

(a) But if he accept it at another place, it is good.

Moor, 367. pl. 502.

Rent reserved payable yearly is to be paid on the land; so, if a man leases, rendering rent, and the lessee binds himself in 20*l.* to perform the covenants; this does not alter the place of payment of the rent, for it may be tendered (b) on the land without seeking the obligee.

21 E. 4. 6.

20 E. 4. 18. b.

(b) But, where the condition is for performance of homage, or other

special corporeal service, to the person of the lord, the tenant, by the law of inheritance, unless he first gives notice that he will do it such a time by feoffment. *England.* Co. Lit. 211. a.

of convenience,

But, if a man makes a feoffment, upon condition that the feoffor, upon payment of 10*l.* may enter, &c., the money being a sum in gross, and collateral to the title of the land, the feoffor must tender the money to the person of the feoffee if in *England.*

Lit. § 78. Co. Lit. 210.

If the condition of a bond or feoffment is to make a (c) feoffment, it is sufficient to tender it upon the land; because the estate must pass by livery.

Co. Lit. 210.

(c) Otherwise, if to make an absolute estate

of inheritance, unless he first gives notice that he will do it such a time by feoffment. Allen, 24. Stile, 61. adjudged.

Allen,

If the condition of an obligation or feoffment be, to deliver twenty quarters of wheat, or twenty load of timber, &c. to the obligee or feoffee, the obligor or feoffor is not bound to carry the same about, and seek the feoffee, but the obligor or feoffor, before the day, must go to the obligee or feoffee, and know where he will appoint to receive it, and there it must be delivered.

Co. Lit. 210.

3 Leon. 260.

S. P.

If by the condition of the obligation money be to be paid to the obligee at or before the 29th of *September* at such a place, it cannot be tendered at the place before the last day, unless the obligee is there ready to receive it; but, if the obligor meet the obligee at a place before the day, he may there tender it, and the obligee ought to receive it.

Cro. Eliz. 14.

Moor, 122.

Hawley v.

Simpson, ad-

judged. Co.

Lit. 211. Salk.

140. S. P.

If an obligation be conditioned to be at *A.* at a certain day there to choose two arbitrators, to be joined to two others to be chosen by the obligee, to arbitrate all matters between them, he ought to be there in such a time, that the arbitrators may be chosen and all ended that day; and therefore his pleading, that he was there the last instant to make his choice, is not sufficient.

Moor, 545.

Marsh v. Ed-

munds. Cro.

Eliz. 549. S. C.

adjudged, that

the plea was

naught; be-

cause he shew-

ed not what

hour of the day he came, or how long he continued there, nor that his arbitrators were present there also.

21 Ed. 4. 6. b. If the condition of an obligation be to pay a small sum, and no place be limited, he ought to seek the obligee wherever he may be found.

21 E. 4. 52.
Bro. Condition, 174. If the condition of an obligation be to pay 10*l.* at *D.* such a day, or 10*l.* at *S.* such a day, if he tenders it at *D.* the first day, the condition is saved.

Roll. Abr. 545.
Musgrave v. Robinson. If the condition of an obligation be, to appear *coram justiciariis apud Westmonasterium*, he ought to appear in *C. B.*, and not in *B. R.*, for this is not the style of the King's Bench.

Co. Lit. 211. a.
Dyer, 354. pl. 32. Latch. 158.
8 Co. 92. b. If a man is bound to pay 20*l.* at any time during his life at a place certain, the obligor cannot tender the money at the place when he will, for then the obligee should be bound to perpetual attendance; and therefore the obligor, in respect of the uncertainty of the time, must give the obligee notice, that on such a day, at the place limited, he will pay the money; and then the obligee must attend there to receive it.
[Where the giving of notice becomes impossible by the act of the person to whom it was to be given, it shall be dispensed with. Salk 214.]

6 Mod. 227.
259. Fitzhugh v. Dennington. By the condition of an obligation, a master is bound to make his apprentice free, on request, at the end of seven years; and in debt on this obligation the master pleads, that *ad finem* of the said seven years, or after, till the time of action brought, he was not requested; and it was holden, that in this case the request was material, being part of the condition; and Holt held, that the request here ought to have been on the most convenient time of the last day of the seventh year, and that it would come too late the next day; but Powell inclined, that a request in a day or two after the seven years would do well.
2 Ld. Raym. 1094. 3 Salk. 309. pl. 1.

5. What shall be said a sufficient Performance.

5 Co. 95. b.
96. a. Cro. If a man makes a feoffment in fee, upon condition that the feoffor, within a year after the death of the feoffee, pay to his heirs, executors, or administrators, 100*l.*, that then the feoffor shall re-enter; the feoffee makes a feoffment over, and dies; Moor, 708. the feoffor pays the 100*l.* within the year, and the heir pays Gouls. 177. back 30*l.*; this is a partial and fraudulent payment, and no good Poph. 99. Co. performance of the condition, to defeat the estate of the [second] Litt. 209. feoffee; but, if the whole money had been paid, it had been Godb. 299. good; because the payment is to be made to the persons mentioned in the condition, and not to the assignee of the land, who S. C. between Goodall and Wiat. is not named therein.

Cro. Eliz. 7. If *A.* is bound to *B.* in an obligation, conditioned that *A.* Moor, 709. shall deliver to *B.* before such a day an obligation, in which *B.* Gouls. 177. is bound to *A.*; (*a*) if *A.* sues *B.* upon the obligation, and recovers, Leon. 52. S. P. and after, before the day, delivers it to *B.*, this is no performance of the condition; for notwithstanding the delivery of the (*a*) Sid. 48. obligation, he may take benefit of the judgment; and so the intent of the condition is not performed. Raym. 25. Keb. 103. Like point in case of a covenant.

—So, in case of a promise. Roll. Abr. 448.

If *A.*, being a common brewer, covenants that *B.* shall have seven parts of all his grains made in his brew-house for seven years, and after *A.* puts in great quantities of hops into his malt, of which the grains were made, by means whereof the grains are spoiled, this is a breach; because in all contracts the intention of the parties is to be considered; and here it was the intention of the parties, that *B.* should have the grains for the use of his cattle, and they will not eat them when hops are put into them.

the grains, the plaintiff shewing for a breach, that the defendant had *subdole & callide*, to deceive the plaintiff of the benefit of the covenant, mixed hops with his malt, by which he had disabled himself to perform the intent of the agreement.

So, if I covenant to deliver so many yards of cloth, and cut it in pieces, and deliver it, this is a breach; for the law regards the (b) real and faithful performance of contracts, and discountenances all such acts as are done *in fraudem legis*.

money, yet it must be so intended; and the obligee cannot tender fifty pound weight of stone. Sid. 151. Said by *Twisden*, that he remembered it to have been adjudged.—[So, if a tenant, who hath covenanted to leave, at the end of the term, so many acres of hop-land, leave them in patches, having grubbed up the land in several parts between, this is clearly a breach.]—But if a man covenants that his son, then *infra annos nobiles*, shall marry the daughter of *B.* before such a day, and he marries her accordingly, but at the age of consent disagrees to the marriage, yet is the covenant performed; for it was a marriage, though subject to be defeated by disagreement, and no other could be had within the time. Owen, 25. adjudged.

[If the condition of a bond be to *render a fair, just, and perfect account in writing of all sums received*; if the obligor neglect to *pay over* such sums, it is a breach of the condition.]

If a man assumes to make a surrender of a copyhold, upon request, he is not bound to make it into the hands of two customary tenants; for that is but a particular way of making a surrender, grounded upon a particular custom.

the obligee shall devise, he is not bound to acknowledge a fine by *dedimus*; for that is but a special way of taking the cognizance. Allen, 69.—*Secus*, if there is a proviso that he shall not go above five miles from his house, and his house is above five miles from *Westminster*. Allen, 69.—Covenant to make an estate to *A.*, and it is made to *B.*, to the use of *A.*, and whether good, Godb. 95. *per Curiam dubitatur*, and *vide* Cro. Eliz. 825.—If one man is bound to make to another a sure, sufficient, and lawful estate in certain lands, by the advice of *J. S.*; if he makes an estate to him according to the advice of *J. S.*, be it insufficient, or not lawful, he is excused of the obligation. 5 Co. 23. b.—Where the condition is to deliver a release to the obligee, it is not enough to say that it was written, and wax affixed to it, and that he was ready to seal and deliver it, but that the obligee refused to accept; for he ought to have done all that he could; and he might have sealed it notwithstanding. 2 Roll. Rep. 238.

If a man by indenture bargains and sells his lands to another in fee, and covenants to make thereof to the vendee a good and sufficient estate before *Christmas* next, and before *Christmas* the vendor causes this deed to be enrolled, yet this is not a good performance; for, by the intention of the covenant, some other assurance was to be made.

Raym. 464.
2 Jones, 191.
S. C. between Griffith and Goodland, adjudged, though objected case would lie, and not covenant; for that it was performed by the delivery of

Raym. 464.
(b) If the condition of a bond be to pay 50*l.* though it is not said of

Backe v. Proctor, Dougl. 382.

Allen, 68.
Stile, 107. adjudged.—So, if a man be bound to make an assurance as

And. 27.
Bendl. 36.
3 Leon. 1. S. C. adjudged.

Cro. Eliz. 476. If one be obliged to assure twenty acres of land, the acres shall
665. 6 Co. 67. be accounted according to the estimation of the country where
Poph. 55. Cro. the land lies, and not according to the measure limited by the
Eliz. 681. statute.

Moor, 570. If *A.* covenants with *B.* to make such assurance of all his
(*a*) If *A.* cove- lands at the costs of *B.*, as *B.* or his counsel shall (*a*) advise, *B.*
nants to make may require one assurance for one parcel, and another assurance
such assurance of lands to *B.* for another parcel; for being to be made at the costs of *B.*, it is
as the counsel no prejudice to *A.*
of *B.* shall de-
vise, *B.* himself, though learned in the law, cannot devise the assurance, but it ought to be
devised by some of his counsel; for if the party himself might advise it, then it would be no
plea to say *quod concilium non dedit consilium*. Roswell's case, 5 Co. 19. b. Cro. Eliz.
297. S. C. Clifton v. Gibbon, Cro. Eliz. 465. Roll. Abr. 466. *contr.*

Moor, 570. But, if the assurance is to be made at the costs of the *cove-*
Cro. Eliz. 681. *nantor*, if an assurance of part only is required, he must make it;
but then he is discharged from making any assurance of the residue.

Yelv. 44. If the condition of an obligation be, that the obligor, before
Moor, 682. *Michaelmas*, shall make, &c. all and every reasonable act and
S. C. adjudged, thing for assur' g the manor of *D.* to *J. S.* and his heirs, and
the condition the obligee request him generally to convey, the obligor must
being to do *all* make an assurance; and if thereupon the obligor make a feoff-
acts, &c. to be ment, and the obligee after request a fine, the obligor must
required by the acknowledge it; and so upon every request, he ought to make
obligee; but several assurances.
said, if it had
been to be de-
vised by the obligee or his counsel, he ought to have shewed he had devised, and required such
a particular feoffment or fine.

Cro. Ja. 251. If a man covenants to make further assurance, and to do any
Moor, 810. act or acts, &c. which shall be devised, &c., and a note of a fine
S. C. adjudged; is tendered, and he is required to acknowledge it before a judge
because the of assise, he must acknowledge it, though no writ of covenant is
note is an act depending; for he hath covenanted to do every act, and this
preparatory note of a fine is an act; and whether it be well levied, or to no
for the fine; purpose, is not material.
and the writ of
covenant may be sued out after; and so it is an act for further assurance, though the writ of covenant is not
depending. Bulst. 90. S. C. and *vide* Latch. 186. And. 56.

(*b*) Lit. § 352. If *A.* (*b*) enfeoffs *B.* upon condition that *B.* shall make a gift
Co. Lit. 229. in tail to *A.* and his wife, and the heirs of their two bodies, re-
Vide Jones, mainder to the right heir of the feoffor, and *A.* dies, *B.* ought
180. Roll. Abr. to make an estate for life to the wife, (*c*) without impeachment
451. Eq. Abr. of waste, remainder to the heirs of *A.*; for the estate shall be
19 and *post.* made as near the intent of the condition as it can be.
(*c*) And yet if made as near the intent of the condition as it can be.
the wife ac-
cepts the estate for life without this clause, it is good; because the estate for life is the sub-
stance of the grant, &c. Co. Lit. 219. b.

Taylor v. Bird, [The condition of a bond was, that the obligor should leave
1 Wils. 280. 200*l.* to the children by his intended wife jointly: the obligor
left four children, and by will gave the eldest son an estate in
land of more than the value of 50*l.*, and to the other three 50*l.*
a-piece,

a-piece, to be paid as they should respectively attain their ages of twenty-one. By the Court — The giving the three children the several legacies of 50*l.* each, to be paid at twenty-one, and the landed estate to the eldest child, is not a performance of the condition: there is a great difference between leaving the children 200*l.* jointly, and giving them several legacies at twenty-one; it was intended there should be a benefit of survivorship, and the land cannot survive; besides, there is no present provision for the children, which was plainly intended to be made by the bond; therefore, there must be judgment for the plaintiff.]

If the condition be in the copulative, and it is not possible to be performed, it shall be taken in the (a) disjunctive.

Owen, 52.

Leon. 74.

Gouls. 71.

Roll. Abr. 444. (a) As, if the condition be, that he and his executors shall do such a thing, this is in the disjunctive, because he cannot have an executor in his life-time. 21 Ed. 4. 44. b. Roll. Abr. 444. S. C. — So, if the condition be, that he and his assigns shall sell certain goods, this is in the disjunctive, because both cannot do it. 21 E. 4. 44. b. Roll. Abr. 444. S. C.

If a lease be made to husband and wife for twenty-one years, if the husband or wife, or any child between them, so long lives, and the wife dies without issue, yet the lease shall continue during the life of the husband; for the disjunctive referreth to the whole, and disjoineth the latter part, not only as to the child, but also to the baron and feme; so that the sense is, if the baron, feme, or any child should so long live.

Co. Lit. 225. a.

Moor, 239.

Owen, 52.

Gouls. 71.

And. 161.

Leon. 244.

Cro. Eliz. 269.

So, if an use be limited till *A.* shall come from beyond sea, and attain to his full age, or die: if he comes from beyond sea, or attains his full age, the use ceases.

Co. Lit. 225. a.

Leon. 243.

Cro. Eliz. 270.

If a devise be made upon a disjunctive condition, to be performed by the devisee, he hath his (b) election.

Palm. 76.

(b) So, if the condition be

to enfeoff the obligee of *D.* or *S.* the obligor hath his election. 18 E. 4. 17. b. 5 Co. 22. a. But for this *vide* title. *Election*, and Roll. Abr. 446.

If an obligation be conditioned to pay *B.* or his heirs annually 12*l.* at *Midsummer* and *Christmas*, or to pay him or his heirs at either of the said feasts 150*l.*, the obligor hath election to pay the 12*l.* or the 150*l.*, though he may at any time determine the payment of the 12*l.* by the payment of the 150*l.*

Cro. Ja. 594. adjudged.

If *A.* covenants with *B.* that *A.* or his son *C.*, or either of them, shall work with *B.* at the grinding and polishing of glass, *B.* paying to each of them so much, &c., and *B.* requests *C.* to work with him, &c.; if he doth not, the covenant is broken; for *B.* had the election to require both or either of them to work with him.

2 Sid. 107. Sir Paul Neele and Reeve, adjudged.

If an obligation be conditioned to pay money if a ship puts to sea, or the goods or the obligor return safe, and the obligor dies before his return, yet the money is payable; for all those things being contingent, and it being uncertain which of them will happen, the law supplies the words *which shall first happen*, and forecloses the election of the obligor; (a) and it is not like the case where a man is bound to pay money at *Lady-day* or *Michaelmas*, and he dies after *Lady-day*, and before *Michaelmas*.

Lev. 54. Sayer and Glean, adjudged.

(a) *Vide* Cro. Eliz. 380.

[Where

Box v. Day,
1 Wils. 59.

[Where the condition of a bond was, that the defendant should not marry any other person but the plaintiff, and should pay 1,200*l.* in case she did so, or refused to marry the plaintiff within a month after her father's death; and the defendant married in her father's life-time; the Court strongly inclined to think the bond forfeited, and the money immediately payable.]

Resvel and
Coats ad-
judged.

So, where the condition of a bond was, that the obligor should bring the son and daughter of *J. S.* at their full age to give such releases as a third person should require; the defendant pleads that the son is alive, and under age; and on demurrer to this plea, it was held, that the force of the bond was not suspended till they are both of age, because it is to be taken not conjunctively, but respectively and distributively; for the obligor undertakes that the daughter shall release at her full age, as well as the son; and if she does not, the condition is broken.

Leon. 69.
Moor, 241.

If the condition of an obligation be to pay 30*l.* or twenty kine, within a month after the death of *K.*, at the election of the obligee, he must, at his peril, make his election within the time limited; for the obligor is not bound to tender both; but, where the condition is to pay such a day 10*l.* in gold or silver, at the election of the obligee, if he does not make his election before the day, yet the duty remains payable, being parcel of the penalty.

Mod. 265. ad-
judged by
three judges
visi, against
Windham,
who said the
condition is
not disjunctive
till request to
seal a deed of annuity; and that therefore the obligor ought to pay the 300*l.* 2 Mod. 201.
S. C. adjudged *per totam Curiam*.

If the condition of an obligation be, that if the obligor, within six months after the death of *B.*, shall assure a rent of 20*l.* yearly to *C.*, as the counsel of *C.* shall advise, at the costs and charges of *C.*, if *C.* require the same; or, if the obligor shall not grant the rent, if then he shall pay to *C.* 300*l.*, the obligation shall be void; and *B.* dies, and *C.* tenders no grant of the rent within the time; the obligor is not bound to pay the 300*l.*

2 Mod. 304.
Wright and
Bull adjudged.

If the condition of an obligation be, that the obligor shall work out 40*l.* at the usual prices in packing, when the obligee shall have occasion for himself or friends to employ him therein, or otherwise shall pay him 40*l.*; if the obligee hath no occasion to make use of him in packing, he must pay the 40*l.*

Freshwater v.
Eaton, 1 Str.
49.

¶ On a recognizance in the Marshal's Court to surrender the principal to the gaoler of the Palace Court, if he should be condemned; a surrender of him to the King's Bench, the proceedings having been removed thither, was holden to be a good performance of the condition.¶

(Q) What shall excuse the Non-performance : And herein,

1. *Of the Act of God.*

REGULARLY, if a condition, which was possible at the making thereof, (a) becomes impossible by the act of God, the obligation is discharged. Roll. Abr. 449. Co. Lit. 206. a. Same rule.

(a) Where the sickness of the wife will excuse the husband and wife from levying a fine, the condition being to levy it upon the reasonable request of the obligee. Moor, 124. pl. 270. Leon. 304.

If a man be let to mainprize, it is a good plea at the day when the mancaptors ought to have the body, &c., for the mancaptors to say that he who was let to mainprize was dead before the day, so that they could not have his body at the day. But for this vide title *Bail*, and Roll. Abr. 449.

If a man covenants to build an house before such a day, and after the plague is there before the day, and continues there till after the day ; this shall excuse him from the breach of the covenant, for the not doing thereof before the day ; for the law will not compel a man to venture his life for it ; but he may do it after. Roll. Abr. 450.

If the condition consists of two parts in the disjunctive, in which the party hath an election which of them to perform, and both possible at the time of making the condition, and one becomes impossible afterwards by the act of God ; this shall excuse the performance of that and the other also ; for otherwise his election should be taken away by the act of God. 5 Co. 22. Laughter's case. Poph. 98. Moor, 357. Cro. Eliz. 398. S. C. The condition being, that if B.

aliened his wife's lands, if he should purchase other lands of as much value to his wife and her heirs, or should leave her the value by his will, then the bond should be void, and he aliened his wife's lands ; and before any purchase made the wife died, leaving B. ; *Gaudey* held, that he ought to purchase lands to the heir of the wife. *Et vide* Cro. Eliz. 277. 864. Moor, 432. 645. 2 Jones, 95. 3 Keb. 738. 761. 770. Mod. 265.

But it hath been holden, where the condition was to make the obligee a lease for life by such a day, or pay him 100*l.*, that though the obligee die before the day, his executor shall have the 100*l.*, and the ground of *Laughter's* case was denied to be universal. Salk. 170. pl. 2. *Per Treby Ch.* Just.

If a condition consists of two parts, of which one was not possible, at the making of the condition, to be performed, he ought to perform the other. 5 Co. 22. Cro. Eliz. 780. S. P. Da Costa v. Davis, 1 Bos. & Pull. 242. S. P.

As, if the condition be to enfeoff *J. S.* or his heirs, when he comes to such a place ; he is bound to enfeoff *J. S.* when he comes, because the other is not possible ; for he cannot have an heir during his life, and so he had not any election. 21 E. 3. 30. Roll. Abr. 450.

If a condition of an obligation be to make an assurance of certain land to the obligee and his heirs, and after the obligee dies, yet he ought to make the assurance to his heir ; for this copulative and his heirs shall have the signification of a disjunctive. Roll. Abr. 450. Jones, 180. Palm. 552.

If

Roll. Abr. 451.
N. Bendl. 35.
S. P. cont. per
Montague.

If the condition of an obligation be to enfeoff two before such a day, and one die before the day; yet he ought to enfeoff the other.

Roll. Abr. 451.
Wood and
Bates. But
Jones, 171.
S. C. adjudged,
cont. per totam
Curiam. Palm.
513. S. C. ad-
judged cont.
and it was said
that there was
no difference
when the elec-
tion is in a
stranger or in
the obligor.
* The text
seems to be
law.

If the condition of an obligation be, that whereas a marriage is intended between *A.* and *B.* if the said marriage takes effect, and if *B.* the wife survives *A.*, and does not receive 300*l.* of *A.* by his will, or by the custom of *London*, within three months after the death of *A.*, that then if the obligor pays to *B.* or her executors, 500*l.* within six months after, the obligation shall be void; and after the marriage takes effect, and *B.* survives *A.*, and dies within three months, without receiving any thing of the said 300*l.* by the will of *A.*, or by the custom of *London*; it seems the death of *B.* within the three months shall not excuse the obligor to pay the 500*l.* to the executors of *B.*, because it is not any disjunctive condition of which the obligor hath any election to do the one or the other; but the condition is, that if a stranger does not pay so much within a time, that he himself will pay another sum, so that the death of the party, who is to receive from the stranger, shall not excuse the obligor.*

2 Brownl. 97.
Cheyney and
Sell. Godb.
153. S. C. ad-
judged.

If *A.* binds himself apprentice to *B.* for seven years, and *B.* enters into a bond to *A.*, conditioned to pay *A.*, his executors or assigns 10*l.* at the time of the end or determination of his apprenticeship, and *A.* serves six years, and then dies; the money shall not be paid to his executor, though it was objected that his apprenticeship ended at his death.

2 Leon. 155.
Kingwell and
Chapman.
Cro. Eliz. 10.
S. C. adjudged.

If *A.* enters into a bond to *B.*, conditioned that *C.* shall perform an award to be made between *B.* and *C.*, and it is awarded that *C.* shall pay to *B.* 10*l.* at *Michaelmas*, and 10*l.* at *Lady-day*, yet, because the sum awarded is a duty, it is as if the condition of the bond had been for the payment of the money; and if not paid, the bond is forfeited.

2 Leon. 155.
Co. Lit. 218.
a. S. P.

But, if the condition of an obligation be, that the obligor shall enfeoff the obligee at such a day, and before the day the obligor dies, and the land descends to his heir; the condition is become impossible by the act of God, and the performance thereof excused.

Eq. Abr. 18.
Decreed ac-
cordingly, and
said to have
been often
done.

But, it hath been holden in equity that if the condition of a bond be to settle certain lands in such a manor by such a day, though the obligor die before the day, by which the bond is saved at law, yet an execution ought to be decreed in specie.

Salk. 170. pl. 1.
Thomas and
Howel, ad-
judged in *C. B.*
and affirmed in
B. R. Skin.
301. pl. 5. 319.
pl. 1. S. C. ad-
judged.

One devised to his eldest daughter, upon condition she should marry his nephew on or before her attaining the age of twenty; the nephew died young, and the daughter never refused, and indeed never was required to marry him: after the death of the nephew, the daughter, being about seventeen, married *J. S.*; and it was adjudged that the condition was not broken, being become impossible by the act of God.

2. *Of the Act of Law.*

If an annuity be granted upon condition that the grantee shall be attorney for the grantor in all pleas; if he be after made sheriff, yet this shall not excuse him from the performance of the condition; but he ought to be his attorney; otherwise the condition is broken. Roll. Abr. 451.

If *A.* devises land to *B.* and his heirs, upon condition that he, his heirs and assigns, with the issues and profits of the land, shall pay yearly so much for certain charitable uses, and dies, and after the devisee dies, his heir within age, and in ward to the king; the payment shall be excused, during the time the king hath him in ward; for by the intent of the condition the payment ought to be made with the issues and profits, which are transferred by act of law to the king. Roll. Abr. 451. Slade and Thompson, adjudged. Cro. Ja. 374. Roll. Rep. 193. 3 Bulst. 58. S. C. adjudged. Hard. 10, 11. S. P. appears, and long argu-

ment, whether the king should be bound by the condition.

If a recognizance be conditioned for the appearance of *B.* at the next assizes holden for the county of *S.*, and before the next assizes, *B.* sues a *certiorari* out of the King's Bench to remove the recognizance, and at the next assizes delivers the *certiorari* to the judge, yet this doth not excuse his appearance; for though the *certiorari* was the command of the king, yet the purchase thereof was the act of *B.*, and he could by no such slight save his recognizance. Yelv. 207. Rosse and Pie, adjudged. Bulst. 155. S. C. per Curiam, and said that though the hands of the judges were shut and fore-

closed by the *certiorari*, yet they might have entered his appearance. Cro. Ja. 281. S. C. adjudged, and that he ought to have procured his appearance to be recorded.

If a man hath good title to land by virtue of a fine, and sells the same, and covenants with the vendee his heirs and assigns that he shall enjoy against him and *B.* and all claiming under him; and after by an act of parliament, reciting that *B.* had settled this estate upon *C.*, and that certain persons had unduly procured the said fine from her, it is enacted, that the fine shall be void, and that every person may enter, as if no such fine had been; and after one enters, claiming title under *C.*, this is a breach of the covenant; for the act makes no new title, but removes the obstruction of the old; and it was said, that doubtless *B.* was named in the covenant for this purpose, in case this fine unduly obtained should be avoided. 2 Lev. 26. Vent. 175. 2 Keb. 831. S. C. adjudged, against the opinion of Twisden.

3. *Of the Act of the Parties.*

If the condition of an obligation be, that the obligor shall enfeof the obligee of the land before such a day, and after, before the day, the obligee disseise the obligor, and keep it by force till after the day, so that the obligor cannot enter, this will excuse the performance of the condition. 8 Co. 92. Co. Lit. 206. S. P. upon the condition of a feoffment.

If lessee for years covenants to drain the water which is upon the land before such a day, and after the lessor enters before

Cro. Eliz. 374. the day, and there continues till the day is past, yet this shall S.C. adjudged, not excuse the performance of the covenant, (a) because this is it not being alleged that collateral to the land.

the lessor held him out, and disturbed him in doing it. Moor, 402. Owen, 65. Godb. 69. (a) But, if it had been a covenant adhering to the land, and in respect of the enjoyment thereof, it would have been otherwise; but then it must have been shewn that he held him out of possession. Moor, 402. pl. 534. Owen, 65.

Bro. Covenant, 31. If a man be bound to build an house, &c. he is excused if the obligee will not suffer him to build it; for he cannot come upon the land against his will. Roll. Abr. 453.

9 H. 6. 44. b. So, if a condition be to repair a house, he is excused thereof, Roll. Abr. 453. if a stranger, by the command of the obligee himself, disturbs him, and will not suffer him to do it.

3 H. 6. 37. If the condition be to erect a mill, and the obligor comes Roll. Abr. 453, to the obligee, and says all is ready for the erecting thereof, and demands of him when he shall come with the mill to erect it; 454. if the obligee says he will not have the mill, and entirely discharges him of the mill, this shall excuse him of the performance.

Roll. Abr. 454. If lessee for years of an house covenants to repair it, and to leave it in as good plight as he found it, and after certain sparks of fire come out of the chimney of the lessor in an house not much remote, by which the house of the lessee is burnt; this will excuse the performance of the covenant to the lessee; so that he is not bound to rebuild, because this comes by the act of the lessor himself.

35 H. 6. 162. If a lease be made upon condition that the lessee shall not 8 Co. 91 b. permit or harbour any whore within the house to him let, and Godb. 70. S.C. cited. (b) If that if he suffers such woman to stay there six weeks after warning, &c., it shall be lawful for the lessor to enter; and after a bond be conditioned to procure a marriage between the obligee and B. before a certain day, and before the day the obligee calls B. whore, and tells her if he marries her, he will tie her to a post; by reason whereof the obligor could not procure B. to marry him; this will excuse the non-performance. Cro. Eliz. 694. Admitted *per Cur.* but then it must be shewn in pleading, that the obligor did what he could to procure her to marry, &c.

35 H. 6. 162. But, if the lessor ousts the lessee, and by force and against 8 Co. 92. the will of the lessee puts in the woman, and violently makes her stay there by force against the will of the lessee for six weeks; this shall excuse the performance of the condition.

Co. Lit. 206. b. If A. is bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marries her; he shall take no advantage of the condition, because by his means it could not be performed.

Co. Lit. 210. b. If a man makes a feoffment in mortgage, upon condition to be void upon payment of money by the feoffor, &c. to the feoffee at a day; if at the day the feoffee is out of the realm, the feoffor

feoffor is not bound to seek him, or to go out of the realm to him; and therefore, because the feoffee is the cause that the feoffor cannot tender the money, the feoffor may enter into the land, as if duly tendered.

If *A.* leases to *B.* for years, upon condition that if *B.* pays money to *A.* or his heirs at a day, that *B.* shall have the fee; and before the day *A.* is attainted of treason, and executed; now though the condition became impossible by the act and offence of *A.* yet *B.* shall not have a fee; because a precedent condition to increase an estate must be performed; and if it becomes impossible, no estate shall rise. Co. Lit. 218. a.

If *A.* leases to *B.* certain lands for years rendering 40*l.* per ann., and a stranger covenants with *A.* that *B.* shall pay unto him the 40*l.* for the farm and occupation of the lands; and before any day of payment, *A.* ousts *B.* of his farm; *B.* is excused of the payment of the rent; for the covenant was, that *B.* should pay 40*l.* for the farm and occupation; so that it is a conditional covenant: and there ought to be *quid pro quo*; and here the consideration upon which the covenant is conceived, viz. the farm and the occupation of it, is taken away by the act of *A.* himself. 3 Leon. 159. adjudged Bedel's case.

A. entered into a bond to *B.*, conditioned to save *B.* harmless from a bond made to *C.* for payment of 100*l.* at a day and place, and at the day of payment *A.* was going to the place to pay it, and *B.* by covin caused *A.* to be imprisoned till after sunset, to the intent the 100*l.* should not be paid; and this being pleaded to an action of debt upon the bond, it was adjudged upon demurrer, that such a bare surmise was no bar. Cro. Eliz. 672.

If the king grants a reversion in tail, upon condition that if the grantee pays 20*s.* at the receipt of the Exchequer, &c., the grantee shall have a fee; if afterwards the king, under his great seal, refuses to receive the money, yet if the grantee tenders it at the receipt of the Exchequer, he shall gain a fee; for the king by no means can countermand or hinder the increase of the estate in such case. 8 Co. 76. b. Strafford's case adjudged. 2 Brownl. 252. S. C. adjudged.

If the condition of an obligation be, that the obligor shall pay 10*l.* to the obligee, which is for the rent of certain lands, and the obligee enter upon the land, and so suspend the rent, yet this shall not excuse * the payment; for it is but a recital that it was for rent, and not material. Hob. 103. adjudged. So, if by pleading it had been applied to the lease, &c.

* But entry

and eviction before rent due avoids payment in covenant, &c. for the rent as rent.

If a parson by indenture leases his parsonage for years, rendering rent, and the lessee covenants to pay his rent, and before any day of payment, the parsonage (*a*) is sequestered for the non-payment of the first fruits, yet the lessee shall not be excused of the payment of his rent. Hetley, 54. Jeakil and Linn, adjudged. So, in case of an obligation for payment of the

rent. (*a*) Otherwise, if lessee for years is evicted by a prior title. Roll. Rep. 198. Yeiv. 23. Cro. Car. 415.

Poph. 39. If *A.* leases lands to *B.* for seventeen years, and after *B.* enters
 Cro. Eliz. 313. into an obligation to *A.*, conditioned to pay an annual rent to *C.*
 Owen, 101. for the term of seventeen years, if *C.* lives so long, and the said
 Moor, 597. *B.*, or his assigns, or any claiming under him, shall or may so
 S.C. adjudged. long enjoy the said land; and *B.* after surrenders to *A.*; yet he
 must continue the payment of the rent, because merely collateral,
 and to be made to a stranger.

Poph. 40. But, if the condition had been that *C.* during the term should
 Owen, 104. hold part, without the interruption of *B.* or his assigns; if after
 Cro. Eliz. 313. the surrender *A.* had interrupted him, *B.* should not have for-
 Like point by *Popham*; for feited his bond.
 that the ob-
 ligees should not take advantage of his own act.

22 E. 4. 26. If the condition of an obligation be, that the son of the
 Roll. Abr. 455. obligor shall serve the obligee for seven years; if he tenders his
 (a) So, if he son, and the obligee (a) refuses, it is no forfeiture.
 takes him, and
 after, within the term, commands him to be gone. Roll. Abr. 455.

20 E. 4. 1. b. If the condition of an obligation be to pay a small sum, and
 22 E. 4. 26. the obligee refuse it at the day, though this saves the penalty,
 Roll. Abr. 448. yet the principal money (b) must be paid; for it still remains
 Co. Lit. 207. a debt.
 S. P. because
 the sum men-
 tioned in the condition is parcel of the obligation; and the obligee hath remedy for it
 by law. Cro. Eliz. 755. S. P. (b) And therefore if an action be brought against him upon
 the obligation, and he plead the tender and refusal, he must also plead that he is yet ready to
 pay the money, and tender it in court. Co. Lit. 207. a.—But, if the plaintiff will not then
 receive it, but takes issue upon the tender, and it is found against him, he hath lost the
 money for ever. Co. Lit. 207. a. Hob. 198, 199. Noy, 110.

Co. Lit. 207. a. But, if the condition of an obligation of 100*l.* be for the de-
 livery of corn, timber, &c., performance of an arbitrament, or
 other act, &c., this is collateral to the obligation, and no parcel
 of it; and therefore a tender and refusal is a perpetual bar.

4. Of the Act of a Stranger.

Roll. Abr. 452. Regularly, if the condition be to be performed by a stranger,
 and he refuse, the obligation is forfeited; for the obligor hath
 taken upon him that the stranger shall do it.

22 E. 4. 26. b. As, if the condition be that my son shall serve *J. S.*; if he
 will not, my obligation is forfeited.

22 E. 4. 25. b. *A.* and *B.* submit themselves to the award of *C.*, and *A.* enters
 Roll. Abr. 452. into an obligation to *C.* to stand to the award; and *B.* also; and
 (c) So, if a re- *C.* awards *A.* to pay 10*s.* to *B.*, and *A.* tenders it, and *B.* refuses;
 cognizance, the obligor is excused (c) because *B.* is not a mere stranger,
 bond, &c. is but privy, and so is the obligee.
 made to *A.* to
 the use of *B.*
 conditioned to pay money, &c. to *B.* and *B.* refuses, &c. Cro. Eliz. 755. Cro. Ja. 14.

Hutt. 48. But, if the condition be, that the son of the obligor shall
 Winch, 30. marry the daughter of the obligee; if the daughter of the obligee
 3 Bulst. 30. refuse the son, yet the condition is forfeited; for the daughter

is a mere stranger, and the obligor hath taken upon him that his son shall marry her.

So, if the condition (a) be to enfeoff a stranger, who refuses, yet the obligation is forfeited. (a) 2 E. 4. 2. 39 H. 6. 10. b. Co. Lit. 209.

S. P. — But otherwise, if to be made to the obligee, or to any other for his benefit. Co. Lit. 209. a.

If there be a feoffment upon condition to enfeoff a stranger, if the stranger refuses, yet the condition is broken, because the intent was not that the feoffee should retain it. 19 H. 6. 34. b. Co. Lit. 209. 1 Leon. 266. 2 Leon. 222. S. P.

But otherwise it had been, if the condition was to make (b) a gift in tail to a stranger, and he refuses; for there the intent was that he should have the reversion. 2 E. 4. 2. Co. Lit. 209. Leon. 266. 2 Leon. 222.

S. P. (b) So, if the condition be, that he shall grant a rent-charge to a stranger, and he refuse; because intended the feoffee should retain the land. Co. Lit. 209.

If the condition of an obligation be, that whereas the obligor and obligee are jointly seised of the office of registrar of the court of admiralty; if the obligor shall permit the obligee to use the said office, and to take the profits thereof only to his own use during his life, without interruption made by the obligor, then, &c.; although after the admiral dies, and the new admiral grants the said office to a stranger, (as he may by law,) and he interrupts and ousts the obligee, yet, if the obligor after this interrupts the obligee also, the condition is broken. Roll. Abr. 453. 2 Leon. 114. 3 Leon. 142. S. C. Godb. 47. S. C. and S. P. *per Curiam*, and said whether the obligee occupy by right or wrong, the obligor is not to interrupt him against his own bond.

If *A.* is bound to (c) *B.* to pay 10*l.* to *C.*, if *A.* tenders it to *C.*, and he refuses, the bond is forfeited. Co. Lit. 208. b. (c) Otherwise, if bound to pay it to the obligee, or his assigns, and the obligee appoints *C.* to receive it as his assignee, and it is tendered to *C.* and refused by him. Dals. 38.

If *A.* disseises *B.*, and after leases to *C.* for years, and *C.* covenants at the end of the term to leave and yield up the tenements well repaired to *A.*, and after *B.* enters, &c., *C.* is excused. Cro. Eliz. 656. adjudged.

If the condition of an obligation be, that the obligee shall in Michaelmas term next give unto the obligor, &c. such release as by the judge of the prerogative court shall be thought meet; the obligor ought to procure the judge to devise and direct such release; for the judge is a stranger to the condition, and the condition is for the benefit of the obligor, and he hath (d) taken upon him to perform it at his peril. 5 Co. 23. b. adjudged. Cro. Eliz. 716. S. C. Moor, 645. And Cro. Eliz. 864. S. C. cited, and *vide* like point, Lit. Rep. 13.

Lev. 101. Sid. 313. (d) So, if the condition of an obligation be, that a stranger shall release all the right which he hath, or pretends to have in a certain manor; the obligor must procure him to make a release *de facto* though he hath no right. Saund. 215.

If *A.* leases his land for forty years rendering rent, and devises the reversion to *J. S.* in tail, &c., provided that *B.* and his wife shall have the rent to their own use till *J. S.* comes of age, Winch, 26. 69.

upon condition that *B.* and his wife, within three months after his death, enter into a bond to his overseers for the payment of 34*l. per ann.*, in such penalty as his overseers shall advise, and *A.* dies; *B.* and his wife must give notice of this to the overseers, and at their peril procure them to advise.

Worsley v.
Wood, 6 T.
Rep. 710.
Routledge v.
Burrell, 1 H.
Bl. 254. S. P.
Oldham v.
Bywicke, 2 H.
Bl. 577. S. P.

¶ Where by a policy of assurance against fire it was stipulated, that the assured sustaining any loss by fire should procure a certificate of the minister, churchwardens, and some reputable householders of the parish, importing that they knew the character of the assured, and believed that he had sustained the loss by misfortune and without fraud; it was holden, that the procuring of such a certificate was a condition precedent to the right to recover, and that it was immaterial, that the minister and churchwardens wrongfully refused to sign the certificate; *Lawrence J.* observing, that the cases were uniform to shew, that if a person undertakes for the act of a stranger, that act must be done.¶

CONSTABLE.

- (A) How chosen and appointed.
- (B) Who are obliged to serve.
- (C) Of their Power and Duty in acting without any Warrant from a Justice of the Peace.
- (D) Of their Power and Duty in executing Warrants.

(A) How chosen and appointed.

Of the high constable of England, *vide* title Courts, and their jurisdiction in general.

(a) Were before the statute of Winchester, 2 Hawk. P. C. c. 10. § 33.
4 Inst. 267.
Vide Somner's Antiquities Canterbury.
Lamb. Con-

CONSTABLES appear to have been officers of great (a) antiquity; for by the laws of king *Alfred*, the freemen were to digest themselves into decennaries and hundreds, and every ten freeholders chose an annual officer, whom they called constable, borsholder, tithingman, or headborough, as head of the decennary; these, in every hundred where there was a feudal lord, were sworn in, and admitted by the lord or his steward in his lect; but where there was no such feudal lord, the sheriff in his torn had the swearing and placing of them in: also, if there was no feudal lord of the hundred, an annual officer was chosen, who was to preside over the whole hundred, who was called the high constable; but if the hundred was feudal, as it often anciently was, then such lord of the hundred administered the office himself.

stable,

stable, 8. [That both high and petit constables were of earlier date than this statute is, satisfactorily proved in the introduction to a little treatise, entitled "The Office of Constable," published in 1791.]——By common law, they are to be chosen by the leet or torn. 4 Inst. 265.—And by 2 Hawk. P.C. c. 10. § 37. it is difficult to determine to whom the power of chusing them doth of common right belong; for by Dalt. Sheriff, 400. Roll. Rep. 34. both high and petty constables are to be chosen and appointed by the sheriff in his torn; and by 2 Jones, 212. Lamb. Constable, 8. Salk. 175. pl. 1. 2 Salk. 502. pl. 2. 5 Mod. 124. 11 Mod. 215. 12 Mod. 88. 115. 180. Comb. 351. Skin. 635. pl. 4. 669. pl. 6. Ld. Raym. 69. St. 13 & 14 Car. 2. c. 10. they are to be chosen by the decennary; but it seems clear, that whether a constable is to be chosen by the sheriff or decennary, yet he is to be sworn and placed in his office by the sheriff, as being judge of the Court. Also it seems certain, that a custom either way is good. 2 Hawk. P.C. c. 10. § 38. And that a sheriff or steward, having power to place a constable in his office has by consequence a power of removing him. Bulst. 174. 2 Hawk. P.C. 63.

It seems by the better opinion, that a custom in a town, that the inhabitants thereof shall serve the office of constable by turns, is good, and that the objection, that by such means it may come to a woman's turn to serve, is of no force, since she is allowed to make a deputy (*a*), or procure one to serve for her, who shall be considered as the proper officer.

Also, the office of constable being necessary for the preservation of the peace, justices of the peace have by an uninterrupted usage, not now to be disputed, taken upon them not only to swear constables who have been chosen at a torn or leet, but also to nominate and swear constables, where none have been sworn at such courts, through the neglect of the sheriff or lord, and also to (*b*) displace those who have been so chosen; and this point hath been carried so far as to allow the sessions of the peace to swear one constable who had been elected at the leet, and unduly rejected by the steward, who had sworn another in his place.

And by 13 & 14 Car. 2. cap. 12. § 15. reciting, "That the laws and statutes for apprehending rogues and vagabonds had not been duly executed, sometimes for want of officers, by reason lords of manors do not keep court-leets every year for making them;" it is enacted, "That in case any constable, headborough, or tithingman, shall die, or go out of the parish, any two justices of the peace may make and swear a new constable, headborough, or tithingman, until the said lord shall hold a court, or until next quarter sessions, who shall approve of the said officers so made and sworn as aforesaid, or appoint others, as they shall think fit; and if any officer shall continue above a year in his or their office, that then in such case the justices of the peace in their quarter sessions may discharge such officer, and may put another fit person in his or their place, until the lord of the manor shall hold a court as aforesaid."

The justices of the peace of the county of *Northampton*, at their general sessions, chose a constable for *Holmby*, and for not coming in to take the oath proceeded against him; which proceedings being removed by *certiorari* into *B. R.*, it was moved

Sid. 355.
2 Hawk. P.C. c. 10. § 37.
(a) 2 T. Rep. 406. admitted.
2 Stra. 943.
Cro. Car. 329.
cont.

Salk. 175. pl. 2. 176.
Mod. 13. 12
Mod. 180, 181.
2 Stra. 1050.
2 Jones, 212.
Allen, 78.
Dalt. c. 121.
(b) Salk. 176.
pl. 2. 2 Stra. 798. *cont.*
Bulst. 174.

[The sessions have no right to appoint under this statute, unless there hath been a default at the leet.
Rex v. Goudge, 2 Str. 1213. See Rex v. Lone, Fitzg. 192. and R. v. Routledge, Doug. 536. S. P. argued.]

The case of the Constable of *Holmby*, Mod. 13. S. C. 2 Keb. 557.
on S. C.

(a) That the court of King's Bench has the supreme power of ordering an inferior jurisdiction to swear, restore, or discharge a person chosen constable, and of awarding a *mandamus* where it shall be necessary, *vide* Roll. Abr. 535. 2 Roll. Rep. 82. 2 Hawk. P. C. c. 10. § 47.

James v. Green, 6 T. Rep. 232. By Lord Kenyon.

Weatherhead v. Drewry, 11 East, 168.

Cro. Car. 567. Co. Ent. 572. 5 Mod. 130. Salk. 175. pl. 1. 1 Ld. Raym. 69. 8 Co. 38. (b) But cannot be lawfully committed without more. 2 Hawk. P. C. c. 10. § 46. (c) 2 Stra. 1149.

2 Hawk. P. C. c. 10. § 46. 2 Stra. 920. Fitzgib. 192. Bernard. K. B. 413. 11 Mod. 215. 12 Mod. 180. (d) That it is insufficient to say in general, that the party was *debito modo electus*, or *legitime electus*. 5 Mod. Rep. 96. 129. adjudged. (e) That the special circumstances of such notice must be set forth. Allen, 78. 5 Mod. 96. 130. Keb. 418. adjudged. (f) Mod. 24. *vide* 2 Saund. 290.

Keb. 416. 2 Hawk. P. C. c. 10. § 46.

on affidavits, that there had not been a constable there for fifty years before, that he might be discharged, alleging likewise, that *Holmby* was a privileged place, and that all the inhabitants were the Duke of York's tenants: but the Court held, that they (a) could not discharge him on motion, and said, that they must determine the matter by action of false imprisonment, or some other way, and inclined strongly, that he could not any way be discharged; for *per Cur.*, though originally constables were chosen in leets, yet the constable being an officer, whose duty it is to keep the peace, the justices may choose him in cases of necessity; as in the hamlets about the *Tower*, the justices, by reason of the increase of buildings, where there was formerly but one constable, did choose five; and it was ruled they might do so; and they seemed to incline, that though formerly there had been none, yet they might choose one if they should think it convenient.

¶ If a district be separated from the county at large, and made a county of itself by charter, it should seem by the common law, but certainly by the statute of *Winchester*, that the office of constable is incident to the creation of such a district with separate jurisdiction.

And it has since been determined without difficulty, that a high constable may be appointed, and a rate in the nature of a county-rate levied for a town corporate having an exclusive commission of the peace, though not a county of itself, by virtue of the st. 13 Geo. 2. c. 18. though no such officer had been appointed, or rate levied before.¶

A person duly elected constable refusing to take upon him the office, may, if present, be (b) fined by the Court; and if absent, on having a certain time and place appointed him for the taking of the oath before (c) a justice of peace, may, after notice of such appointment and presentment at the next court, be amerced.

Also, in either case he may be indicted, either before justices of *oyer and terminer*, or at the sessions of the peace; but such indictment ought specially to set forth the manner of every such (d) election, appointment, (e) notice, and refusal, and before (f) whom the Court was holden.

(d) That it is insufficient to say in general, that the party was *debito modo electus*, or *legitime electus*. 5 Mod. Rep. 96. 129. adjudged. (e) That the special circumstances of such notice must be set forth. Allen, 78. 5 Mod. 96. 130. Keb. 418. adjudged. (f) Mod. 24. *vide* 2 Saund. 290.

Neither is an indictment for not finding a sufficient person to serve the office of constable good, unless such indictment shew that the party refused to serve it himself.

Penalty on constable neglecting to provide waggons, &c. for the army, 30 Geo. 2. cap. 6. § 41. Or for the mariners, cap. 11.

§ 25. Or for the militia, cap. 25. § 50. For taking money to excuse from quartering soldiers, cap. 6. § 66. Or mariners, cap. 11. § 9. *

* See further the Table to the Statutes, tit. *Constable*.

(B) *Who are obliged to serve.*

IT seems agreed, that all (a) sworn attornies, and all (b) other officers whose attendance is required in the courts in *Westminster-hall*, are not obliged to serve or execute any inferior parish-office, and that where they are chosen, though by a (c) particular custom, with respect to their estates or otherwise, they may have a writ of privilege; for no custom shall be intended to be more ancient than the usages of those courts, and therefore shall give way to them.

Vide title *Privilege*.

(a) Noy, 112. March, 30.

Cro. Car. 389.

2 Keb. 477.

(b) That practising barristers at law, and the servants

of members of parliament have the same privilege. Mod. 22. 2 Keb. 578. Mod. 13. (c) 2 Keb. 508. Cro. Car. 389. Lev. 265, 266. 2 Hawk. P. C. c. 10. § 39.

So, if an alderman of *London* has an house at *D.* in the county of *Essex*, and he, as an inhabitant there, is chosen constable, yet he is not compellable to serve, for that as an alderman he is bound to be present in the city, for the good government thereof.

Alderman Abdy's case, Cro. Car. 585.

Jones, 462.

S. C.

But a captain of the king's guards being presented to serve as constable, in pursuance of a custom in respect of his lands in a town, cannot claim this privilege; for though by his office he is bound to a personal attendance on the king, yet such office being of late institution shall not prevail against an ancient custom.

Vide Keb. 309.

Sid. 272. 355.

Lev. 233.

Keb. 933.

Yet if such an officer, or (d) a gentleman of quality, who hath no such office, or a practising physician, be chosen constable of a town, which has (e) sufficient persons besides to execute this office, and no special custom concerning it, perhaps he may be relieved by the King's Bench.

2 Hawk. P. C. c. 10. § 41.

(d) Keb. 439.

cont. 2 Keb.

578.

(e) But no privilege can exempt

empty fitting persons from serving the office of constable, where there are not sufficient besides them to execute it. 2 Hawk. P. C. c. 10. § 41. Sid. 272. Keb. 933. *Vide* tit. *Privilege*.

[One who is resident within a *private* lect within the hundred, is not therefore exempt from serving the office of constable for the hundred; and a custom to elect such an one is good.

Rex v Genge, Cowp. 13.

A younger brother of the corporation of the *Trinity-house* is not as such exempt from serving the office of headborough.

Rex v. Clarke, 1 T. Rep. 679.

Persons naturalized being excluded from taking any civil office of trust, are thereby rendered ineligible to this office.

Rex v. Mierre, 5 Burr. 2787.

No persons who keep a publick house ought to be constables. They are expressly prohibited in *Westminster* by st. 29 Geo. 2. c. 25.]

6 Mod. 42.

By the 5 H. 8. cap. 6. "The wardens and fellowship of surgeons enfranchised in *London*, and all barber-surgeons admitted and approved according to the statute made in that behalf, not exceeding the number of twelve, shall be discharged of constableness and watch, &c." (f)

(f) [It seems that by the equity of this statute, and the ancient custom of the realm,

realm, all surgeons have been allowed the like privilege. 2 Keb. 578 — The like exemption is given to surgeons and barbers, by 18 Geo. 2. c. 15. § 10. for making the surgeons and barbers of *London* two distinct corporations.]

(a) [It seemeth to have been holden, that the equity of this act doth not extend

By the 32 H. 8. cap. 40. “The president of the commonalty and fellowship of physick in *London*, and the commons and fellows of the same (a), shall not be chosen constables in the city of *London*, or suburbs of the same, &c.”

to other physicians not mentioned in it; perhaps for this reason, because physicians have no such special custom for their discharge as surgeons are said to have. 2 Hawk. P.C. c. 10. § 44.]

By the 6 & 7 W. 3. cap. 4. “All persons using the art of an apothecary, who have been brought up and served as apprentices in the said art for seven years, according to the statute of 5 Eliz. cap. 4., shall be freed and exempted from the office of constable.”

|| By 1 W. & M. c. 18. Dissenters appointed to the office of constable, and scrupling to take it upon them in regard of the oaths, may execute it by deputy.

By 10 & 11 W. 3. c. 23. an exemption is granted to the original proprietor or first assignee of a certificate for prosecuting certain felons to conviction (called a *Tyburn*-ticket) from all and all manner of parish and ward offices within the parish or ward where the felony shall be committed.

But, if the original proprietor of such ticket shall make use of it to exempt him from any parish or ward office, it shall not be afterwards assignable by himself, nor by any other person claiming any interest therein.

Moseley v. Stonchouse, 7 East, 174.

Rex v. Derbyshire. 2 Burr. 1182.

The office of constable for a manor and township within the parish where the felony shall have been committed, where the parish contains also other townships, is a *parish office* within the meaning of this statute. *Secus*, if the manor be larger than the parish; for the act did not intend the certificate to be a discharge from an office the functions of which are to be exercised out of the limits of the parish.

By st. 2 G. 3. c. 20. § 86. serjeants or privates in the militia are exempted during the time of their service, unless they shall consent thereto.

By st. 31 Geo. 2. c. 17. persons in *Westminster* aged 63.

Rex v. Routledge. Dougl. 531.

A college barber at *Oxford*, though resident in the city out of college, seems to be exempt by the privilege of the university.

Herson's case. Vin. Abr. tit. Court of

But the degree of master of arts, if the graduate be not resident in the university affords no exemption.||

King's Bench (1.) pl. 1. Court-Leet (U.) p. 5. Constable (B.) p. 3.

2 Show. 75. The King and Bettesworth, Vent. 344. S.C. adjudged.

A. was indicted for not taking on him the office of high constable; and the question on a special verdict was, Whether a tenant in ancient demesne may be made constable of an hundred, which reaches farther than the demesnes? and it was adjudged that he might.

(C) Of their Power and Duty in acting without any Warrant from a Justice of the Peace.

AS constables were originally instituted for the better preservation of the peace, they may by the common law arrest (a) felons, and all suspicious persons that go abroad in the night, and sleep by day, or resort to bawdy-houses, or keep suspicious company.

2 Hawk. P.C. c. 10. § 34.
c. 12. § 7. 4 Bl. Comm. 292.
(a) [They are justifiable in arresting per-

sons directly charged with felony, although it should afterwards appear that no felony had been committed. *Samuel v. Payne*, Dougl. 359. And where a felony hath actually been committed, they are justified in making an arrest, provided they act *bona fide*, and in pursuit of the offender, upon such information as amounts to a reasonable and probable ground of suspicion. In this case, indeed, a private person may arrest, though not in the former. *Ledwith v. Catchpole*, Cald. 291.—If they have notice that a burglary hath been committed, it is their duty to pursue the felon immediately, though in the night. *Cro. Eliz.* 652.]

Also, by the (b) ancient common law, the constable was to present at the torn or leet all those within his precinct who were not admitted into some tithing, and who had not sworn to the king's allegiance; and it seems that by (c) the law in use at this day, he ought to present (d) all offences inquirable in the torn or leet.

(b) Lamb. Constable, 5, 6.
45 E. 3.
(c) Crompt. 212. Dalt. Sheriff, 388.
See Rast. Ent. 151. (d) Yet

in the oath set down by *Kitchen*, 47. he only swears to present all bloodshed, outcries, affrays, and rescoues done within his office.

A constable is not only empowered, as all private persons are, to part an affray in his presence, but is bound at his peril to endeavour it, not only by doing his utmost himself, but also by demanding the assistance of others, which they are bound to give him under pain of fine and imprisonment.

3 Inst. 158.
H. P. C. 135.
Lamb. 132.
Dalt. c. 8.

And it is said, that if he sees persons actually engaged in an affray, whether the violence were done or offered to another, or even to himself, or see them upon the very point of entering upon an affray; as, where one threatens to beat another, &c., he may either carry the offender before a justice of peace, in order to his finding sureties for the peace, &c., or may imprison him himself a reasonable time till the heat be over, and afterwards detain him till he give such surety by bond: but he seems to have no power to commit the offender in any other manner, or for any other purpose; for he cannot commit him to gaol till he shall be punished; neither ought he to lay hands on those who barely contend with words without any threats or personal hurt; but all he can do in such case is to command them, under pain of imprisonment, not to fight.

Lamb. 132.
Dalt. c. 1. 8.
Bro. Surety, 23. 36. Cro. Eliz. 375.
9 E. 4. 26. a. Moor, 284.
22 E. 4. 35. b.
10 E. 4. 18. .
5 H. 7. 6. a. Savil, 97. Roll. Rep. 238.
2 Bulst. 329.
* It is more advisable for the constable to carry the offender im-

mediately before a justice of the peace.

If an affray be in a house, the constable may break open the doors to preserve the peace, and if affrayers fly to a house, and he freshly follow, he may break open the doors to take them.

Dalt. c. 8. 67.
13 E. 4. 9. a.
7 E. 3. 12. b.
H. P. C. 92.
135.

But

Lamb. 133.
Cro. Eliz. 375.
Owen, 105.

But he cannot of his own authority compel a man to find sureties, who is delivered into his hands, as having broken the peace in his absence, but ought to carry him before a justice of the peace; neither can he arrest a man for an affray out of his view, without a warrant from a justice of the peace, unless a felony were done, or likely to be done.

Moor, 284.
Owen, 98.
2 Hawk. P.C.
c. 12. § 19.

If a constable see a person expose an infant in the street, who refuses to take it away, he may lawfully apprehend and detain such person till he or she shall consent to take care of it.

And so may a private person.

(D) Of their Power and Duty in executing the Warrants of Justices of the Peace.

(a) 5 Mod. 130.
Salk. 175. pl. 2.
(b) Salk. 381.
2 Roll. Rep.
78.

AS the constable is the proper officer to a justice of peace he is bound to execute his warrants. Hence it hath been (a) resolved, that where a statute authorizes a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the (b) proper officer to serve such warrant, and indictable for disobeying it.

Roll. Abr. 591.
Moor, 845.
Crompt. 222.
3 Bulst. 77.
Dalt. c. 1. S.C.
Roll. Rep. 274.
Sid. 355. Lev.

Yet inasmuch as the office of constable is wholly ministerial, and no way judicial, it seems that he may appoint a deputy (c) to execute a warrant directed to him, when by reason of sickness, absence or otherwise, he cannot do it himself: but without some such special cause a constable cannot make such a deputy.

233. March, 30. 2 Keb. 309. 321. [3 Burr. 1259. Cald. 252. 1 T. Rep. 682. (c) And the deputy is within the equity of st. 7 J. 1. c. 5. Moor, 845. 2 T. Rep. 395. St. 29 Geo. 2. c. 25. § 2.

Salk. 176.
Ld. Raym.
545. 1 H. Bl.
15. [By 29
G. 2. c. 25. the

If a warrant be directed generally to all constables, no one can execute it out of his own precinct; but, if it be directed to a particular constable by name, he may execute it any where within the jurisdiction of the justice.

Westminster constables are to be appointed out of the different parishes for the whole city and liberty. In *London*, also, by ancient custom, the constables, though appointed in particular wards, of which there are twenty-six, have power to serve warrants and execute their office throughout the city.]

6 Co. 54.
9 Co. 69.

A sworn constable in executing a warrant need not shew it to the party, although he demand a sight of it; but in making an arrest he ought to acquaint him with the substance of it.

2 Hawk. P.C.
c. 13. § 28.

[And all private persons to whom warrants shall be directed, and even officers, if they be not sworn and commonly known, and even these, if they act out of their own precincts, must shew their warrants if demanded. And it is enacted by 27 Geo. 2. c. 20., "That in all cases where any justice of the peace is required or empowered by any statute to issue a warrant of distress for the levying of any penalty inflicted, or any sum of money thereby directed to be paid—the officer executing such

§ 2.

"war-

"warrant if required, shall shew the same to the person whose goods and chattels are distrained, and shall suffer a copy thereof to be taken."]

An unlawful arrest without a justice's warrant, cannot be made good by a warrant taken out afterwards.

Dyer, 244.
Fitz. Bar. 248.

If the constable, after he hath arrested the party by force of a warrant, suffer him to go at large on his promise to return again, he (*a*) cannot, by force of the same warrant, arrest him again.

Crompt. 149.
2 Keb. 705.
Crompt. 148.
2 Keb. 206.
Dalt. c. 117.

13 E. 4. 9. a. (*a*) But by the better opinion, if the party voluntarily returns into custody, the constable may lawfully detain him, and bring him before the justice, in pursuance of the warrant. 2 Hawk. P. C. c. 13. § 9.

A constable cannot justify an arrest by force of a warrant from a justice of the peace, which expressly appears on the face of it to be for an offence whereof a justice of peace hath no jurisdiction; or to bring the party before him at a place out of the county for which he is a justice.

14 H. 8. 16.
Crompt. 147.
148, 149.
2 Str. 1002.

But it seems that he ought to execute a general warrant to bring a person before a justice to answer such matters as shall be objected against him on the part of the king.

Dalt. c. 117.
2 Hawk. P. C. c. 13. § 10.

[A general warrant to apprehend all persons suspected, without naming, or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and it ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. 4 Bl. Comm. 291. 3 Burr. 1742. 1 Bl. Rep. 562. 11 St. Tr. 307. 321. Comm. Jour. 22 & 25 Apr. 1766.]

Also by the better authorities it seems holden that it is not material whether the party arrested by virtue of a warrant from a justice of peace, were guilty or innocent, or whether the felony, &c. were actually committed or not; for it would be a great discouragement to officers, to subject them to actions in such cases for doing what they apprehend to be their duty; and the liberty of the subject seems sufficiently secured by subjecting the justice to an action.

But for this vide 2 Hawk. P. C. c. 13. § 11. Skin. 568.

[A warrant properly penned, (even though the magistrate who issues it should exceed his jurisdiction,) will, by stat. 24 Geo. 2. c. 44., in all events indemnify the officer who executes the same ministerially. 4 Bl. Comm. 291.] And how far a constable may execute a general warrant to make a general search for felons or stolen goods. 2 Hawk. P. C. 82. [and 11 St. Tr. 321. 2 H. H. P. C. 313. 321.]

[A warrant properly penned, (even though the magistrate who issues it should exceed his jurisdiction,) will, by stat. 24 Geo. 2. c. 44., in all events indemnify the officer who executes the same ministerially. 4 Bl. Comm. 291.] And how far a constable may execute a general warrant to make a general search for felons or stolen goods. 2 Hawk. P. C. 82. [and 11 St. Tr. 321. 2 H. H. P. C. 313. 321.]

¶ Where a magistrate committed a person *instanter* for an offence under the game laws, who had goods whereon a distress might have been levied, yet the warrant was a sufficient justification to the constable, it being in a matter within the jurisdiction of the magistrate.]]

Hill v. Bate-man, 1 Str. 710.

[If a constable be sued for any thing done in the execution of his office, he and all who assist him may plead the general issue, not guilty, and give the special matter in evidence; and on a verdict for the defendant, or on the plaintiff's becoming nonsuit or discontinuing, he shall have double costs. And the action can be laid only in the proper county; for, if upon not guilty pleaded,

St. 7 Ja. 1.
c. 5. St. 21
Ja. 1. c. 12.

pleaded, it appear that the fact was done in another county, the jury shall find the defendant not guilty.]

|| By st. 24 Geo. 2. c. 44. § 6. "No action shall be brought
 " against any constable, headborough, or other officer, or
 " against any person or persons acting by his order or in his
 " aid, for any thing done in obedience to any warrant under
 " the hand or seal of any justice of the peace, until demand
 " hath been made or left at the usual place of his abode by the
 " party or parties intending to bring such action, or by his,
 " her, or their attorney or agent, in writing, signed by the
 " party demanding the same, of the perusal and copy of such
 " warrant, and the same hath been refused or neglected for the
 " space of six days after such demand; and in case after such
 " demand and compliance therewith, by shewing the said war-
 " rant to and permitting a copy to be taken thereof by the
 " party demanding the same, any action shall be brought
 " against such constable, headborough, or other officer, or
 " against such person or persons acting in his aid for any such
 " cause as aforesaid, without making the justice or justices, who
 " signed or sealed the said warrant, defendant or defendants,
 " that on producing or proving such warrant at the trial of such
 " action, the jury shall give their verdict for the defendant or
 " defendants, notwithstanding any defect of jurisdiction in any
 " such justice or justices; and if such action be brought jointly
 " against such justice or justices, and also against such con-
 " stable, headborough, or other officer, or person or persons
 " acting in his or their aid as aforesaid, then on proof of such
 " warrant, the jury shall find for such constable, headborough
 " or other officer, and for such person and persons so acting as
 " aforesaid, notwithstanding such defect of jurisdiction as afore-
 " said," &c.

By § 8. "No action shall be brought against any justice of
 " the peace for any thing done in the execution of his office, or
 " against any constable, headborough, or other officer, or per-
 " son acting as aforesaid, unless commenced within six calendar
 " months after the act committed."

Price v. Mes-
 senger, 2 Bos.
 & Pull. 158.

If there be a warrant to an officer to seize *stolen goods*, and he
 seize goods which turn out not to have been stolen, he is entitled,
 if he acted *bonâ fide*, to avail himself of the protection of this
 act.

Jones v.
 Vaughan,
 5 East, 445.

If the officer comply with the plaintiff's demand of a perusal
 and copy of the warrant *before the action brought*, though not
 within *six* days after the demand, it is sufficient.||

Anon. 1 Str.
 446. Money
 v. Leach,
 3 Burr. 1742.
 Sty. 393. Milton v. Green, 5 East, 233.

[Where the officer is not acting in the execution of his office,
 or not pursuing the directions of his warrant, the act affords
 him no protection.]

Jory v. Or-
 chart, 2 Bos.
 & Pull. 29.
 This was determined, *Rooke J.* dissent.

|| If the plaintiff's attorney, previously to bringing an action
 against the officer for a distress under a magistrate's warrant,

make

make out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to this act, and sign both for his client, and then deliver one to the defendant, the other will be sufficient evidence at the trial; for it is to be considered, not as a copy, but as a duplicate original.||

COPARCENERS.

In *Coparcenary* these Things are to be considered :

- (A) The Nature and Reason of such Inheritance.
- (B) The Nature of such Estate, in respect of Actions by or against Parceners.
- (C) Of a Partition, when the Things are dividable or entire, and the Manner thereof.
- (D) Of Partition by the Writ *de Partitione faciendâ*.
- (E) Of *Hotchpot*, and the Nature and Incidents of this Kind of Partition.
- (F) Of the Nature and Incidents of the Estate after Partition made.

(A) The Nature and Reason of such Inheritance.

IF one seised of an estate of inheritance die, leaving only daughters, sisters, aunts, or other females of kin in equal degree, and the estate descend to any of these, they are said to hold in *coparcenary*, and to make but one heir to their ancestor. Bracton, lib. 2 c. 30. Lit. § 241. [Parceners are so called, because partition lies between females, or the heirs of females. *Id.* § 254. By custom, indeed, brothers may be parceners, as by the custom of gavelkind in *Kent.* *Id.* § 265. But, in either case, this manner of holding ariseth only by operation of law, namely, by descent: for, if sisters purchase lands, they are joint-tenants, and not parceners. *Id.* § 254.]

In this inheritance sometimes the descent is *in capita*; as where a man hath issue two daughters, and dies, the descent is *in capita*; therefore each shall inherit alike: and sometimes the descent is *in stirpes*; as if a man hath issue two daughters, and dies, and the eldest daughter hath issue three daughters, and the youngest one daughter; all these four shall inherit, but the daughter of the youngest shall have as much as the three daughters of the eldest. Co. Lit. 164. b. This came over to us from the civil law, and they took the descent *in stirpes*, for this reason, that the child was entitled to his portion

portion by the law of nature during the father's life, though he was not to possess it, or be a complete heir according to the civil law of the country, till after his death; and that founded the fiction, that the children should stand in the place that he possessed.

Co. Lit. 164. b. If a man hath issue two daughters, and the eldest hath issue several sons and daughters, and the youngest hath issue several daughters, the eldest son of the eldest daughter shall only inherit *his* ancestor; but all the daughters of the youngest shall hold their mother's moiety in coparcenary with him.

Co. Lit. 163. If a man seised of lands in fee hath issue two daughters, and one of them is attainted of felony, and the father dies, both daughters being alive, one moiety shall descend to the innocent daughter, and the other moiety shall escheat: but, if a man make a lease for life, remainder to the *right heirs* of A., being dead, who hath issue two daughters, whereof one is attainted of felony, it seems the remainder is not good for a moiety, but void for the whole.

For in the first case the lord by escheat must make a title to divest the estate, which was once lawfully vested in the ancestor, which he cannot do, because there is no defect in this case, since the ancestor may be legally represented, and the innocent daughter may legally represent; and therefore there can be no title in the lord to evict that moiety, though he has title to the moiety of the offending daughter, who after her crime can represent no man: but in the second case, the sisters are to make title to the remainder; which they cannot do, because, to make title to the remainder, they must bring themselves within the words of the donation; and the innocent daughter cannot take upon her the character of an heir alone, since they both make but one heir to the ancestor; and both cannot join, because one is attainted and incapable of that character.

(B) The Nature of such Estate in respect of Actions by or against Parceners.

Co. Lit. 164. **P**ARCENERS, in respect of their ancestor, make but one heir, and therefore, to recover the possession of their common ancestor, they must join in the *præcipe*: so, when they come into possession before partition, they are seised of an undivided possession, though having a right to a writ *de partitione faciendâ*, they have a right to sever and divide the possession that before was joint in them.

5 Mod. 141. In replevin, the plaintiff declared for taking bricks, &c., and the defendant made conusance as bailiff to one *John Bennet* and *Grace* his wife, setting forth, that one *Simon Bennet* was seised in fee of the lands, &c., and made a lease thereof for forty years, rendering rent, and died, and the lands descended to his daughters and co-heiresses, one whereof married the said *John Bennet*, and the other was the Countess of *Salisbury*, and so made conusance for a moiety of the rent; and upon demurrer judgment was given for the plaintiff; because one coparcener cannot make avowry for a moiety of the rent before partition, though they have several inheritances.

5 Mod. 141. Ld. Raym. 64. pl. r. Skin. 596. Mich. 7 W. 3. between Stedman and Page. Carth. 364. S.C. adjudged; where it is said *per Cur.* that when one sister distrains, she ought to avow in her own right, and also as bailiff to her other sister, for the entire rent. Salk. 390. S. P. adjudged between Stedman and Bates, where it is stated, that the defendant made conusance as bailiff to the Countess of *Salisbury*.

If co-heirs are disseised before partition, their possessory action must be joint, for their remedy must follow the nature of their possession, and that being joint, the action must be joint too; but, if they had made partition before the disseisin, then their possessions would have been several, and then they could not have recovered by a joint *præcipe*, or on a joint demise in an ejectment.

But there is a difference between an action possessory and an action droiturel; for though the possessory action be joint, because it follows the nature of the possession, which was joint, yet the droiturel action must be several, where the right descending was several; as, if two coparceners be disseised, and each die, having issue, each of their issue must have several *præcipes*, because in their droiturel action each of them counts on the several right descending from their several ancestor, and not from the joint possession their ancestor enjoyed.

daughters, there they must both join in an action, and so must their issue, if they die before recovery of their right, because their remedy must follow their right. Co. Lit. 164. a.

Two parceners in tail alien and die, leaving issue; the issue of each shall have a several remedy, and when one of them recovers, the other cannot enter with him, because the alienation of their several ancestors amounted to a partition; for by such alienation each conveyed distinctly and separately that moiety which belonged to her, and so broke and divided the estate.

Though parceners before partition have one entire freehold in respect of any stranger's *præcipe*, yet to many purposes among themselves they have in judgment of law several freeholds; for each parcener, where there are two of them, has really but a title to a moiety of the land, and is not, as in case of jointenancy, seised *per my & per tout*: the same law holds where there are more parceners, for in such case each has but a title, in judgment of law, to her proportion; therefore parceners may enfeoff each other of their share, as well as convey it to strangers.

The parol shall demur during the minority of one of the daughters, because both of them must be in court to demand, as one heir to their ancestor, and the infant cannot appoint an attorney to continue the suit in court for her.

If one coparcener enters upon the discontinuee of her father, and is afterwards disseised by him, and thereupon brings an assize, and recovers by false verdict, the other coparcener may enter and hold in coparcenary with her; for though the action was not well laid, yet she recovered as heir to the common ancestor, and, consequently, under that title, which is common to both the parceners, since they both make but one heir to the common ancestor.

So, if two parceners bring a *formedon*, and one of them is summoned and seyered, and the other recovers a moiety, and enters by execution, the severed parcener shall enter with the other, and enjoy the land in parcenary; for the severance is only an order of the court for disuniting joint interests, when one of

Co. Lit. 164. a.
2 Keb. 700.
Bro. tit. Several Prec. (1.)

Co. Lit. 164. a.
Bro. tit. Several Prec. (1.)
Joinder in Action, 43. But, where a joint right descends from one common ancestor; as, where a man is disseised and leaves two

Bro. tit. Copar. (2.)

Co. Lit. 164.

Co. Lit. 164.

2 Roll. Abr. 254.

Bro. tit. Copar. (2.)

the parties is negligent in prosecuting or defending, and not a disherison; therefore the several parcener may well enter into the land which the other recovers as heir to the common ancestor, since both make but one heir to him: otherwise, if the person summoned and severed releases or aliens her part, for then she has departed with all her title to the inheritance, and, consequently, can never pretend to any share in an interest which she has thus conveyed away to another.

Parceners shall join in *assise of mortdancester*, though in different degrees. St. Gloc. 6 Ed. 1. c. 6.

(C) Of Partition, when the Things are dividable or entire, and the Manner thereof.

Co. Lit. 164. b.

AVILLEIN is an inheritance indivisible in its own nature; yet, if he descend to coparceners, the profit of him may be divided; as one of them may have the service of him one day, one week, or the like, and the other another day, week, &c.

Co. Lit. 164. b.
2 Roll. Abr.

255. If a partition be made of a manor to which an advowson belongs, without mention made of the advowson, it shall remain in common among them. F. N. B. 62.

(a) [But see Bishop of Salisbury v. Phillips, Carth. 505. and 1 Salk. 43.]

So, an advowson is in itself entire; yet in effect the same may be divided between parceners, for they may agree to present by turns; however, this was holden only a partition of the presentation (a), for the advowson continued in the right of coparcenary, and they must all have joined after such partition in a writ of right of advowson; but since the statute 7 Ann. c. 18. their joining does not seem necessary; || for by that statute it is enacted, that "if coparceners, or joint tenants, or tenants in common, be seized of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition is or shall be made between them to present by turns, that thereupon every one shall be taken and adjudged to be seized of his or her separate part of the advowson to present in his or her turn; as, if there be two, and they make such partition, each shall be said to be seized, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn; in like manner, if there be three, four, or more, every one shall be said to be seized of his or her part, and to present in his or her turn." ||

Co. Lit. 164.

A rent charge is partible among co-heirs, and by the act of law the tenant is subject to their several distresses, which is no injury to him if he punctually discharge his duty, since he is not thereby burthened with an increase of rent.

Co. Lit. 165. a.

Reasonable estovers, as house-bote, hay-bote, &c., appendant to a freehold; corody incertain, granted to a man and his heirs; a piscary incertain; or common *sans* number, cannot be divided between co-heirs, because a partition of them would enlarge the original grant beyond the intencion of the grantor, and likewise prove a greater charge than was originally intended to the tenant of the soil; but the manner of enjoying them among co-heirs, is commonly settled in the following method. If any other inheritance

ritance descends to them besides, then the eldest only shall take them, and the rest shall have a contribution or allowance in value out of the other inheritance which descended to them; but, if no other inheritance descended to them, then one shall take the estovers, piscary, &c. for a fixt time, as a month, a year, &c., and the other for the like time after, which will effectually secure the owner of the soil from any prejudice; or in case of the piscary one may have the first fish, the other the second, &c.; or one of them may have the first draught, and the other the second, &c.

So, in case of a park or mill which cannot be divided, the one to have the first beast, the other the second, &c.; and in case of the mill, the one to have it for a time certain, and then the other for the like time; or the one to have the first toll-disl, and the other the second, &c.

If there are three coparceners of a manor who make partition, each shall have a manor and court-baron within her pur-party. But this must be understood of a partition before the statute of *quia emptores*; for though that statute allows of the creation of a rent to make partitions equal, yet it will never allow the erection of new manors by partition made of an old manor, since such partitions, as appears, may be equal without such new creations. Dav. 61. 2 Roll. Abr. 257. 6 Co. 69.

If an earl hath his dignity to him and his heirs, and dies leaving only a daughter, the dignity shall descend to the daughter; for it is agreeable to the original intention of the grant, that it should devolve on such single person; but, if there had been several daughters, though the possession of the earldom, like other lands, be divided among them, yet the dignity itself shall return to the crown, who may confer it on which daughter it pleases; but no partition can be made of it between the daughters, because it is not partible in its own nature; for that would be to make several honours out of one, contrary to the grant; and the eldest alone cannot have it, because all make but one heir; therefore to prevent disputes, it returns to the crown from whence it proceeded.

But there is a difference between a dignity or name of nobility, and an office of honour; for if a man holds a manor of the king to be high constable of *England*, and dies, having issue two daughters, this office shall not return to the crown; for if it should return to the crown the manor must go with it, which would destroy the grant itself; therefore if the eldest daughter marries, her husband shall exercise the office alone, and before her marriage it shall be exercised by some sufficient deputy.

office of *great chamberlain of England*, leaving two sisters his co-heiresses, the judges gave it as their opinion in the House of Lords, that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy to be appointed by them; such deputy not being of a degree inferior to that of a knight, and to be approved of by the king. See Journ. Dom. Proc. 25th May 1781, the printed cases of the several claimants, and the Parl. Regist. for 1780-1, v. 4. 258 to 297.]

If a castle, used for defence of the realm, descend to two or more co-heirs, this shall not be divided, because that would ex-
pose

2 Roll. Abr.
255. Co. Lit.
165. a.

Co. Lit. 165. a.
2 Roll. Abr
254. cont.

Co. Lit. 165.
[But this doctrine is over-ruled by a late authority. For upon the death of the Duke of Ancaster and Kesteven, July 8, 1779, seised in fee of the

Co. Lit. 165. a.
2 Roll. Abr.
254. A co-

rody certain
may be di-
vided. Co.
Lit. 164.

b. A reversion may be divided, viz. that one shall have the reversion of so many acres, and the other the reversion of other acres. F. N. B. 62.

Co. Lit. 164. b.

165. a. Lord Montjoy's case. [This case is reported in Godb. 17. 1 And. 307. and Mo. 174. Anderson gives the opinion of the judges, as it was certified in writing to the privy council; but this certificate takes no notice of the point of *indivisibility*; nor is it one of the ques-

tions stated by Anderson to have been referred to the judges.—In Mo. 707. the same case is cited *arguendo*; and there four judges are represented to have been equally divided in opinion as to the first point mentioned by Lord Coke. But, according to Anderson, the difference of opinion was only, whether any remedy was furnished by law for the interest reserved to Lord Montjoy by the proviso. As to this latter point, see 8 Co. 46. Noy, 145. Co. Lit. 13th edit. 165. a. note 1.]

Lit. § 243, 244,
245.

Coparceners may voluntarily agree according to their numbers to make partition; as, if there be two of them, to divide the tenements between them in two parts, in severalty and of equal value, and they may choose certain friends to make partition in the form aforesaid; in which case the eldest shall choose first, and so on according to the priority of age, unless it be otherwise agreed among them; for they may agree that one shall have such tenements, and another such, &c., without any *primer* election: so, if by common agreement the eldest sister makes partition in the form mentioned, to prevent partiality, she shall choose last.

Hob. 107.

Lit. § 245. Co.
Lit. 166.

Kelw. 1. a.
49. a. 2 And.
21. (a) [*Enitia*
pars is called,
in old books,
æisnetia, which
is derived of
the French
eisne, for
eldest, as much

This part, which the eldest takes by virtue of her priority of age, is called the *enitia* (*a*) *pars*, and is purely personal, so that it differs from any privilege which the law gives the eldest without her act, for such a privilege shall descend; as, if there be two parceners of an advowson, and they cannot agree to present, the law gives the first presentment to the eldest, and this privilege shall descend to her issue; nay, her assignee (*b*) shall have it, and so shall her husband, who is tenant by the curtesy; and the reason of this difference is, because the *enitia* is only the honorary respect

respect paid to age among equals; but where it is not a respect merely to age, nor purely honorary, but a real benefit, there it shall descend not only to the issue, but shall go to the assignee and tenant by the curtesy; for since they come in the place of the person in whom it first vested, they are entitled to all the benefits the law gave him; but the mere respect to age was only personal.

as to say the part of the eldest. Co. Lit. *ib.* (b) *Qui.* of this; and see the cases *supra*, Cro. Eliz. 18, and note 2 Co. Lit. *ubi* *supra*. 13th edit.]

There is another manner of voluntary partition or allotment, and that is, when after partition each division is written in a little scroll, and that is covered all over with wax, like a little ball, so as the scroll cannot be seen, and then all the balls are put into a hat, to be kept in the hands of an indifferent person, after which the eldest daughter draws first, and then the rest according to their seniority.

Lit. § 246.

Coparceners may agree to make partition for life, or for a fixt term of years; for private persons, for their own convenience, may make contracts to bind themselves, as long as those contracts are consistent with law.

F.N.B. 62. L.

If two houses descend to two parceners, one worth 20s. *per annum*, and the other but 10s., each parcener shall have a house; but she that has the house worth 20s. *per annum* shall pay to the other and her heirs 5s. *per annum* thereout, that the partition may be equal; and distress may be of common right for this 5s. *per annum* into whose hands soever the house comes.

Lit. § 251, 252. *Note:* To these grants no deed is necessary, though a rent be granted for equality of

partition. Co. Lit. 169. a. But in exchange a deed is necessary; so when jointenants make partition. Co. Lit. 169. 2 Roll. Abr. 255. [A parol agreement for a partition in part executed, will, it seems, be established in equity. 1 Atk. 542. 1 Vern. 472.]

If one upon partition grants a rent to another generally for equality of partition, without taking notice out of what land it is to arise, yet it shall arise out of the part of the grantor, for being granted for equality, &c. sufficiently explains that.

2 Roll. Abr. 257. Rent granted for equality of partition shall go in coparcen-

ary; and if such rent be granted to two sisters, it shall not survive. Bro. tit. Copar. (6.) Co. Lit. 169. b. If two coparceners, says my Lord *Coke*, alien by deed indented both their parts to another in fee, rendering a rent to them two and their heirs, they are not jointenants of this rent, but shall have it in the course of coparcenary. Co. Lit. 169. b. But *Q.*; for the 38 E. 3. 26. b. which he cites to warrant this opinion, seems to maintain the contrary; for this rent being newly created by the deed, and a new purchase, must be governed by the words thereof; and of this opinion he himself seems to be. Co. Lit. 12. b.

If two parceners of land in fee, at full age, make an unequal partition, yet it shall bind them; for as the lands being in fee may be aliened, so they may be disposed of by partition: besides, the parties being of full age are presumed to know what they do, and therefore their acts are binding upon them.

Lit. § 255.

But, if one of them had been within age, it would not have bound; for though partition, if equal, will bind an infant, because compellable to make partition, and whatever one is compellable to do, may be done by the same person voluntarily; yet when the partition is unequal, and the less part allotted to the

Lit. § 258. Co Lit 171.

minor, this shall not bind her; for then the security, which the law has provided for infants, to prevent them from being overreached, would be useless.

Co. Lit. 171. But if she takes the profits after full age, of an exact moiety of the whole, what effect this will be of?

2 Roll. Abr. 236.

A *prochein amy* may make partition on behalf of an infant, and it will bind the infant if equal; for the *prochein amy* is appointed by the law to take care of the inheritance of the infant, and this separation and division of his part from what belongs to another is so far from being a prejudice to the infant, that it is really for his benefit and advantage.

Co. Lit. 173. b. acc. 2 Vern. 232, 3. But, if such partition be unequal, though they are bound

If a partition between parceners of tailed lands be equal when it is made, no alienation by one of them after shall avoid it, or let in her issue upon the other, because they were at first compellable to make partition, and the partition they did make was binding, because it was just and equal.

by it during their own lives, yet the issue of the coparcener, who had the less part allotted to her, is not bound, but may enter and occupy in common with her aunt.

Lit. § 260. Co. Lit. 172. b. 173. a. F. N. B. 52. M. In this case, if *A.* should make a gift in tail of her part, the reversion is no recompence to her issue, because that may be docted by a common recovery; but, if *A.* had made only a lease for life, it would be otherwise, because the

If lands in fee and in tail, of equal value, descend to *A.* and *B.* as coparceners, who make partition, and *A.* has all the fee-simple lands, and *B.* the tail, the issue of *B.* cannot avoid the partition as to the fee-simple lands; but the issue of *A.* may avoid the partition as to the lands in tail, if *A.* aliens any part of the fee simple lands; for the issue of both having *per formam doni* an equal right to the tailed lands, the act of their ancestor, unless an equivalent be left to descend, shall not bar them of such right; but as to the fee-simple lands, the allotment thereof by *B.* to *A.* was equivalent to an alienation of *B.*'s part therein, which would have bound her issue: but if *A.* had left the whole fee simple lands to descend to her issue, then such issue could not avoid the partition, because a full recompence descended to him; and also, because it would be unjust that he should defeat the partition for the tailed lands, when the issue of *B.* is bound, and cannot avoid the partition for the fee-simple lands.

tenant for life could not hurt the reversion. Co. Lit. 173. a. And in this case, if a writ of partition had been brought, neither of the coparceners would have been obliged to take all the tailed lands, but they and the fee simple lands would have been divided in moieties equally between them, to avoid the inconveniences that might happen upon allotting the whole tailed lands to one. Co. Lit. 173. b.

Co. Lit. 166. a. And therefore that it binds the parties themselves, is the same that all other contracts bind them. [But see F. N. B. 202. D. 2. Bl. Comm. 291, 2.]

If parceners of *non sane* memory make partition, unless it be equal, it shall only bind the parties themselves, but not their issue.

If two parceners seised in fee take husbands, and the husbands make partition equal in value, this shall bind the wives and their heirs, because being compellable by law to make partition, they may by agreement make it without process of law: but, if the partition had been unequal, the wife who suffered by the inequality might have avoided it after her husband's death, and so might her heirs.

say, that a partition by agreement between two husbands will not bind the inheritance of their wives. But, notwithstanding this high authority, Mr. *Hargrave* takes this doctrine of *Littleton* and *Coke*, that such partition will bind the wives, *unless it be unequal*, to be clear law, and for the cogent reason here given by the latter. See *acc.* F. N. B. 62. F. Co. Lit. 171. a. note 2.]

Lit. § 257.
Co. Lit. 171. a.
11 Ass. p. 23.
8 Co. 101. b.
[In 1 Atk. 541.
there is a case,
in which Lord
Hardwicke is
represented to

If there are two coparceners, and one of them lets her part to another for years, and after, on a writ of partition brought against the lessor, too little is allotted to the lessor; some hold, that the lessee cannot avoid it, because he will not be allowed to object partiality to men on their oaths, and to the proceedings of a court of justice thereon: but, if two parceners are of three acres of land, each of equal value, and one coparcener lets her part, and after they agree to make partition, and one acre is only allotted to the lessor, the lessee is not bound by it, but may enter and take the profits of another half acre, which justly belongs to him, for the gross and apparent partiality of the partition.

A partition that shall bind on account of its equality, must not only be founded on an equality in the value of the land, but likewise on an equality of advantage and profit redounding from each share to the several owners; as, if one share be incumbered with an assize, from which the other is free, though each share be equal in its intrinsic value, yet the partition is not equal; for the expence of managing the assize, from which the other is free, which is a real action, and therefore dilatory and expensive, may eat up the whole profits of that part which it incumbers, and so make the partition unequal.

When a partition is unequal, the whole must be avoided, because what is the surplusage of the unequal part, cannot be distinguished but by a new division; also, the inequality makes the partition, which consisted in the equality of it, voidable in the whole.

Besides the several sorts of partition already mentioned, there are likewise these following: 1st, Where lands descend in coparcenery, and they agree that one of them shall have and occupy the land from *Easter* till the first of *August* in severalty, and that the other shall have and occupy the land from the first of *August* till *Easter* yearly, to them and their heirs.

Also, if two coparceners have two manors by descent, and they make partition, that one shall have the one manor for one year, and the other the other manor for the same year, and so *alternis vicibus* to them and their heirs; this is a good partition, and each of them has an inheritance, though they have the occupation but for a *fixt* term.

Co. Lit. 46. a.
Dyer, 52. a.

2 Roll. Abr.
256.

Co. Lit. 170. b.

Co. Lit. 167.

Co. Lit. 167. b.
F. N. B. 62. K.

2 Fulb. Paral. [So, if one release to the other with warranty, this hath been
fol. 57. b. cites holden to be a good partition.
44 E. 3. F. Abr.
tit. Counterplea de vouch. 22. — 34 E. 1. Partition, 17.

Morrice's case, So, there may be a partition by judgment, exclusive of that on
6 Co. 12. b. the writ *de partitione faciendâ*.]

(D) Of Partition by the Writ *de Partitione faciendâ*.

Lit. § 247. Co. THE writ *de partitione faciendâ* lies for one coparcener against
Lit. 167. a. another, when she will not agree to make partition volun-
Booth, 244. tarily; or by one parcener against three or four; or generally
F.N.B. 62. against all those that will not consent to make partition by them
that do consent.

See as to this part tit. JOINT-TENANTS AND TENANTS IN COM-
MON (H.) 7.

(E) Of *Hotchpot*, and the Nature and Incidents of this Kind of Partition.

Lit. § 266, 268, A MAN seised of lands in fee-simple, as for instance, of thirty
269. Co. Lit. acres of land, each of the annual value of 12s., hath issue
165. a. two daughters, one of whom being married, the father gives ten
acres of the thirty to the husband with his wife in frank-
marriage, and then dies, leaving the residue; in this case the un-
married sister shall enter into and enjoy the residue, unless the
husband and wife will put the ten acres given in frankmarriage
with the twenty acres into *hotchpot*, that is to say, *together*; and
then, finding each acre to be of the same yearly value, allot
fifteen acres to the unmarried sister, and take five acres to the
ten which they have already in frankmarriage, which puts them
on an exact level with the sister that is unmarried; for upon the
death of the ancestor the remnant shall descend to the other co-
parcener, because the gift in frankmarriage shall *prima facie* be
intended a sufficient advancement of the other sister, and as full a
share of the inheritance as she could have pretended to in case it
had entirely descended in coparcenary: but, if these lands given
in frankmarriage are of less value than those that descend to the
unmarried sister, then, as hath been said, she shall have the be-
nefit of a partition in the manner before expressed; for it would
be an unreasonable construction to make what was designed for
her advancement turn to her prejudice, especially when we con-
sider, that this gift in frankmarriage was made by a tenant in fee,
who might have disposed of it as he pleased.

Lit. § 269. In this manner of partition the lands given in frankmarriage
cannot be allotted to the other coparcener, for they must de-
scend according to the form of the gift; and if they should be
transferred to another, contrary to the original intention of the
donor, the issue of such marriage would avoid the alienation.

If the lands given in frankmarriage be of equal value at the time of the gift with the residue that continues in the hands of the ancestor, and remain so upon the death of the ancestor, they shall never be put into *hotchpot*: but, if in this case the lands given in frankmarriage, without default of the donees, decline in value by the act of God; or, if the donor purchase more land after the gift; or, if the remnant be improved in his hands, so that the lands, which descend to the other sister, are of greater value than those given in frankmarriage; then the partition in *hotchpot* shall be made, that each sister may have her just and equal proportion.

Lit. § 273. Co.

Lit. 179. a.

The lands given in frankmarriage, and the lands in fee-simple, which descend to the other sister, must move from the same ancestor, otherwise there shall be no *hotchpot*.

Lit. § 272. Co.

Lit. 178. b.

This way of partition by *hotchpot* is appropriated to lands in frankmarriage; for if an ancestor enfeoff one of his daughters of part of his lands, or purchase lands to him and her and their heirs, or make her a gift in tail, she shall have her full share of the remnant without putting her share into *hotchpot*.

Lit. § 275. Co.

Lit. 179. b.

The reason seems to be this, that when she is enfeoffed, &c.

she is considered as a purchaser, and what she acquires by purchase can never be made a pretence to exclude her from what comes to her in a course of descent.

If lands in fee-tail descend from the donor in frankmarriage, the donee shall have an equal share of them without putting the lands given in frankmarriage into *hotchpot*; for she claims the lands in tail *per formam doni*, by force of which gift both parceners must equally inherit, because both make up but one heir to the ancestor, and, consequently, one without the other cannot claim under the words of the donation.

Lit. § 274. Co.

Lit. 179.

If the lands given in frankmarriage are of greater value than the lands descended in fee-simple, the other sister has no remedy against the donees; for it was lawful for the donor, being tenant in fee-simple, to dispose of his own lands at his will and pleasure.

Co. Lit. 176. a.

If the donees in frankmarriage and all the other parceners die before partition made in *hotchpot*, yet the benefit of this kind of partition shall descend to their issues.

Lit. § 270. Co.

Lit. 178. a.

This kind of partition hath the same incidents with the common partition: so that the donee, if empleaded of the lands in frankmarriage, shall have aid of the other parcener; for it is unreasonable, that what was designed for the donee's advancement should put her in a worse condition, than she would have been if the gift had not been made.

Co. Lit. 177. b.

[See. Co. Lit.

174. b. *contra* as to gift in tail to a daughter not being in frankmarriage.]

(F) Of the Nature and Incidents of the Estate after Partition made.

THOUGH the law gives every parcener a power to sever her own moiety, and to carry it over into the family into which she marries; yet, since the partition is compulsory, the law will

Co. Lit. 173. b.

4 Co. 121.

Bustard's case.

not

not put parceners in a worse condition after partition, than if they had enjoyed their moieties without division; and therefore on a suit commenced for any part, or an eviction of any part after partition, they shall have like remedy as if they had enjoyed in common; in which case, if a suit had been commenced, both parties must have been empleaded, and on the recovery there had been an equal loss to both: therefore after partition there is a warranty annexed to each part, so that if either be empleaded she may vouch her sister, and thereby deraign the warranty paramount annexed to the purchase of the ancestor; and if she loses, she may recover one moiety of her loss in value against the other sister.

So, if parceners enjoy in common, and any part is evicted by entry without action, they shall enjoy what is left in common: therefore, that parceners may not be in a worse condition by the partition which the law compels them to, there is a condition annexed to the partition, that if either the whole of any one share, or an estate for life, or in tail, be thereout evicted by entry without action, the party so evicted may enter on her sister's moiety, and avoid the partition by enjoyment of an undivided moiety of what is left.

But, if after partition either sister aliens with warranty, and the alienee is empleaded, he shall only vouch the alienor to recover in value, who may with the other sister deraign the warranty paramount; for as the parceners shall not be in a worse condition by the partition than if none had been made, so they shall not be in a better by the warranty or condition which the law annexes upon the partition: now if a parcener before partition aliens her part with warranty, and the alienee is empleaded, he can only vouch his warrantor, who may vouch the other sister to deraign the warranty paramount, but not to recover in value; for there is no reason that the sister, who did not enter into the contract of warranty, should be subject to it; since it is fit that she, whose folly it was to insure the title, should answer for the consequences of it.

If one sister after partition aliens to her heir apparent and dies, and the son is empleaded, though he be in by the feoffment of his mother as a purchaser, yet he shall pray in aid of the surviving parcener to deraign the warranty paramount: for though he claims the land by purchase from his mother, and so never having it in parcenary cannot recover *pro rata*; yet upon the contract of warranty, whereby the vendor did warrant to the ancestor and his heirs, he, together with his aunt, make up one heir to such ancestor; and therefore they must join to deraign the warranty; otherwise there is not that heir before the court, who by virtue of such contract is to take the benefit of the warranty.

If a man seised of lands in fee have issue two daughters, and make a gift in tail to one of them, and die seised of the reversion in fee, which descends to both the sisters, and the donee or her issue be empleaded, she shall not pray in aid of the other sister to

Hob. 21. 26.
2 Roll. Rep.
418.

Co. Lit. 174. a.

Co. Lit. 174. a.
2 Roll. Abr.
418.

Co. Lit. 174. b.

to deraign the warranty paramount, because this estate was never in coparcenary, and, by consequence, they never possessed as heir to the common ancestor, whereby they may pray in aid of each other; and there being no warranty in deed annexed to the tail granted, she has no means to bring in her sister, without whom she cannot take benefit of the original contract of the warrantor, since such warranty ran to the heirs of the ancestor, and the tenant in tail and the other sister make but one heir to the ancestor.

If two acres descend to two parceners, and one of them before partition grants a rent-charge out of one of the acres, and afterwards upon partition the acre charged is allotted to the other sister, she shall hold it discharged; for a parcener before partition, having no separate title to a distinct moiety, cannot pretend to charge any particular part of the lands, so as to make it subject to that charge in the hands of another who does not hold under her; therefore this grant by the sister, who at the time of the grant had only a title to an indistinct and undivided moiety, shall never affect the other parcener who does not claim under her, and who at the time of the grant had as good a title to that acre out of which the rent was to arise, as the grantor had. Mo. 95.

COPYHOLD.

- (A) The Nature of the Tenure, and what shall be deemed Copyhold.
- (B) In what Respect Copyholds partake of the Nature of Freehold Lands.
- (C) What Acts of Parliament shall be said to extend to Copyholds: And herein,
 1. *Of the Statute De Donis, the entailment of Copyholds by Custom, and the Manner of docking such Entails.*
 2. *Of such Statutes as may be said to relate to them.*
- (D) Of such General Customs as may be said to relate to all Copyhold Estates.
- (E) Of particular Customs that are good, and peculiar only to some Copyholds.
- (F) Of granting Copyhold Lands: And herein,
 1. *What Persons may make good Grants.*

2. *What*

2. *What Acts shall destroy the Power they had of making such Grants.*
4. *What Things may be granted to be holden in Copyhold.*
5. *Of the Operation of the Grant, and the Estate and Interest that pass thereby.*

(G) Of Surrenders, Presentments, and Admittances :
And herein :

1. *Of the Necessity of a Surrender, and where the Copyholder shall be said to be in before Admittance.*
2. *Where the Want of a Surrender will be supplied in Equity.*
3. *What Persons may surrender.*
4. *What Persons may accept such Surrenders, and make Admittances.*
5. *What Words or Acts amount to a Surrender.*
6. *What Acts amount to an Admittance.*
7. *Of the Construction to be made when the Surrender, Presentment, and Admittance, differ.*
8. *Of the Time of making the Surrender, Presentment, and Admittance, and where they shall be effectual, though any of the Parties die before they are completed.*

(H) Of the Operation of the Surrender in passing the Estate : And herein,

1. *Of the Persons to take, and what shall be sufficient Certainty in the Description of them.*
2. *What shall be said to pass by the Surrender.*
3. *What Estate or Interest passeth by the Surrender.*
4. *Of the Power and Authority of the Lord and Steward ; and therein of the Difference of their Acts.*

(I) Of Fines payable by Copyholders : And herein,

1. *Where a fine shall be said to be due, and by whom, and to whom payable.*
2. *At what Time and Place payable.*
3. *Of the Certainty and Reasonableness of the Fine.*
- [4. *Remedy for the Fine.*]

(K) Of the Extinguishment of the Copyhold : And herein,

1. *Where the whole Copyhold shall be extinguished or suspended.*
2. *Where Part only, or what is incident to it, shall be extinguished.*

(L) Of

(L) Of Forfeiture: And herein,

1. Of Forfeiture for Non-attendance at Court, and not doing Service.
2. Forfeiture for Non-payment of Rent.
3. Forfeiture in the Copyholder's taking upon him to dispose of the Copyhold, and make Leases.
4. Of Forfeiture in committing Waste; and therein of the Lord's or Tenant's Interest in the Trees.
5. Forfeiture by Inclosure.
6. Forfeiture for Treason and Felony.
7. In what Cases a Forfeiture of Part shall be a Forfeiture of the Whole.
8. Who shall be affected by a Forfeiture, or take Advantage thereof.
9. What Persons shall be excused from a Forfeiture.
10. Where the Forfeiture shall be said to be dispensed with.

(M) Copyhold, where and how to be sued for and recovered.

(A) Of the Nature of the Tenure, and what shall be deemed Copyhold.

THE (a) original of this tenure arose from grants of lands made by lords to their villeins, to hold of them by base tenures: those villeins or tenants were enrolled on the lord's roll, and said to hold by copy thereof; and were capable of taking no greater estate than at the (b) will of the lord; for otherwise, they had been enfranchised: yet to prevent the frequent ending of these estates, they had them granted in fee, but still at the will of the lord; who, notwithstanding such grant, (c) might have ousted them when he pleased: but this, being a very great inconvenience, (d) was, it seems, altered by some positive law, (though such law does not now appear,) which (e) preserved their estates to them and their heirs, doing their services, but yet in other respects left them only estates at will.

(e) They are now established by custom, and such tenant, so long as he doth his services, and doth not break the custom of the manor, is not to be ejected by his lord. 4 Co. 21. b. 22. a. [He is called tenant at will *secundum consuetudinem manerii*; which words, *secundum consuetudinem manerii*, were not to bound the lord's pleasure in the determination of his will, but meant only, that the tenant, as long as he continued tenant, was to hold the land under those terms and conditions which the custom had established. 1 Str. 452.]

Lands, parcel of the manor of C. in Wills, and parcel of the Carth. 432.
dutchy of Cornwall, although they pass by surrender and copy Gale and
of Nobie, re-

(a) As to the name and origin of copyhold, vide 9 Co. 76. Co. Lit. 57. b. 2 Roll. Rep. 236. 2 Bl. Comm. 90. Dougl. 724. n. 2 Wooddes. Syst. View, 36. (b) Lit. § 172. 4 Co. 21. a. (c) Co. Copyholder, 6, 7. (d) Preced. Chan. 574.

solved on a trial at bar, and a verdict for the plaintiff accordingly, against whom there was a verdict *ad nisi prius*, for a forfeiture by committing waste, he and all the other tenants taking them to be copyhold. Comb. 387. S. C. resolved accordingly. (a) That he was seised *secundum consuetudinem manerii*, does not necessarily import a copyhold. 3 Bulst. 230. Roll. Rep. 411. 5 Co. 84. 2 Vent. 144. [Cro. Car. 229. 1 Lutw. 126. 1 Salk. 365. 2 Lutw. 1171. Bl. Law Tracts, vol. i. p. 154. 8vo. edit.]—That copyholds are parcel of the manor, and not held *ut de manerio*, vide Salk. 185. pl. 4. 186. 3 Lev. 405. 1 Ld. Raym. 43. (b) The omission of these words aided after verdict. Salk. 364. pl. 5. 365. 2 Ld. Raym. 1225. [But if not stated, or found, or pleaded to be demisable by copy of court-roll time out of mind, they cannot be adjudged copyhold. Newman v. Newman, 2 Wils. 125.]

3 Leon. 107.
Style, 141.
Taverner and
Cromwell.

Vide 4 Co. 24.

The bishop of N. 10 H. 8. was seised of the manor of N. in right of his bishoprick, and, at a court holden within the same manor, granted parcel of the demesnes of the said manor to one T. and his heirs, by copy; whereas, in truth, the land was never demised by copy before; and so the land continued in copy till 23 H. 8. when T. committed a forfeiture, and the bishop seised the land, and granted the same again by copy to T. in fee, from which time it continued in copy till the 8th of Eliz. which was forty-seven years; and it was holden by the whole court, that fifty years' continuance is requisite to fasten a customary condition upon the land against the lord; and that though the original commencement of granting those lands by copy was 10 H. 8., from which time to 8 Eliz. was above sixty years; yet that the seisure for a forfeiture which happened 23 H. 8. interrupted utterly the continuance from the time, which might by the law have perfected the customary interest; so that the commencement of the copyhold was to be reckoned from 23 H. 8., which not being sufficient time to make good a custom, the lord might enter upon the copyholder as upon his tenant at will.

2 T. Rep. 425.
per Cur.

[A copyhold cannot be created by operation of law; for it is not a creature of law, but of fact; it must have custom to support it, and cannot be created by any other mode, unless by an act of parliament, which might operate as an estoppel to any man to say it had not existed time out of mind.]

(B) In what Respect Copyholds partake of the Nature of Freehold Lands.

4 Co. 22. a.
Co. Copy.
117.

(c) [A custom, therefore, that where there was no son or daughter, the land should descend to the eldest sister, was holden not to entitle, by implication, the eldest niece. For if the custom is not fully explicit, the common law must regulate the course of descent. 1 T. Rep. 466.]

MY Lord Coke says, that copyholders have only a fee-simple *secundum quid*; that though they are tenants at will, yet their estates shall descend to their heirs, and such descent shall be governed by the rules of the (c) common law; but not *simpliciter* to have all the collateral qualities of estates in fee-simple.

Therefore,

Therefore, where a copyholder by licence made a lease for years, and the lessee entered, and the lessor died, leaving issue a son and a daughter by one venter, and a son by another, and the eldest son died; it was adjudged the daughter of the whole blood should inherit; (a) for the possession of the lessee for years was the possession of the elder brother, who may have possession before admittance.

Dyer, 292. Cro. Car. 411. Roll. Abr. 502. That there shall be a *possessio fratris* before admittance. Roll. Abr. 502. 3 Leon. 70. Mod. 120. Moor, 272. 597. Vent. 261. Dalis. 110. S. P. but said, that if the lord, by custom, during the nonage of the heir, demises it to a stranger for years, this will not make a *possessio fratris*; and vide Co. Copyh. 95., where my Lord Coke saith, that if the lease for years determine, and the elder brother die before entry, the youngest brother shall inherit; but *quare*? Gilb. Ten. 158.

But, though it be governed by the rules of the common law concerning descents, yet it partakes not of the nature of freehold lands in other respects; for it is not assets in the heir's hands; neither shall a woman be endowed of it, nor a man be tenant by the curtesy, unless by special custom; nor shall a descent take away an entry.

A man seised of copyhold lands in right of his wife, surrenders to the use of another in fee, this is no discontinuance, but the wife may enter after the death of her husband: for this is not like a feoffment at common law*, which by the notoriety of it took away the entry of the wife for the benefit of strangers, that they might not be at a loss against whom to bring their *præcipes*; for in case of copyhold lands, as there is no such inconvenience, so the nature of the conveyance will not admit of such exposition.

So, if a tenant for life surrender to the use of another in fee, it is no forfeiture; for it may be seen by the court-rolls who is tenant; and so the stranger is at no loss to sue.

If a copyholder in fee surrenders to the use of *A.* and *B.*, and the longer liver of them, and that for want of issue of *A.* the lands shall remain to the youngest son of *J. S.*; in this case *A.* has but an estate for life; for an estate tail in copyhold lands shall not pass by implication.

A man may surrender a copyhold estate to the use of his wife; for she takes the estate from the lord, as an instrument to convey the estate to her; and so it comes not within the reason of other cases, that they being but one person cannot contract; for the husband gives the estate to the lord, and the lord admits the feme to it.

|| But the lord cannot make a grant of a copyhold to his own wife, the grant in that case being immediate.||

There can be no occupant of a copyhold estate, because of the prejudice it would do the lord; and therefore if a copyholder being tenant *pur auter vie* die, the lord shall enter.

4 Co. 21. a.
Moor, 125. pl.
272. adjudged.
Vide 4 Leon.
38.

(a) The same
law of a guar-
dian. Co.
Copyh. 95.

4 Co. 23. a. 30.
b. 6 Mod. 63.

4 Co. 23. a.
Co. copyh. 141.
Supplement,
59. Cro. Eliz.
717. cont.

* By 32 H. 8.
c. 28. § 6. the
husband is dis-
abled from dis-
continuing his
wife's estate.

Moor, 753.
4 Co. 23.

Co. Copyh. 97.
Cro. Car. 366.
Brownl. 127.

4 Co. 29. b.

Firebrass
v. Pennant,
2 Wils. 254.

Salk. 188. pl. 7.
2 Ld. Raym.
994. 6 Mod.
63. per Holt,
Ch. Just.

|| But

Doe v. Martin, 2 Bl. Rep. 1148. || But there may be a *special* occupant of a copyhold. ||
Mardiner v. Elliott, 2 T. Rep. 746.

Smith v. Triggs, 1 Str. 487. [A copyholder *ex parte materna* devised to his heir, who died before admission: it was holden, that the estate should descend to the heir on the part of the mother.]

Crow v. Balldwer, 5 T. Rep. 104. || If tenant in tail of a copyhold suffer a recovery in the lord's court, the fee acquired by such recovery shall follow the descent of the entail. ||

(C) What Acts of Parliament shall be said to extend to Copyhold Estates: and herein,

1. Of the Statute De Donis, the entailing Copyhold Estates by Custom, and the Manner of docking such Entails.

Co. Lit. 60. THE entailing of copyholds, and whether they are within the statute *de donis*, appears to have been matter of great controversy; and it seems now agreed, that the statute *de donis* creates no entail of copyhold lands, because they are entirely subject to the custom of the manor, and governable by it; and because they are not within the word *tenementa*, which comprehends only an estate of freehold.

(a) My Lord Coke says, Co. Lit. 60. that by the custom of the manors, the statute co-operating with it, copyholds may be entailed; Also it seems now agreed, that if the custom of the manor has admitted of limitations of remainders upon such gifts, that then the custom of the manor, (a) pursuing the model of the statute, creates a good entail; but such entail doth not arise by virtue of the statute; but it shall be presumed there was the same law of that manor by custom time immemorial, as began in the kingdom by the statute.

but there cannot be an estate tail in copyholds by custom only, nor any estate tail by the statute only; the meaning of which seems to be, that estates tail were before the statute, as to the manner of the limitation, by the custom of some manors; as, that an estate was granted to a man and the heirs of his body begotten, the remainder over to another; but that in other respects those estates were not estates tail before the statute; as, that the tenant should no ways alien to debar his issue, or them in remainder; and that if he discontinued, they should have a *formedon* in descender or remainder; but these things were introduced by the statute upon the estate, which was the same in limitation by the common law. And this seems supported by the following authorities: Carter, 22. Cro. Eliz. 307. 717. 907. Moor, 173. 188. Leon. 175. Poph. 128. Sid. 268. Cro. Car. 45. Moor, 637. 3 Co. 8. 9 Co. 105. a. 3 Lev. 327. 4 Mod. 86.

Cro. Car. 44, A copyhold was surrendered to the use of the copyholder's last will, who devised it to *J. S.* in tail, &c.; *J. S.* hath issue and surrenders to the use of his wife for life; and it was adjudged, that since the jury found it was not the custom of the manor to have an estate tail in the copyhold, that *J. S.* had a fee conditional; and that by his having of issue, he had performed the condition; and the surrender to the use of his wife was good.

3 Co. 8. b. But though, by custom time out of mind, copyholds may be entailed, yet it is no proof of such custom, that an estate hath been granted to a man and the heirs of his body; for that may be

Co. Lit. 60. b.
Roll. Abr. 838.

be a fee conditional; but it must be shewn that a remainder hath been limited over, and enjoyed, or that the issue hath recovered after the alienation of his ancestor, or the like.

These entails, like all others, may be docked; but the manner of doing it differs according to the custom of the manor; the more common, and (according to Lord *Macclesfield*) the only proper way of barring such entails is by recovery in the lord's courts, which is (a) always allowed where the custom of entailing prevails, to avoid the danger of perpetuity in such copyholds. (b)

the entail of a copyhold estate; but that as to the entailing of them, custom is requisite; so, without custom, the entail cannot be cut off: The reasons are, that, without an intended recompence in value, no recovery shall bind, and the surrenderee comes in in the *post* by the lord, and is not in the *per* by the party, and so no warranty can be annexed of common right; for no estate less than a freehold is capable of common right of having a warranty annexed to it. *Moor*, 358. 753. *Cro. Eliz.* 380. 391. 907. 4 Co. 23. *Raym.* 164. *Lev.* 136. (b) || It would seem from the case of *Taylor v. Shaw*, *Carter*, 22. that a custom to restrain a recovery would not be good; as a custom to bar by forfeiture, & *non aliter*; the *non aliter* would be void. "If you allow a customary entail, you must allow a customary recovery," said *Bridgman C.J.*||

Also, according to the custom of some manors, a surrender to the lord is equivalent to a recovery at common law, and shall bar such entails.

And it hath been determined, that where the custom does not prescribe any particular mode of barring the entail, a surrender (although only to the use of a will) will be sufficient without a custom. *Carr v. Singer*, 2 *Ves.* 603. *Moore v. Moore*, *Id.* 596. *Ambl.* 279. *S.C.* *Otway v. Hudson*, 2 *Vern.* 583. *Hinton v. Hinton*, 2 *Ves.* 639. But a custom to bar by surrender may be concurrent with a custom to bar by recovery. *Everall v. Smalley*, 1 *Wils.* 26. 2 *Str.* 1197. *S.C.* *Doe v. Truby*, 2 *Bl. Rep.* 944. One instance has been holden to be sufficient evidence, uncontradicted, of a custom to bar by surrender, though the surrenderor had not been dead twenty years, and though an instance was in evidence of a recovery suffered, *Roe v. Jeffery*, 2 *Maule & Selw.* 92. which, however, as we have seen above, would not be inconsistent with the custom to bar by surrender.||

And in some manors, a forfeiture committed by tenant in tail of the copyhold, and the lord's making three proclamations, and seizing the copyhold, and re-granting it to the copyholder, has been allowed a good custom to bar the entail. So it is, if tenant in tail surrenders to the purchaser and his heirs, who commits a forfeiture, and the lord, as before, seizes it, and makes proclamations; this is a bar of the entail, and the custom allowed good. *Copley*, 2 *Saund.* 422. This custom of barring entails is peculiar to the manor of *Wakefield*.||

|| Also, if a copyholder in tail accept a grant of the freehold of the premises holden by copy, the entail of the copyhold will be extinguished.

Cookes, 1 *Br. Ch. Rep.* 515. *Challoner v. Murhall*, 2 *Ves. Jun.* 524.

So, if tenant in tail of a trust of copyhold accept a surrender of the legal estate from the trustees, it will bar the entail and remainders over.

Co. Lit. 60. *Sid.* 314. *Moor*, 358. 3 *P. Wms.* 10. (a) But a recovery with voucher doth not of common right bar

Co. Lit. 60. b. || *Martin v. Mowlin*, 2 *Burr.* 969.

Co. Copyh. 135. || *Pilkington v. Bagshaw*, *Style*, 450. *Pilkington v. Stanhope*, 1 *Sid.* 314. 2 *Keb.* 127. *S.C.* *Grantham v.*

Dunn v. *Green*, 3 *P. Wms.* 9. *Wynne v.*

Grayme v. *Grayme*, 1 *Watk. Copyh.* 179.

Roe v. Lowe,
1 H. Bl. 451.
1 Watk.
Copyh. 180.

But, while the equitable entail and the legal estate are in several persons, such entail must be barred by some act of the tenant; for though it be but an estate in equity, it will not be devisable unless the entail be barred.

Ortway v. Hud-
son, 2 Vern.
583.

Where a tenant in tail of the trust of a copyhold requested the trustees to surrender to him, and on their refusal to do so, filed a bill to compel them; and, pending the suit, went to the lord's court and desired to be permitted to surrender, which was refused, because the legal estate was in the trustees; and he afterwards devised the premises; it was decreed, that the copyholds should pass by his will, the entail and remainders being considered as sufficiently barred.

Wadsworth's
case. Clay-
ton's Rep. 26.

A dormant entail shall be presumed to have been cut off, where several of the issue of the original tenant in tail have been admitted as tenants in fee simple.

¶ To facilitate the suffering of common recoveries in the lord's court of copyhold or customary tenements, persons, whether under coverture or not, who may suffer them in person are by st. 47 G. 3. sess. 2. c. 8. enabled to suffer them by attorney.¶

2. Of such Statutes as may be said to relate to them.

3 Co. 7.
Leon. 4.
Moor, 128.
Cro. Car. 42.
Skin. 297.
Salk. 185.
4 Mod. 83.

The general rule laid down for the exposition of statutes, as to their extending or not extending to copyhold estates, is this, that where an act of parliament alters any estate, interest, tenure, or custom, or service of the manor, or doth any thing in prejudice either to the lord or tenant, there the general words of the act will not extend to copyhold estates; but, where an act is generally made for the publick good, and no prejudice accrues to the lord, &c., there copyholders are bound by it.

Moor, 410.
(a) But debt
for a fine is
not within the
statute of limitations.

(a) Copyholders are within the statute of limitations; for that is an act made for the preservation of the publick quiet, and no ways tending to the prejudice of the lord or tenant.

(b) Co. Copyh.
151. 156.
Suppl. 106.
Cro. Car. 24.
Lex. Custom.
253. Yelv.
135. 222.
Cro. Ja. 305.
Hob. 177.

It seems (b) formerly to have been the better opinion, that a grantee or surrenderee of reversions of copyholds could not take advantage of a covenant broken, by 32 H. 8. c. 3.; because he comes in in the *post*, and not in the *per*; and the lord would have a tenant put upon him, without his admittance: but it (c) has been solemnly adjudged, that this being a beneficial law, it shall extend to copyholds.

Cro. Eliz. 17. Keb. 356. (c) 4 Mod. 82. to 86. adjudged between Cope and Glover. 3 Lev. 326. S. C. adjudged. Skin. 297. 305. S. C. adjudged. Salk. 185. S. C. adjudged.

Co. Copyh.

The 32 H. 8. c. 28. of the husband's discontinuing of the wife's lands, does not extend to copyhold estates.

12. Suppl. 68. 4 Co. 23. But, whether the other branch of it, or the 13 Eliz. c. 10. concerning leases made by husband and wife, tenants in tail, or ecclesiastical persons, extend to copyhold, *vide* Cro. Car. 44. Co. Copyh. 151. Co. Lit. 44. a. 6 Co. 37. 3 Lev. 327. And *vide tit. Leases*.

Copyholds are not within the 11 H. 7. c. 20., which makes void the alienation of the wife of any estate which she hath in dower, for life, or in tail, jointly with her husband, &c.; for thereby an entry being given to the next heir, he would come in to be tenant without the admittance of the lord.

The 27 H. 8. c. 10., for executing uses to the possession, extends not to copyholds; neither doth that branch of the act concerning jointures extend to them; so that if a jointure be made to a woman of copyhold lands, that will be no bar to her dower. (a)

circumstances, it may be a bar in equity. And where a testator, reciting that he was seised of a copyhold (though he was not so) devised to his wife "in full satisfaction of all dower and right of dower or thirds, which she might have or claim in or out of his real estate," and, after making his will, purchased a copyhold; it was holden in equity, that the devise extended to the freebench of the widow; and that she was, consequently, barred, or at least put to her election; freebench being "a customary right *nomine dotis*, and so declared "by *Bracton*, and instead of dower." *Warde v. Warde*, *Ambl.* 299. So to the same effect *Walker v. Walker*, 1 *Ves.* 54.||

But yet the statute of Merton, that gives damages in a writ of dower where the husband died seised, extends to copyholds, though the word *seised* is properly applicable to freeholds; but this is by force of the equity of the statute.

The statute of Westm. 2. c. 3. in all its branches extends to copyhold lands; for it is an act made to redress wrong, and no way prejudicial to the interest either of the lord or tenant, either in the *cui in vita* given to the wife upon the husband's discontinuance, the receipt of the wife, &c., or *quod ei deforceiat* to particular tenants.

It is enacted by 31 H. 8. c. 13. that if any abbot, &c. shall make any lease of lands, &c., in the which any estate for life, &c. then had its being and continuance, then every such lease shall be void. A copyhold was let by copy for life, and then the religious house granted a lease of it to another for 80 years; and the question was, Whether a copyhold estate for life was within the words of the act, *in the which any estate or interest, &c.*? and it was resolved that the lease was void, and that the copyholder had an estate or interest for life.

The 32 H. 8. c. 9., against *champerty*, extends to copyholds, for the words, *if any bargain, buy or sell any right or title*; so that they are within the words of the act, being made to suppress wrong; and within the equity of it, neither lord nor tenant being prejudiced by it.

The 31 H. 8. c. 1. and 32 H. 8. c. 32., concerning partitions, extend not to copyholds, because the acts provide it shall be done by writ of *partition*; and copyhold lands are not embleadable at common law.

The statute of Westm. 2. c. 20., which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or consent.

Abr. 888. *Cro. Car.* 44. *Hardr.* 433. *O. Benl.* 163. 3 *Read. Stat. Law.* 123. 2 *Inst.* 396.

Co. Copyh. 145. By 2 Ed. 6. c. 8. it is expressly provided, that copyholders shall have the like traverse and remedy where their interest is not found by the office, as freeholders and others have; and so also upon 12 Eliz. c. 8.

Co. Copyh. 146. By 1 Ed. 6. c. 14. it is expressly provided, that no copyhold should come into the king's hands by dissolution of monasteries; which clause was put in for the benefit of lords of manors.

Co. Copyh. 146. The forging of court-rolls is expressly within 5 Eliz. c. 14. as well as forging any other charter, deed, or writing sealed, whereby to defeat a copyholder or freeholder.

Cro. Car. 550. Copyholders are within the statutes of bankrupts, for the 568. Co. statute of 13 Eliz. c. 7. expressly mentions them; and though Copyh. 146. other statutes do not, yet they, being made for further remedy, But the statute of 34 are to be expounded by the former, especially since that hath & 35 H. 8. taken care that no prejudice should happen to the lord. c. 24. did not extend to them; therefore it was necessary to make a subsequent law to include them. 4 Mod. 84, 85.

Co. Copyh. 147. Copyholds are within the 35 Eliz. cap. 2., against recusancy, and forfeitable for the recusant's life, but the forfeiture goes to 147. Leon. the lord, not to the king, by the express words of the statute; 97. Owen, 37. but it seems that copyholds are not within the 29 Eliz. c. 6. 2 Inst. 737. or 3 Jac. 1. c. 4. in respect of the prejudice that would accrue Cawley, 107. to the lord by the loss of his services. 2 Hawk. P. C. c. 10. § 16. ||As to recu- sancy, see stat. 31 G. 3. c. 32.||

Co. Copyh. 149. The 16 R. 2. c. 5. which makes it a forfeiture of lands, &c. to purchase bulls of the pope, extends not to copyhold lands for the prejudice the lord would sustain if the king should have the lands.

9 Co. 105. a The statute of fines extends to copyhold lands, because it was Co. Copyh. made to avoid controversies, and is no-ways prejudicial to the 153; but see lord. 5 Co. 125.

D. e v. Mor- ||The st. 7 Ann. c. 19. relative to conveyances by infant trus- gan, 7 T. Rep. tees extends to copyholds. 103.

Vide 2 Watk. Qu. whether the statute 4 G. 2. c. 28. § 5. relative to distresses Copyh. 181-2. for rent arrear extends to copyholds.

Attorney Ge- Copyholds are within the statute of mortmain of 9 Geo. 2. neral v. An- c. 36.|| drews, 1 Ves. 225.

Withers v. [Resulting trusts of copyholds, as well as of freeholds, are with- Withers, in the statute of frauds. But copyholds are not within 20 Car. 2. Ambl. 151. c. 3. § 12. or the 14 Geo. 2. c. 20. § 9. relative to estates *pur autre vie*; ||that statute being confined to cases where there is no spe- ||Doe v. Mar- cial occupant; and there being, by the better opinion, no *general* tin, 2 Bl. Rep. 1148. Gilb. *occupant* of a copyhold.] Ten. 326.

Zouch v. Forre, 7 East, 186.||

Copyholds seem to be within the statute of 27 Eliz. c. 4. *Cowp. 705.*
 against covinous and fraudulent conveyances. || *Dougl. 716.*

The 17 E. 2. c. 10., which giveth the wardship of idiots' *Bulst. 50. Co.*
 lands to the king, he finding them convenient maintenance out *Copyh. 152.*
 of the profits thereof, extends not to copyhold lands, for *4 Co. 126. b.*
 the prejudice that would thereby ensue to the lord; but yet
 all alienations made by an idiot of his copyhold lands, after
 office found, shall be avoided by the king.

A copyholder is not within the statute 12 Car. 2. c. 24. to *3 Lev. 395.*
 dispose of the custody of his infant heir, because of the meanness *Clench and*
 of his estate, and the prejudice that would accrue to the lord of *Cudmore.*
 the manor; and therefore the lord, or those entitled by the cus- *2 Lutw. 1181,*
 tom, shall have the custody of him. *S. C. Comb.*

|| Though the *243. S. C.*
 appointment of a guardian by a father under the stat. 12 Car. 2. c. 24. as to the copyhold *||*
 property of his child, would not be good where the custom of the manor gives the guar-
 dianship to the lord: yet it should seem to be good against the guardian in socage, who
 would be entitled to the custody of the copyholds, if the custom had not vested the guar-
 dianship in another. And in both cases the appointment would be good, perhaps, as to the
person of the child. *Watk. n. clxxii. to Gilb. Ten. p. 476-7. ||*

|| Copyholds are not within the 10th chapter of the statute of 2 Inst. 100.
 Merton, enabling suitors to make attornies.

Nor do they seem to be within the 9th chapter of the statute *Id. 117.*
 of Marlberge, which gives contribution for suit.

Nor are they within the 12th chapter of the statute of Glou- *Id. 235.*
 cester, relative to foreign warranty.

Nor the statute of Acton Burnel, *de mercatoribus.* *Moor, 123.*

Nor the statute 32 H. 8. c. 37., which empowers executors to *Bull. N. P. 57.*
 distrain. *but see Gilb.*
Ten. 186-7. & Qu.

Nor the statutes of wills. || *Tuffnell v.*
Page, 2 Atk.

36. Attorney General v. Andrews, 1 Ves. 225. Hargr. Notes (1.) & (3.) to Co. Lit. 111. b.
Carey v. Askew, 2 Br. Ch. Rep. 58. Doe v. Danvers, 7 East, 299.

(D) Of such general Customs as may be said to re- late to all Copyhold Estates.

THERE are two sorts of customs; first, General, which ex- *Salk. 184.*
 tend to all kinds of manors, which are warranted by the
 common law, and of which the courts take notice; secondly,
 Particular customs, which must be pleaded.

By the general custom, and of common right, every copy- *13 Co. 68.*
 holder may take hedge-bote, house-bote, and plough-bote, upon *Godb. 172.*
 his copyhold; but yet this power may be restrained by custom; *2 Brownl. 329.*
 as, that the copyholder shall not take it, unless by the assignment
 of the lord, or his bailiff.

Every copyholder may make a lease for a year, and such *4 Co. 26. a.*
 lessee may maintain an ejectment; for as the common law war- *Cro. Eliz. 461.*
 rants such lease, so it gives him a remedy for the recovery of
 what he is entitled to under it.

Cro. Ja. 526. A copyholder may (a) surrender to the lord by attorney in
 Cro. Eliz. 443. court, because he may do that *communi jure*; and so the com-
 cont. Cro. mon law gives him power to do it by attorney, as an incident to
 Car. 273. his estate. So, a surrender to the lord out of court is *de communi*
 Leon. 36. Co. *jure*, and therefore the copyholder may, as it seems, do it by at-
 Copyh. 92. See torney (b), and so, it seems, to the (c) steward; but, if the surrender
 st. 47 G. 3. c. 8. (a) Admit- be to two customary tenants, there it cannot be done by attorney
 tance by the lord in court, without a special custom.
 or out of court,
 seems to be *de communi jure*; but *quære*, whether *de communi jure* he is to admit by
 attorney; and *vide* 9 Co. 75. Leon. 36. cont. Co. Lit. 59. 3 Bulst. 80. and 2 Sid. 37. 61.
 That the lord is not compellable to admit by another, because the corporal service of
 fealty is due from every copyholder. (b) [It is said in 2 Ves. 679. to have been expressly
 denied by Lord Hardwicke, that a surrender can be by attorney out of court.] || But this,
 if understood generally, is contrary to unquestionable authority, 1 Watk. Copyh. 67. ||
 (c) That there is the same reason that the steward should take surrenders out of court,
 and also out of the manor, as that the lord should. Salk. 184. So R. 9. Co. 76. a. b.
 1 Roll. Abr. 501.

(E) Of particular Customs that are good, and peculiar only to some Copyholds.

PARTICULAR customs are to be construed strictly: but the reasonableness of them is not altogether to be considered from the rules and maxims of the common law, (for there is no custom but what in some point or other overthrows the common law,) but from the convenience of the thing itself.

March, 161.

A custom that if a copyholder do not repair, it shall be presented by the homage, the tenant amerced, and that the lord shall distrain upon the copyholder or under-tenant, is a good custom, for the under-tenant is not a mere stranger.

2 Brownl. 85. But a custom that after the death of tenant for life the lord is
 Noy, 2. Cro. compellable to make a grant for life to his son, and if no son, to
 Ja. 368. the daughter, is a void custom, because it obliges the lord, who
 Moor, 842. hath the interest, to grant it to this or that particular person,
 788. (d) || Noy, whether he will or no: (d) but a custom for a copyholder for life
 2. Crabb. v. to nominate his successor, is good; and a custom that such a
 Bales, Id. 3. copyholder may cut down trees is good, for he is *quasi* a copy-
 cited in Warne holder in fee. (e)
 v. Sawyer, 1 Ro. Rep. 48.
 and in Perkins
 v. Titus, 3 Mod. 134. Bill's case, 4 Leon. 238. Rowles v. Mason, 1 Brownl. 132. 2 Brownl. 85.
 192. S. C. 1 R. Abr. tit. Customs. (E.) pl. 18. S. C. Devenish v. Baines, Pr. Ch. 3. Mardiner v.
 Elliott, 2 T. Rep. 746. (e) And where a copyholder of inheritance in a manor, in which such a
 custom obtains, carves out the estate, he may give to him, whom he makes tenant for life,
 the right of cutting the timber. Denn v. Johnson, 10 East, 266. On this custom, how-
 ever, there would seem to be still doubt. Dench v. Bampton, 4 Ves. 703-4. ||

Parkin v. || A custom for the homage to assess a compensation in lieu of
 Radcliffe, a heriot to be paid by an in-coming copyholder on surrender or
 1 Bos. & Pull. alienation, would seem to be bad. ||
 282.

March, 28. Custom for the steward to make bye-laws for the ordering
 Leon. 190. of the common, is good; but an order that the tenant shall
 [In the case not put in this or that beast, is void, because it takes away his
 from Leonard, inheritance: but a bye-law that he shall not do it before such a
 the bye-law was day,

day, is good, being not restrictive of his inheritance, but only by the majority of the tenants.]

Custom that he who lives above ten miles from the manor, upon paying 8*d.*, and 1*d.* to the steward, shall be excused from attendance upon the court, is a good custom, if it be averred that there are sufficient tenants who live near the manor. Sid. 361. Mod. 77. 2 Keb. 344. 380. 851.

A custom to devise land, the lessee paying the treble value of the rent, and if he die within the term, that his heir shall have it, paying one year's rent; and that if he assign, the assignee shall have it, paying a year's rent; was holden to be a good custom. Hut. 101. 126, 127.

That a copyholder shall not alien without a licence, is a good custom; so is a custom that if a copyholder make a lease for one year, and die, that it shall be void against his heir; (a) but a custom that the copyholder shall hold the land half a year after the term, is void. Lit. Rep. 233. Moor, 8. pl. 27. (a) A custom that the executors shall hold a year after the copyholder's death, is a good custom. Cro. Ja. 36. — That a copyholder may give a warrant of attorney to surrender after his death, is a void custom. 2 Roll. Abr. 157.

holder's death, is a good custom. Cro. Ja. 36. — That a copyholder may give a warrant of attorney to surrender after his death, is a void custom. 2 Roll. Abr. 157.

That if a copyholder will sell his land, the next of blood shall have the refusal, or the next neighbour to the east, is a good custom. Lex Custom, 34.

If there be a custom that a copyholder shall not put in his beasts to take the common before the lord hath put in his, this is a void and unreasonable custom, because it is in the power of the lord to take away the interest of his commoners. (b) So, a custom that the tenant shall pay a fine upon the marriage of his daughter, is void, because against the freedom of the subject; but, if a man obliges himself to such a thing by tenure, it is good, being his own contract. 2 Brownl. 277. Co. Copyh. 70, 71. (b) If the husband shall be tenant by the curtesy, or the woman in dower, then to pay a fine upon marriage, is reasonable. Co. Copyh. 73. 2 Roll. Abr. 264, 265.

A custom may be void for the uncertainty of it; as, if it be that the tenants ought not to pay above two years' rent for a fine, but that they may pay so much or less. *Qui.* 2 Roll. Abr. 264.

My Lord *Coke* seems to be of opinion, that, by special custom, a wife may devise copyhold land to her husband; but he says that this custom hath been so much impugned, that he cannot justify the validity of it. Co. Copyh. 94. *Vide Moor*, 123. where it was debated, whether a custom that a

feme covert might devise copyhold to her husband, or any other was good? and it seemed to be the opinion of the court that it was; but the judgment went on a fault in pleading; but *vide* Winch. 27. March, 8. 4 Co. 61. b. where it is holden no good custom.

Copyholders by custom may have *solam et separalem pasturam* in the soil of the lord, and exclude the owner (c); but a copyholder of inheritance cannot, without special custom, dig for mines; neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyholder's estate; but the copyholders may dig marl to lay on the copyhold land, but cannot inclose where it never was inclosed before. 2 Saund. 326. Sid. 152. Roll. Abr. 888. Winch. 8. Lit. Rep. 234. [Player v. Roberts, Sir Wm. Jones, 244. Gray v. Duke

of Northumberland, 13 Ves. 236. 17 Ves. 281. Bourne v. Taylor, 10 East, 189. (c) A copyholder in fenny lands may be entitled to dig the lord's soil for turf. Dean of Ely v. Warren, T. 1741. 2 Atkyns, 189. — Common of turbary cannot belong to an occupant. *Ibid.*]

holden, that though by the custom the wife was also entitled to her free bench, yet that the lessee's title being pursuant to the custom, was as good as hers, and being prior could not be (a) avoided by her.

course there was a dying seised) hath, in Chancery, been carried into specifick performance, in total exclusion of the widow's claim. 2 Ves. 631. Brown v. Raindle, 3 Ves. 256.] (a) But it seems, after the lease ended, she should be endowed; but *quære*, whether she ought to be endowed of the third part of the rent during the continuance of the lease, because customs are to be taken strictly. *Vide* head of *Dower*, and that her title doth not commence by the marriage, as it doth in dower at common law. Carth. 276.

If a copyholder in fee, where by the custom the widow is entitled to her *free bench*, surrenders his copyhold into the hands of two tenants, according to the custom, to J. S. in fee, and this surrender is presented at the next court; but after, and before the second court, the surrenderor dies, and at the next court after his death J. S. and the widow are admitted; the title of the surrenderee shall prevail; for though the husband died seised, yet it was of a defeasible estate, of which quality the wife's estate must partake, being thereout derived, and by the admittance, which had relation to the surrender, being actually defeated.

¶ And on the other hand, had the surrenderee in this case died before admission, his heir would have been entitled to admission, and his widow to her free bench.]]

If the lord of a copyhold manor, in which are several copyholders for life, (b) takes a wife, and a copyholder dies, and the lord after coverture grants the land again, according to the custom of the manor, for life, and dies; his wife in a writ of dower shall not avoid this grant; for though the grant was after her title of dower, yet the custom, which is the life and force of the grant, was long before.

2 Leon. 109. 8 Co. 63.; but for this, *vide* Leon. 4. 16. 2 Leon. 152. 3 Leon. 59. Godb. 130. Moor, 94. Roll. Abr. 684. But the heir's grant the wife shall avoid. Moor, 237.

If there be a custom in a manor that the lord shall enter and enjoy the lands during the nonage of the infant, it is a good custom; for the freehold of the land is in the lord, and he is tenant to the *precipe*; and an estate at will may cease for a time, and revive again, as well as it may descend by custom.

[A custom in a manor, if there be any such, that copyholds shall not be surrendered to the use of a will, or that being actually so surrendered, they shall not pass thereby, is a void custom.

A custom not to present mortgages till the third court, is good.]

¶ Though a custom for a copyholder for life (c) to commit waste would not be good; yet it would for a copyholder in fee to do so. A custom diminishing the value of the lord's estate is not therefore bad.

245. S. C. Powell v. Peacock, Cro. Ja. 30. (c) So, of one who holds to him and his heirs for lives. Mardiner v. Elliot, 2 T. Rep. 746. Otherwise, perhaps, if he has a power of nominating his successor. *Ibid*.

acc. And even an unexecuted agreement by him to sell (where of

Salk. 185. Benson and Scott, 3 Lev. 385. S. C. adjudged.. Skin. 406. S. C. adjudged. Carth. 275. adjudged without difficulty.

Vaughan v. Atkins, 5 Burr. 2764.

4 Co. 24. adjudged. 8 Co. 63. cited. 2 Brownl. 208. S. C. cited. (b) So, if he grant a rent-charge.

Leon. 266. pl. 357. Co. 87.

Pike v. White, 3 Br. Ch. Rep. 286. See Church v. Munday, 15 Ves. 403, 404.

2 Ves. 303.

Id. Ibid. Rockey v. Huggens, Cro. Car. 220. Sir Wm. Jones,

Mitchell v. Neale, 2 Ves. 679. A custom, that a tenant must surrender in person, unless in some special cases of disability, is good.||

(F) Of granting Copyhold Lands : And herein,

1. What Persons may make good Grants.

Co. Lit. 58. b. 4 Co. 23. b. Co. Copyh. 79. 107. Moor, 147. Roll. Abr. 499. S. P. 8 Co. 63. b. Noy, 41. (a) The ancient services must be reserved, the reason whereof is, that there being nothing but custom to warrant the grant by copy, the custom ought to be strictly pursued as to the estate, customs, services, and tenure, else it is not the estate that was demised before, Co. Copyh. 107, 108. Bro. Tenant by Copy, 27. — Therefore he that hath but a particular estate in the manor, cannot grant a copyhold by parcels, or demise part, and retain the residue himself. Cro Eliz. 662. (b) It is one of the pillars of a copyhold estate, that it hath been demised, or demisable time out of mind. 4 Co. 24. b. Co. Lit. 58. b. Leon. 56. 3 Leon. 107, 108. 2 Wils. 125.

EVERY lord of a manor who hath a lawful estate in the manor, whatsoever that estate be, whether in fee, in tail, for life, years, or at will, &c. may make voluntary grants of copyhold lands that come into his hands; which grants shall bind those that have the inheritance of the manor, whatsoever defects the lord of the manor may be under, that made the grant; (a) provided the ancient rent, custom, and services be reserved; for these estates and grants derive not their force and effect from the lord's interest, but from the custom of the manor by which they have been (b) demised, and are demisable, time out of mind; so that to support such a grant, it is sufficient if it be done *per dominum manerii pro tempore*.

grant by copy, the custom ought to be strictly pursued as to the estate, customs, services, and tenure, else it is not the estate that was demised before, Co. Copyh. 107, 108. Bro. Tenant by Copy, 27. — Therefore he that hath but a particular estate in the manor, cannot grant a copyhold by parcels, or demise part, and retain the residue himself. Cro Eliz. 662. (b) It is one of the pillars of a copyhold estate, that it hath been demised, or demisable time out of mind. 4 Co. 24. b. Co. Lit. 58. b. Leon. 56. 3 Leon. 107, 108. 2 Wils. 125.

4 Co. 23. b. 8 Co. 63. S. P. (c) But the grant must be made in the name of both. grantor. If baron and feme, being seised of a copyhold manor in the right of the feme, (c) grant a copyhold, this shall bind the feme, notwithstanding her coverture; for the copyholder is in by custom, without regard to the estate or person of the grantor.

4 Co. 23. 8 Co. 63. (d) Noy, 41. So a grant made by an (d) infant, *non compos mentis*, bishop, prebendary, (e) parson, &c. shall bind for ever.

S. P. adjudged. (e) Grants by a parson before induction are not good; so, if after institution and induction he reads not the articles. Co. Copyh. 48. § 34. Qu.

4 Co. 23. So, if the queen be tenant for life of a manor, and a copyhold of inheritance escheat, she may grant it by copy, and such grant by the custom of the manor shall bind the king; for she was *domina pro tempore*.

Co. Copyh. 97. If there are two jointenants of a manor, and a copyhold escheats, one may grant the whole; for he is *dominus pro tempore*, being seised *per my & per tout*.

(f) Owen, 115. Co. Copyh. 87. That there ought to be a custom to enable a lord of some opinions has been holden void, unless the reversion happens before his estate for years ended; for by this means he binds the (g) future lord's interest, and lets his own go at large: but now (h) by the better opinion, this grant is good; for the first ground

ground of this law, that the lords for the time being may grant copyhold estates, was, because copyholders were only tenants at will; and so though the lord, for the time being, had but a particular estate, and granted the lands in fee, yet that was no prejudice, but rather an advantage to the lord that was to have the manor afterwards; for if he had a mind, he might put out the tenant at his own pleasure: but this uncertainty of the copyholder's estate being found inconvenient, it was afterwards adjudged that he should retain his lands, and not be subject to the pleasure of the lord: but the other part of the law was left as before, *viz.* that lords for the time being might grant lands in fee, though they themselves had but a particular estate; and this custom being continued to this day, it is that which warrants the grants by copy; for it is most certain those estates, granted by lords who have a particular interest, cannot be derived from the interest of the lord; for if they were, they must determine when the lord's estate determines: for *nemo potest plus juris, &c.*

tices would give no opinion on the point. The case of *Plimpton v. Dobynet* in *Gouldsb.* 101. pl. 8. is inconclusive, though it seems to be against the validity of such a custom. A custom to restrict the lord, who might have granted a copyhold in possession in fee, appears, as Chief Baron *Gilbert* observes, to be very unreasonable: though if the custom go only to restrain the particular tenant from granting in reversion, it might, as he remarks, be reasonable enough. *Gilb. Ten.* 322. 1 *Watk. Copyh.* 40. || (g) Tenant in dower of a copyhold may grant in reversion, and it shall bind the heir after her death. *Roll. Abr.* 499. *Cro. Eliz.* 661. S. C. *Vide Godb.* 135. *Owen*, 4. — Guardian in socage may grant copyhold in reversion, and it shall bind the ward, though it comes not in possession during his infancy. *Godb.* 143. *Cro. Ja.* 55. 98. *Owen*, 115. *Roll. Abr.* 499. 2 *Roll. Abr.* 41. S. C. (h) 8 *Co.* 63. *Hetley*, 54. *Moor*, 95. 147. *Cro. Eliz.* 661.

If a lord of a manor devises by his will in writing, that his executor shall grant copies according to the custom for payment of debts, and dies; the executor, though he hath no estate in the manor, may make grants according to the custom of the manor.

If the king, by letters patent, grants the stewardship of a copyhold manor, and after a copyhold escheats, the steward (*a*) *ex officio*, without any special warrant, may grant it again, and the king shall be bound by the custom of the manor.

his duty, before he made any grant, to inform the treasurer, chancellor, and barons of the Exchequer, or some of them, for their direction. (*a*) Much more may the steward of a common person, *ex officio*, make such grants, *Co. Copyh.* 124. for the steward is in the place of the lord, and, without a command to the contrary, may, &c. *Cro. Eliz.* 699.

But a steward retained only by the king's auditor or receiver, cannot make such a voluntary grant of a copyhold; for they have not any authority to appoint stewards, the business of the one being to take accounts, and of the other to survey the land.

or make admittances, being things of necessity. *Cro. Eliz.* 699.

If *A.* and *B.* under the seal of the Exchequer are appointed joint stewards of all the lands of a fugitive, and *A.* alone grants copies;

a manor to grant copyholds in reversion. *March*, 6. *Vide Gouldsb.* 102, 103. 3 *Leon.* 226. *Godb.* 140. || The first of the cases referred to for this position does not appear to be any more than a *dictum*, and so Chief Baron Comyns has considered it; *Com. Dig.* Copyh. (c. 12.); and in the two last the jus-

Co. Lit. 58. b. *Vide Dyer*, 251. a. *Co. Copyh.* 85. 4 *Co.* 24. a.

4 *Co.* 30. adjudged. But it was said, though by law he might do it, yet it was

4 *Co.* 30. adjudged. *Cro. Eliz.* 699. S. C. adjudged; but may take presentments, *Cro. Eliz.* 699.

Moor, 109. 1 *Ld. Raym.* S. C. cited.

Leon. 288.
S. P.

copies; though in strictness he had no power without *B.*, yet these grants are good, being made by one that had a colour to keep courts.

Ley. 47, 48.
Resolved by
Hobart and
Tanfield; but
it was ordered
the steward
should grant
none but with
the privy of
the committees,
and warrant from the court: but there is a note that this was in discretion,
and the grant of the steward good.

If *A.* being tenant for life of a manor, within which are several copyhold tenements grantable for one life in possession and another in reversion, grants the stewardship thereof by deed under his hand and seal to *B.* for life, with the fee of 10s. *per ann.* for the executing thereof, and after *A.* becomes a lunatick, and being found so by inquisition, is committed to, &c.; yet *A.*, by his steward, may grant copies.

Ley. 48. re-
solved by *Hob.*
and *Tanfield*.

But the committees cannot grant copies; for they themselves have no estate in the manor, nor are lords thereof.

Dyer, 344. a.
4 Co. 24. a.
Co. Copyh. 82.
88. (a) But
a grant made
by lessee for
years, after
breach of a
condition is
void; for his
interest is *ipso*
facto deter-
mined. Co. Copyh. 88. ——— A grant made by a feoffee on condition to enfeoff the next
day, is good; for he is *dominus pro tempore*. Co. Copyh. 88.

If a man makes a feoffment in fee of a manor, upon condition, and the feoffee grants estates by copy, and then the condition is broken; yet the grant by copy shall stand good, though it be a rule that he, who enters for a condition broken, shall be in of the same estate he was before, and shall avoid all mesne incumbrances: and it is the same, though the grant were made (a) after breach of the condition; for the feoffor may wave the advantage of it, if he pleases: also, a grant by the feoffee of an infant, which by law he may avoid, is good.

Co. Copyh. 88,
89.

A man seised of a manor in fee hath issue a daughter, and dies, his wife *privement enseint* with a son; the daughter may grant by copy. So, grants made after alienation in mortmain, and before entry of the lord, are good.

Co. Copyh. 47.
§ 34.

If a lord of a manor commits felony, and is attainted or convicted by verdict or confession, yet after such attainder, &c. he may make voluntary grants of copyholds.

Co. Lit. 58. b.
4 Co. 24. 2
Co. 140. Poph.
71. Moor, 112.
236. pl. 369.
2 Leon. 45.
Owen, 27.
Cro. Eliz. 699.

But, if any person that hath a tortious or defeasible estate of inheritance, or a disseisor, or the feoffee of a disseisor, or tenant at sufferance, make voluntary grants upon escheats or forfeitures, they shall not bind him that hath the right; for they are not *domini* within the meaning of the custom; but admittances upon surrenders or descents made by such as have defeasible titles are good, and shall bind him that hath right; for that they were compellable to do, and it was no more than the rightful lord must have done.

2. What Acts shall destroy the Power they had of making such Grants.

(b) Roll. Abr.
498. Co. Lit.
58. Cro. Eliz.
699. 4 Co. 31. a.
(c) 4 Co. 31. a.
(d) Roll. Abr.

Although lords of manors, who have copyholds come to them by escheat or forfeiture, (b) may re-grant them again according to the custom of the manor; (c) yet by their acts such power may be destroyed; therefore (d) if copyholds come into the lord's hands

hands in (e) fee, and he makes a lease of them for life, years, or half a year, or for any (f) certain time, by deed or without deed, the copyhold is destroyed; because, during those estates, it was not demised, nor demisable by copy. 498. 4 Co. 31. (e) But, if tenant in tail, for life, &c. makes such lease, &c. this shall not destroy the power of him in reversion. 2 Roll. Abr. 271. 2 Sid. 35. 37. *Vide* Cro. Car. 521. *cont. per Curiam arguendo.* (f) *Secus*, if he leases it at will. 4 Co. 31. 3 Leon. 108.

So, if the lord makes a feoffment thereof in fee, upon condition, and after enters for the condition broken, yet it cannot be granted again by copy. 4 Co. 31. a.

So, if the land so escheated, &c. is extended upon a statute or recognizance made by the lord; or the wife of the lord, in a writ of dower, hath it assigned to her; though these interruptions are by act of law, yet it cannot again be granted by copy. 4 Co. 31. in French's case.

But, if the lord keeps it in his hands, though never so long, yet may it be granted again by copy. 4 Co. 31. a. Co. Lit. 58. b. Cro. Eliz. 699.

So, if the lord be disseised thereof, and the disseisor die seised; or if the land be recovered against the lord by a false verdict; or erroneous judgment, though it is not demised or demisable by copy till it is recovered by the lord, or the judgment reversed; yet, after it is re-continued, it is grantable again by copy, because the interruption was tortious. 4 Co. 31.

If a copyholder takes a lease for years of the manor, by which his copyhold is extinct, yet he may grant it again, if he will; for it was always demised or demisable. 4 Co. 31. b.

So, if a copyhold escheats, &c., and the lord aliens the (g) manor, his alienee may re-grant the land by copy. 4 Co. 31. b. (g) So, if he leases the ma-

nor, and the copyhold land, by the name of his tenement, called *H.*; for the manor being demised, the copyhold is included as parcel thereof; and the naming of the copyhold is but surplusage. Cro. Car. 521.

3. *What Things may be granted to be holden in Copyhold.*

Things that lie not in tenure are not grantable by copy, unless. (a) A rent-ser-
(a) appendant to some thing that doth lie in tenure; and there-vice, rent-charge, or
fore things incorporeal, for which there can be no distress, and common in
which are not parcel of the manor, which consist only of gross cannot
demesnes and services, cannot be demisable by copy; for of such be granted
incorporeal things no service is due; and therefore no court neces-otherwise than
sary to be kept for surrenders, admittances, &c. as they are
appendant to

things which lie in tenure; Co. Copyh. 116.; and therefore, when my Lord Coke says, that any thing concerning lands or tenements may be granted, it must be understood of things appendant to the demesnes, or those parcels which make up the manor. *Vide* Co. Lit. 58. Tithes may be demised by copy, because they are a parcel of the manor, as a rent-charge may. *Per* Roll. Abr. 498. Cro. Eliz. 413. cited to have been adjudged; [and Sandys and Drury, P. 43 El. B. R. Hal. MSS. Co. Lit. 58. b. n. 9. 13th edit.] but Cro. Eliz. 814. S. C. and S. P. *dubitatur*; because not parcel of the manor; and therefore not grantable *secundum consuetudinem manerii*; [and because it did not appear that they had been immemorially granted by copy.] A mill may be granted by copy. 4 Leon. 241. cited to have been adjudged.—So, a fair appendant to a manor may be granted by copy. 4 Co. 31. a. Co. Lit. 58.

(a) Roll. Abr. 498. (b) Co. Lit. 58. 4 Co. Lit. 31. a. so resolved.

4 Co. 30, 31. Things grantable by copy must be things of perpetuity; otherwise it can never be shewn that there hath been a custom to demise them by copy; yet underwood, without the soil, may be demised by copy.

Because it is a thing of perpetuity, to which the custom may extend. Co. Lit. 58. b. S. P. Cro. Eliz. 413. and Moor, 315. adjudged and affirmed upon a writ of error. — That a man may grant, by copy, twenty loads of wood to be taken by the grantee, is good; for it is not necessary that the thing granted have continuance, but only that it be a thing of perpetuity. Co. Copyh. 118. but *quære*.

Co. Lit. 58. b. 2 Brownl. 40. 11 Co. 17. adjudged; and that such customary lord may keep courts and grant copies. Cro. Ja. 327. adjudged.

A customary manor may be holden by copy of court-roll *ad voluntat. &c.* and such a lord may grant copies, but it must be of such things as have been usually demised by him; for he cannot grant all his demesnes by copy, without they have been usually demised; for though they have been demised time out of mind by the superior lord by copy, that will not warrant his demise by copy; because the custom of the manor must be that time out of mind they have been granted *per dominum manerii*.

Bulst. 57. cited; but Cro. Ja. 260. *dubitatur*. — But he cannot hold a court-baron, for he can have no freeholders; for a copyhold manor is not capable of an escheat of a freehold; for if it were, the freehold after the escheat must become copyhold, which is repugnant and impossible. Yelv. 190. Cro. Ja. 259. Bulst. 54, 55. These cases, which seem to contradict each other, and which *vide*, may perhaps be thus reconciled, that a customary court may be holden by one that hath such a manor, but not a court-baron; and my Lord Coke's case seems to go no farther; and *quære*, Whether such a lord may not have freehold services?

Hughes v. Games. Sel. Ca. temp. King, 62. Lord Northwick v. Stanway, 3 Bos. and Pull. 346.

¶ Lands, parcel of the waste of the manor, may by custom be granted by copy of court-roll, though they have never been so granted before; for it is only necessary that the lands should immemorially have been *demisable*, as here they are by a custom which has immemorially attached upon them, not that they should have been immemorially *demised*.¶

Roe v. Newman, 2 Wils. 125. Mr. Watkins maintains that the wastes may be granted as copyhold without a custom. Copyh. 35 to 36. but see Kitch. 88. b. Kemp v. Carter, 1 Leon. 55. Revell v. Joddrell, 2 T. Rep. 415. Bishop of London v. Rowe, 3 Keb. 124.

4. Of the Operation of the Grant, and the Estate and Interest that pass thereby.

Co. Copyh. 113-4.

Grants of copyholds regularly receive the same exposition which grants of freehold lands do at common law, therefore a grant to one and his heirs male is a fee simple; so is a grant to one & *sanguini suo hæreditabili*; but a grant to one & *sanguini suo in perpetuum* is but an estate for life.

(c) Co. Lit. 52. Godb. 20. S. P. Bytwo justices. Leon. 56. S. P.

(c) If copyhold lands have been usually granted in fee, a grant to one and the heirs of his body, or to one for (d) life or years, is within the custom.

per Curiam. Cro. Eliz. 373. S. P. adjudged. Salk. 188. pl. 7. and 6 Mod. 63. S. P. agreed.
(d) And after the death of the tenant for life the lord may grant the same again in fee; for the grant for life was not any interruption of the custom. Leon. 56. *per Cur.*

So, where grants have been made by copy for life, a grant *durante viduitate* is good, for that is a less estate than during the widow's life, but not *vice versâ*.

If a copyhold be granted to three, *habend. successivè*, they are jointenants, unless by (a) special custom the word *successivè* makes the estate several.

Chancery, that if a copyhold is granted to three *successivè*, and there is no custom proved, that the first taker had power of disposing of the whole, nor any proof that the first taker paid the purchase-money, it shall not go to the executor of the first taker, but shall go in succession. Rundle v. Rundle, 2 Vern. 264. || But, if the whole consideration money be paid by the first taker, the others shall be regarded as trustees for him, Dyer v. Dyer, 1 Watk. 216. though the presumption of their being so, like all other presumptions, may be rebutted even by parol evidence. Goodright v. Hodges, Id. 227. But, if the persons having the legal estate be the children of the person paying the consideration money, the presumption will be changed in favour of such children for whom the father was under a moral obligation to provide, and the purchase shall be considered as an advancement or provision for them; Dyer v. Dyer, *ubi supra*; unless it appear by any concurrent act of the father, that he did not so intend it. Swift v. Davis, 8 East, 354. note. But the moral obligation cannot extend to a nephew or niece. Goodright v. Hodges, *ubi supra*.||

If there be a custom that copyholds may be granted for three lives, a copyhold may be granted to three for the lives of two, within the custom; for there is not any inconvenience to the lord, though it be for the life of another; for there shall not be any occupancy thereof, but the lord shall have it, if the tenant *pur auter vie* die, living *cestui que vies*; and this is not a greater estate than for three lives, which is less than the custom warrants.

So, if the custom of a manor be, that the lands are demisable by copy to two or three persons for their lives, and the life of the survivor, *habendum successivè sicut nominantur in charta, & non aliter*, paying a heriot on the death of every tenant dying seised; a grant to A. and his assigns for the lives of B. and C., and of the said A., is good within the custom; for there can be no occupant against the lord, neither will he be prejudiced by the tenant's becoming a bankrupt; for the assignees have no other right or interest than the bankrupt, and the lord is entitled to his heriot on the death of the tenant, notwithstanding the assignment.

If by the custom a copyhold may be granted for three lives, and it is granted to one (b) for his life, remainder to such woman as he shall marry, and to the first son of his body; both these remainders are void, but the estate for his own life is good.

capienti extra manus domini; yet a surrender may be to the use of one for life, remainder in tail, remainder in fee; Stanton v. Barnes, Cro. Eliz. 373. adjudged; though it was objected, the taking ought to be *immediate*; but the particular estate and remainders make but one estate.

4 Co. 29. b.
30. a. Cro.
Eliz. 323.

Co. Copyh.
142, 143.
(a) It has
been ruled in

Roll. Abr.
511.

Salk. 188.
Smartle and
Penhallow,
adjudged.
6 Mod. 63.
Ld. Rayn.
434. S. C.

Moor, 677.
(b) If by the
custom it is
demisable in
fee, or for life,
solummodo ea

(G) Of Surrenders, Presentments, and Admittances :
And herein,

1. *Of the Necessity of a Surrender, and where the Copyholder shall be said to be in before Admittance.*

Co. Lit. 57. a. 60. b. 4 Co. 21. a. (a) Though a copyholder cannot alien by deed, yet he that hath a right only to a copyhold, may, by deed or copy, release it to one that is admitted tenant *de facto*. Co. Lit. 59. 4 Co. 25. S. P. adjudged. Hut. 65. S. P. Cro. Ja. 101. S. P. *dubitatur*.—But he cannot release to one that ousts him by wrong, for he gains no customary estate, upon which the release of the customary right may enure. 4 Co. 25. b. Leon. 102. But Q. whether such a lease will not enure by way of estoppel against the copyholder himself. Release in fee to one who was admitted for years, will not enlarge his estate; for no man can come to the fee of a copyhold without surrender and admittance by the lord. Co. Copyh. 97, 98. — But, if a copyholder surrenders upon condition, he may after release the condition by deed. Cro. Ja. 36. (b) [An action on the case will not lie against the lord if he refuse to admit. Cro. Ja. 368. 2 Bulstr. 337. But the Court of King's Bench will compel him by *mandamus* to admit a surrenderee, 2 T. Rep. 484. though not the heir, because not necessary. *Id.* 197. Relief in this case, it was formerly thought, could be had only in equity.] || And the right of the common law courts to interfere in this manner seems still to be questioned; 3 Ves. 754. and should at least be confined, it is said, to cases of publick concern, such as was the case of the King v. the Borough of Midhurst, 1 Wils. 283. 1 Bl. Rep. 60. Bull. N. P. 200. where the admission carried the privilege of voting for the representatives of the borough. But the common law courts consider themselves as having unquestionable authority to issue the *mandamus* in questions of mere private right; and they granted it in a late case (Rex v. Coggan, 6 East, 431.) to admit one who had a *prima facie* legal title, in order to enable him to try his right; the Chancellour having refused to compel the lord to admit him, for want of his shewing an equitable title to the property. Williams v. Lord Lonsdale, 3 Ves. 752. ||

(c) Co. Copyh. 97. Copyhold lands cannot be (c) exchanged by deed, but there must be a surrender and admittance thereupon: but, (d) if there be two joint copyholders, and one of them release to the other, (d) Winch, 3. adjudged. this is good without (e) any surrender or admittance; for the first admittance was of them, or either of them, and their ability to release was from the first conveyance and admittance. (e) That any conveyance to the lord will pass the copyholder's interest, for the custom of passing by surrender is for his benefit, which he may waive. Hut. 65. Winch, 67. Jones, 41. S. C.

4 Co. 22. b. (f) And if he dies, his heir may enter. Though, regularly, copyhold estates can only be transferred by surrender and admittance, yet, if the copyholder dies, (f) his heir may enter before admittance, and take the profits; for perhaps there may not be a court holden in a great while afterwards: 4 Co. 23. b. — Though also, such heir may (g) surrender to the use of another before admittance, but not to prejudice the lord of his fine. the lord had admitted another. Noy, 172. adjudged. (g) May take the profits, bring trespass, maintain ejectment, have an assise of *mort d' ancestor* before admittance. 4 Co. 23. Lane, 20. 1 And. 192. Cro. Eliz.

Eliz. 148. Moor, 597. Leon. 100. 3 T. Rep. 169. — But is not complete heir, for he cannot maintain a plaint in nature of an assise. Co. Copyh. 112. Moor, 272. *cont.* [He hath as complete a title without admittance as with it against all the world, but the lord. 2 T. Rep. 198. If a copyhold be devised to the heir, his non-admittance is evidence of his election to take by descent, and not by the will. 1 Str. 491.]

But, if upon proclamation the heir does not come in to be admitted, the lord, without any particular custom, may seize (a) *quousque* the heir come in to be admitted. Lev. 63. *per Cur.* [See *acc.* 3 T. Rep. 162. And if in such case he makes an *absolute* seisure, he cannot support it afterwards as a seisure *quousque*. *Ibid.*—A custom to seize as forfeited, for not claiming to be admitted, doth not bind the heir, if he was beyond sea, *non compos*, or in prison, at the time. 8 Co. 100. Cro. Ja. 226. Godb. 268.—If one of several joint-tenants comes and offers to be admitted, the lord cannot seize *quousque*; for the seisure *quousque* is only till somebody comes to be admitted; and joint-tenants being seised *per my et per tout*, one of them supplies the whole tenure to the lord. Roe v. Hutton, 2 Wils. 162.]

If the custom of a manor be, that the wife of every copyholder for life shall have her free-bench *dum casta & sola vixerit*, after the death of the husband, the law casts the estate upon the wife, so that she shall have the estate before any admittance, and may make a lease for a year, as another copyholder may. Hob. 181. Cro. Ja. 573. 2 Roll. Rep. 178. Noy, 29. Roll. Abr. 502. S. C.

So, if the custom of a manor be *quod si aliquis vir habet uxorem* seised in fee *secundum consuetudinem manerii* of customary lands, that he shall hold *ad terminum vite sue post mortem uxoris per legem Angliæ*, and a copyhold tenement descend to a feme covert, and the husband enter, but before admittance his wife die, yet he shall be tenant by the curtesy; for though the lord before admittance shall claim no duty as fealty, homage, relief, rent, &c., yet his delay shall not prejudice a third person. Moor, 271. And. 192. By the better opinion of the books. Doe v. Brightwen, 10 East, 583. *acc.*

If a man surrender a copyhold to the use of his will, by which he devises it to his wife for life, and that after his death, his wife or her executors shall sell the land; or if the devise be, that she shall choose two attornies, and make sale of the land according to the best advantage; by these devises the wife hath but a bare authority, and there needs no surrender to make the sale; for upon the nomination of the vendee he shall be in by the will of the devisor. Godb. 46. Cro. Ja. 199. [See Holder v. Preston, 2. Wils. 400. S. P.]

[The title to a copyhold relates back from the time of admittance to the surrender against all persons but the lord: and therefore the surrenderee may recover in ejectment against the *surrenderor* on a demise laid between the times of surrender and admittance. Before admittance, however, the surrenderee can maintain no possessory action; for, before that, the estate is not out of the surrenderor; but he holds it as trustee for the surrenderee. Holdfast v. Clapham, 1 Term Rep. 600. Berry v. Greene, Cro. Eliz. 349. Davy v. Beardsham, 9 Mod. 75. And *qu.* Whether he can maintain an ejectment against the lord or a stranger?

So, in the case of a devise of a copyhold, nothing vests in the devisee or surrenderee, or in the lord before admittance; for, until then, the estate is in the surrenderor; and therefore, if a surrenderee be attainted of felony and executed before admittance, no forfeiture can accrue to the lord.] Roe v. Hicks, 2 Wils. 13.

Doe v. Wroot, 5 East, 132. *Perry v. Whitehead*, 6 Ves. 544. *Kenebil v. Sraffton*, 8 Ves. 30. *Floyd v. Aldridge*, cited in 5 Ves. 137. || So, in the case of a surrender upon mortgage, the legal estate till admittance of the mortgagee continues in the surrenderor, and he cannot devise the equity of redemption after such surrender without a new surrender to the use of his will.

Doe v. Tofield, 11 East, 246. So, a surrender to the use of his will by the surrenderee of a copyhold before admittance is merely void, and cannot be made good by a subsequent admittance.||

2. *Where the Want of a Surrender will be supplied in Equity.*

[By special custom a devise of a copyhold may take effect without surrender. Lit. Rep. 26. *arguend.* cites *Wrot's case*, P. 35 Eliz. C. B.] Although copyholds, by the strict rule of the common law, can only be conveyed by surrender, yet in equity, this rule receives a relaxation, and the want of a surrender will be supplied in the following instances.

2 Chan. Rep. 218. *Abr. Eq.* 122. (a) So, if he had refused; for if a man covenants to surrender, equity will compel him to a specific performance, and by decree, not only bind the person, but likewise the lands. *Abr. Eq.* 122. — (b) [It will also supply the want of it in favour of a mortgagee against the assignees and creditors of the party, if he becomes bankrupt. *Taylor v. Wheeler*, 2 Vern. 565. 1 Salk. 449. S. C. || So where a copyhold is granted for lives, and the first taker has power to dispose of it, it will supply a surrender against the person next in succession, equally as against the heir in cases of inheritance. *Greenwood v. Hare*, 1 Ch. Rep. 274. So, against the widow claiming her freebench. *Hinton v. Hinton*, 2 Ves. 631. But not against an heir in tail where the ancestor enters into contract and dies without barring the entail, be the entail with or without a remainder over. 2 Ves. 634. If a person wrongfully admitted to a copyhold surrender it to the use of a purchaser, and after such surrender become entitled to it by right, equity will compel him to convey his interest accordingly, though it seems it will not decree his heir to surrender in case he die; it being considered as a personal equity attaching on the conscience of the party, but not descending with the land. *Morse v. Faulkner*. 1 Anstr. 11.]

Abr. Eq. 124. admitted in several cases. 2. In favour of creditors; as, where a man devises copyhold lands for the payment of his debts, this shall be good without any surrender.

Abr. Eq. 123. 124. *Rafter and Stock. decreed* (c) Whee a man devised all his real and personal estate for the payment of his debts, Lord Chancellor refused to supply the want of a surrender as to his copyholds, because it did not sufficiently appear to have been his intention to charge those. *Abr. Eq.* 124. [But, where a general devise of real estate was preceded by a direction to pay debts; and the testator left no real estate, but his copyholds, Lord

But, if a man seised of freehold and copyhold land, devises (c) both for the payment of debts and legacies, without surrendering the copyhold to the use of his will, and the freehold is sufficient for payment of the debts; equity will not supply the want of a surrender, and lay the legacies on the freehold, and the debts on the copyhold, as is done when there are simple contract creditors, and bond or judgment creditors, and personal assets not sufficient to pay both; nor will equity supply the want of a surrender for the sake of legatees, especially, if they be strangers, as they were in this case.

Lord

Lord Hardwicke ordered a defective surrender of the copyhold to be supplied in favour of the creditors. *Tudor v. Anson*, 2 Ves. 582. *Ithell v. Beane*, 1 Ves. 215. By the law of courts of equity, as now received, the want of a surrender will be supplied in favour of creditors, so far only as may appear necessary for the payment of debts; and, consequently, while any freehold estate remains applicable to that purpose, the want of the surrender of the copyhold shall not be supplied, notwithstanding the express intention of the testator to charge the copyhold rateably with, or in preference to the freehold. *Drake v. Robinson*, 1 P. Wms. 443. *Haslewoode v. Pope*, 3 P. Wms. 322. *Mallabar v. Mallabar*, Ca. temp. Talb. 78. *Hellier v. Tarrant*, *id.* 3d edit. 188. note. *Coombes v. Gibson*, 1 Br. Ch. Rep. 273. *Lindopp v. Eberall*, 3 Br. Ch. Rep. 188. *Bixby v. Eley*, 2 Br. Ch. Rep. 325. *Kidney v. Coussmaker* 12 Ves. 136.]

3. Equity will supply the want of a surrender in favour (a) of younger children against an heir at law; but, if the case be so circumstanced, that by that means the younger children would be in a better condition (b) than the heir at law, equity will not interpose.

187. 1 Atk. 387. S.P. (a) [So, in favour of a wife. 1 Ves. 228. 2 Ves. 164. And this, though her interest be limited, and it cannot be extended to the devisees over. *Marston v. Gowan*, 3 Br. Ch. Rep. 170. (b) But it is not material whether the heir be totally disinherited by his father, so that he hath some provision, ||the quantum of which, or from whom it comes is immaterial.]] *Hawkins v. Leigh*, 1 Atk. 387. *Chapman v. Gibson*, 3 Br. Ch. Rep. 170. *Pyke v. White*, *id.* 286. ||*Hills v. Downton*, 5 Ves. 557. *Garn v. Garn*, 16 Ves. 268.]] Nor is it material (although formerly doubted, as in *Boss v. Boss*, 1 Eq. Cas. Abr. 124. 6 Vin. Abr. 237. S.C.), whether the younger children are otherwise provided for, or not. *Kettle v. Townshend*, 1 Salk. 187. *Carter v. Carter*, Mosel. 370. *Cook v. Arnham*, 3 P. Wms. 283. and Ca. temp. Talb. 35. S.C. *Tudor v. Anson*, 2 Ves. 582. *Pyke v. White*, *ubi supr.* So, with respect to the wife. *Briscoe v. Cartwright*, Gilb. Eq. Rep. 121. *Smith v. Baker*, 1 Atk. 386. But if the heir at law be not a child of the testator, &c. although wholly unprovided for, the defect shall be supplied in favour of the wife. *Chapman v. Gibson*, 3 Br. Ch. Rep. 170. ||*Fielding v. Winwood*, 16 Ves. 90. *Hills v. Downton*, 5 Ves. 557. in which case Lord Loughborough questioned the limitation upon the equity of the wife in favour even of a son unprovided for.]]—If only part of the copyholds devised be surrendered, equity will supply the defect in favour of a younger child as to the residue, if it be manifestly the intention of the testator that they should pass. *Banks v. Denshaw*, 3 Atk. 586. *Secus*, if there are words in the will restrictive of the devise to the part surrendered. *Barker v. Barker*, cited *ibid.*]] ||A devise of all copyhold estates, in general terms, unrestrained, to a child, will pass all copyholds surrendered or not to the use of the will. *Blunt v. Clitherow*, 10 Ves. 589. But these general words “all the rest, residue and remainder of my real estate whatsoever and wheresoever, and of what nature and kind soever,” are not a sufficient indication of an intent to pass copyhold estate, except for the satisfaction of debts. *Judd v. Pratt*, 13 Ves. 168. 15 Ves. 390. *Byas v. Byas*, 2 Ves. 164. *Sampson v. Sampson*, 2 Ves. and Beames, 337. For there is this distinction as to supplying a surrender by implication from general words between the case of creditors and that of children: in the latter, the court having no means of ascertaining the amount of the provision, but it being left indefinite, if there be an appropriation of freehold estate, that will satisfy the testator’s intent; but in the former case, the testator, meaning that all his debts shall be paid, must be considered as intending to provide a fund sufficient to answer that purpose. *Judd v. Pratt*, 15 Ves. 390.]]

As where a man devised his copyhold, being of the nature of *borough-english*, to his eldest son, and devised houses to his youngest; which houses were soon afterwards burnt down, and never entered upon by the heir in *borough-english*; as this case was circumstanced, the court would not supply the want of a surrender in favour of the (c) eldest son.

favour that a younger child is against an heir at common law; ||for there ought not to be one sort of equity for an eldest and another for a younger son. *Bradley v. Bradley*, 2 Vern. 163. So, if an estate is to descend to all the sons, as in gavelkind, the surrender will be supplied for the daughters, or in favour of one son, if such appears the intention of the parent, and the others would not be destitute. *Bradley v. Bradley*, *ubi supra*. *Andrews v. Waller*, Vin. Abr. tit. copyhold, (W. 2.) pl. 12.]]

Vern. 132. adjudged; and that there were several precedents of the kind. 2 Vern. 163. 1 Salk.

2 Vern. 265. Cooper and Cooper decreed. (c) Such eldest son is, in general, entitled to the same

Salk. 187. Nor will equity supply the want of a surrender in favour of a decedent by my grandchild, much less in favour of any collateral relation. *Lord Sommers*, that the want of a surrender should be supplied in favour of a grandson, it depending on the same law of nature and reason; but reversed in the House of Lords, *Pr. Ch. 475. S.C.* cited, and the law and practice now according to the judgment of reversal; || *Perry v. Whitehead*, 6 Ves. 544. *Tudor v. Anson*, 2 Ves. 582. *Elton v. Elton*, 3 Atk. 508. 1 Wils. 161. S.C.; though many judges have expressed great dissatisfaction with it, as *Sir John Trevor*, *Lord Harcourt*, *Lord Cowper*, 1 P. Wms. 61. *Sir Rich. Pepper Arden*, 3 Br. Ch. Rep. 231. *Lord Loughborough*, 5 Ves. 565. In *Allen v. Poulton*, 1 Ves. 121. the Master of the Rolls, *Sir William Fortescue*, supplied such a surrender against testator's eldest son; but that was on the principle that a person claiming under a will (as the eldest son there did) must admit the whole.||

Abr. Eq. 123. Also, in case of a natural daughter, the Court of Chancery refused to supply the want of a surrender; for though the father *Fursaker and Robinson.* might have great affection for such child, and might by the law *Gilb. Eq. Rep. 139.* of nature be obliged to provide for it, yet such a one was not to be considered as a child in law, nor will such affection raise an use at law for such child; for in a civil society, where the solemnities of marriage are established, it would be absurd in the courts to allow privileges to children not born within those rules. *Lord Hardwicke* in *Tudor v. Anson*, 2 Ves. 582. and by the Master of the Rolls in *Cricket v. Dolby*, 3 Ves. 12. and the case was cited in *Osgood v. Strode*, 2 P. Wms. 248. and *Randal v. Randal*, *id.* 468.||

r. Ch. 322. 4. If copyhold lands are in mortgage, the mortgagor may agreed by devise the equity of redemption without any surrender, for he counsel on both sides; has no estate in them whereof he can make a surrender. ||but the mortgagee must be admitted on the surrender in mortgage, else the legal title remains in the mortgagor, the surrenderor, and he cannot devise the lands without a surrender to the use of his will; *Doe v. Wroot*, 5 East 132.|| for *Cestui que trust* of a copyhold estate, having an equitable interest only, may devise it without surrender. *Greenhill v. Greenhill*, 2 Vern. 680. *King v. King*, 3 P. Wms. 358. [*Macey v. Shurmer*, 1 Atk. 390. *Tuffnell v. Page*, 2 Atk. 37. and *Barnardist. Ch. Rep. 9.* *Car v. Ellison*, 3 Atk. 73. *Allen v. Poulton*, 1 Ves. 121. *Macnamara v. Jones*, 1 Br. Ch. Rep. 481.]

Vide title Charitable Uses. 5. In case of a devise to a charitable use, the courts of equity supply the want of a surrender, and go upon the word *appoint* in the statute of *charitable uses*.

2 Co. 17. 6. In case of necessity, as where the king, or lord of a manor grants the fee-simple of the copyhold estate to one in fee, there **4 Co. 15. Cro. Eliz. 252. 443.** the copyholders cannot convey, because the alienee hath no court in which he can make surrenders, &c.; but lest this should turn to the prejudice of the copyholders, Chancery supplies the defect, and makes good the alienation.

Otway v. Hudson, 2 Vern. 583. ||So, where a person entitled to an equitable estate tail in a copyhold, had endeavoured to get in the legal estate to the intent he might make a regular surrender; but the trustees refusing to comply with his request, he had filed a bill to compel them, and had made, or offered to make, in the lord's court such surrender as he could; it was holden sufficient to bar the entail of the trust, and that the devise was good.

Now by st. 55 Geo. 3. c. 102. reciting that "by the customs of certain manors, copyhold estates of such manors pass by the last will and testament of the copyhold tenants thereof declaring

“ claring the uses of surrenders made for that purpose ; and that
 “ much inconvenience had arisen from the necessity of making
 “ such surrenders, It is enacted, that in all cases where by the
 “ custom of any manor in *England* or *Ireland*, any copyhold
 “ tenant of such manor, may, by his or her last will and testa-
 “ ment, dispose of or appoint his or her copyhold tenements,
 “ the same having been surrendered to such uses, as should be
 “ declared by such last will and testament, every disposition or
 “ charge made or to be made by any such last will and testa-
 “ ment by any person, who shall die after the passing of the
 “ act, of any such copyhold tenements, or of any right, title, or
 “ interest in or to the same, shall be as valid and effectual to all
 “ intents and purposes, although no surrender shall have been
 “ made to the use of the last will and testament of such person,
 “ as the same would have been, if a surrender had been made
 “ to the use of such will.

“ § 2. No person entitled or claiming to be entitled to
 “ copyhold lands, tenements, or hereditaments in consequence
 “ of any testamentary disposition, shall be entitled to be admitted
 “ to the same by virtue of any thing in the act contained, ex-
 “ cept upon payment of all such stamp duties, fees, and sums
 “ of money, as would have been lawfully due and payable in
 “ respect of the surrendering of such copyhold or customary
 “ lands, tenements, or hereditaments to the use of such will,
 “ or in respect of the presenting, registering, or enrolling
 “ such surrender, had the same lands, tenements, and here-
 “ ditaments been surrendered to the use of the will of the
 “ person so disposing of the same ; all such stamp duties, fees,
 “ or sums of money due as aforesaid, to be paid in addition to
 “ the stamp duties, fees, or sums of money due or payable
 “ on the admission of such person so entitled or claiming to
 “ be entitled to the same copyhold or customary lands, tene-
 “ ments or hereditaments, and the stamp duties to be affixed
 “ to the copy of the admission.

“ § 3. Nothing in the act contained shall be taken, at law or
 “ in equity, to render invalid or ineffectual any devise or dis-
 “ position of any copyhold lands, tenements, or hereditaments,
 “ or of any right, title, or interest in or to copyhold lands,
 “ tenements, or hereditaments, which would be valid or effectual
 “ if this act had not been made ; or to render valid and effectual
 “ any devise or disposition of any copyhold lands, tenements, or
 “ hereditaments, or of any right, title, or interest in or to
 “ copyhold lands, tenements, or hereditaments, which would be
 “ invalid or ineffectual if a surrender had been made to the
 “ use of the last will and testament of the person attempting to
 “ dispose of the same by will ; any thing, &c.”

For cases of election, see tit. ELECTION.||

3. *What persons may surrender.*

All persons who may make grants, or convey their estates, may by surrender pass copyhold lands : if an infant surrenders

Leon. 95.
Poph. 39.

copyhold lands, he may at his full age disagree, and enter thereupon; for this is not a conveyance of equal solemnity with a feoffment, which works a discontinuance, and which notwithstanding the infant may avoid at his full age.

Doe v. Morgan, 7 T. Rep. 103. || An infant trustee or mortgagee may surrender by order of a court of equity under the statute 7 Ann. c. 19. ||

Cro. Eliz. 717. A feme covert may surrender lands (*a*), being solely examined by the steward; and if there be a custom for her to be examined before two tenants out of the manor, it is good.
2 Taunt. 294. acc. (*a*) [And this, it seemeth, without any particular custom. 1 H. Bl. 344. "A custom for a feme covert to surrender her lands " without the assent of her husband is bad." This was the point which the Court of Common Pleas professed to determine in the case of *Stevens v. Tyrrell*, 2 Wils. 1. But the case seems to warrant no more than an opinion, that a surrender by a feme covert, in which the husband neither joins nor assents, cannot be good. And even this opinion is considerably shaken by the reasoning of Lord *Loughborough*, C. J. in the case of *Compton v. Collinson*, 1 H. Bl. 342-3. The point, in the case of *Compton v. Collinson*, was, whether a married woman living apart from her husband, under articles of separation, by which he covenanted that she should enjoy to her own use all such estates as should come to her during the coverture, and that he would join in all necessary conveyances, and in surrendering the copyholds to such uses as she should appoint; could surrender the copyholds without the husband joining, and without a special custom for that purpose? And the court was of opinion that she could; for that the wife is tenant of the copyhold, and not the husband; that the estate can be forfeited or surrendered only by her acts, not by his; that the authority which he acquires by his martial rights to direct and control her acts, was by his covenant in the present instance, annulled, or at least, suspended; and there was then no impediment to the validity of an act passed in the court of the manor, between her and the lord.] || After the covenant, the surrender must be taken to be with the husband's assent, 2 Br. Ch. Rep. 387. S. C. which, by custom, will be good. *Moore*, 268. If the husband be present at such surrender, whether not evidence of his assent. *Taylor v. Phillips*, 1 Ves. 229. ||

Co. Lit. 59. b. If there are two jointenants, and one of them surrenders his moiety to the use of his last will, and dies before the surrender is presented, having made his will, this is a severance of the jointure, for being presented it relates to the time of the first surrender.
Roll. Abr. 501. S. C.

Wilson v. Weddel, Yelv. 144. *Brownl.* 143. S. C. A copyholder surrenders to the use of another, who before admittance surrenders to another who is admitted; no interest is hereby vested in him; for the first surrenderee had (*b*) nothing in him to give over, and the admittance of the second surrenderee did not amount to an admittance of the first.

Doe v. Vernon, 7 East, 8. S. P. (*b*) But an heir before admittance may surrender to another, because he hath a legal estate and interest in him. 4 Co. 22. b. *Cro. Ja.* 36.

Roll. Abr. 500. If there be baron and feme copyholders, to them and the heirs of the baron, and the baron die, the heir may surrender his reversion into the hands of two tenants of the manor (who by custom have power to take surrenders) before admittance, and during the life of the feme; and this is a good surrender; during the life of a widow the reversion was cast upon him by descent, before any admittance.
Cro. Eliz. 662. S. C. *Yelv.* 145. and *Brownl.* 143. S. P. [So, of a widow who is admitted to her free bench, the heir may incur a forfeiture of his estate by being attainted of felony. 1 Leon. 1.]

Butler v. Lightfoot, 3 Leon. 239. || If there be tenant for life, remainder in fee, he in remainder may surrender his estate, if there be no custom to the contrary.
4 Leon. 9. S. C. *Heggar v. Felston*, *id.* 111.

Tenant

Tenant for life, remainder for life to another, he in remainder enters upon tenant for life, and surrenders; nothing passes, for he hath no customary estate in him; as there cannot properly be a disseisin of a copyhold, the freehold being in the lord.

Bird v. Kirk.
1 Mod. 199.
2 Mod. 32.
S. C. by the
name of Kren
v. Kirby.

No person, who is not in the seisin, can make a surrender. Persons therefore having only a contingent remainder or executory interest have nothing which can be the subject of a surrender; for as the surrender cannot operate by way of estoppel, it cannot, at law, be a bar to such contingent or executory interest: it can operate only upon that which a man has.||

Doe v. Cow-
ling, 6 T. Rep.
63. Taylor v.
Phillips, 1 Ves.
229. Doe v.
Tomkins, 11
East, 185.
Goodtitle v.
Morse, 3 T. Rep. 365.

4. What Persons may accept such Surrenders, and make Admittance.

A copyholder may surrender to a disseisor, abator, intruder, tenant at sufferance, or any others that have defeasible titles, and their admittance will be good, and shall (a) bind him who hath right, for that such particular tenants are compellable to do, and it was no more than the rightful lord must have done.

Moor, 236.
Co. Lit. 58. b.
2 Leon. 45.
Owen, 27.
Poph. 71.
Moor, 112.
3 Leon. 239.

4 Leon. 9. 2 Roll. Rep. 181. Roll. Abr. 503. 4 Co. 240. b. Vent. 360. (a) A. was tenant for life of a copyhold, the remainder to B. for life; and B. surrendered to the use of the disseisor of the manor *ut dominus inde*, &c. 2 Mod. 287. *dubitatur*, Whether the right of B. was extinct, because A. continuing always in possession, the disseisor had gained no reversion in this copyhold tenement, and by consequence was not capable of taking a surrender thereof to his own use. [It was adjudged in the Common Pleas, that the surrender was void, and that judgment was afterwards affirmed by the Court of King's Bench. Sir T. Jones, 153. and 2 Show. 156. 1 Vent. 359. Skin. 28. Freem. 245. S. C. but no decision.]

If lessee for life, years, or at will, a guardian, &c., accept a surrender, and their interest determine, the next lord shall be compelled to admit.

Co. Lit. 59. b.
Roll. Abr. 503.

A surrender to the steward, to the use of the steward, is good to give the steward an interest, for the surrender is in truth to the lord, and not to the steward.

Cro. Eliz. 717.

5. What Words or Acts amount to a Surrender.

(b) Any words spoken in court, expressing the copyholder's intention of surrendering, and that he designs not to hold it any longer, will amount to a surrender; as (c) if he says, that he is weary of his copyhold, and requests his lord to take it again, this is a (d) sufficient surrender.

(b) Jones, 42.
Winch, 57. 67.
(c) Hutt. 65.
(d) My Lord
Coke says,
that the word
surrend. is

vocabulum artis, and therefore where a surrender is requisite, no other words will supply the want of it; as the words, *give*, *grant*, or the like. Co. Copyh. 102. But Q.

But to say that he renounces his copyhold is no surrender, because he limits it to nobody; so, if he says, that he is content to surrender, yet it is no surrender, for that only expresses his inclination to do it, not that he actually doth it.

Roll. Abr. 502.
Hutt. 81.

1 Leon. 191.
1 And. 199.
S. C.
(a) Note: the communication does not appear to have been in court; and Q. Whether any words spoken out of court will amount to a surrender?

3 Bulst. 80.
Shephard and Adams, Roll. Abr. 501. S. C.
And there said, that it was no surrender, for that a

copyhold cannot be surrendered by a surrender in law, but only by actual surrender. — But in other places in Roll., as Roll. Rep. 265., Roll. Abr. 171, 172., the S. C., it is as in Bulst., holden to be a surrender, and the reversion still in the copyholder.

Zinzan v. Talmage.
Raym. 402.
adjudged, and affirmed upon a writ of error.
|| 2 Show. 130.
S. C. Sir T. Jones, 142.
S. C. Pollexf. 561. S. C. ||
(b) But the right to it may be extinguished by fine.
Carter, 24.
(c) If the copyholder joins with his lord in a feoffment of the manor, his copyhold is thereby extinct. Godb. 11.
Vide post, letter (K).

A., lord of a manor whereof *B.* was copyholder in fee, pretended that his copyholder had forfeited, and thereupon entered into communication with him about it, and it was agreed, that *B.* should pay 5*l.* to the lord; and that in consideration thereof *C.* should enjoy the said customary lands (except a wood) for his life, and also of *A.*'s wife, *durante viduitate*, and that *C.* should have election, whether he would have those lands assured to him by copy or by bill, and he chose by bill, which was accordingly done; the Court held this a good surrender for life only, and that the lord had the wood discharged of the customary interest, the (a) communication amounting to a surrender.

Copyholder in fee comes into court, and there accepts a copy to himself for life, then to his wife for life, then to his son for life; this is tantamount to a surrender to these uses; but he hath his old reversion in him; for there is no ground to make a surrender of that by construction, because he hath made no disposition of it.

If *A.* being seised in fee of a copyhold manor, grants certain customary lands, parcel thereof, to *B.*, *habend.* to *B.*, *C.*, and *D.*, for their lives successively, as they are named in the grant, at the will of the lord, according to the custom of the manor, and *B.* is admitted; and within the manor there is a custom, that the first person in such copy named may surrender all the lands, and thereby determine and destroy the title and estate of the other persons therein named; and *A.* and *B.* covenant to levy a fine of the manor, and of the customary lands, by name, to the use of a stranger in fee, and the fine is levied accordingly, yet this does not amount to a surrender within the custom, so as to bar the estate of *B.* and *C.*; for the custom extends only to the copyhold estate, and that cannot (b) pass by the (c) fine.

2 Show. 131.
Doe v. Hendon,
2 T. Rep. 484.

|| A covenant to surrender does not amount to a surrender, though it be presented by the homage. ||

6. *What Acts amount to an Admittance.*

3 Bulst. 219.

Any thing that expresses the lord's consent to a surrender, amounts to an admittance; for if his consent to take the surrenderee as his tenant appears, it does not seem material whether it be done by a *dominus concessit & admissus est*, or by other acts which amount to as much.

Roll. Abr. 505.
Freswell and Welch.

Therefore if a copyholder surrenders to the use of another, and after the lord, having notice thereof, accepts the rent from the

the surrenderee, this by implication and construction of law amounts to an express admittance. *Note: This case is differently re-*

ported in several books; in 3 Bulst. 215. 237. S. C. acceptance of rent from the hands of the tenants, into whose hands the surrender was made, doth not amount to an admittance of *cestui que use*, for the lord may take the rent of them, without designing any thing thereby to a third person; but had it been shewn that the lord had accepted the rent as of his copyholder, then it had been a good admittance. Cro. Ja. 403. S. C. reports it, that acceptance of rent of *cestui que use* is no admittance; but by Godb. 268. S. C. it is an admittance, the lord knowing of the surrender; *secus*, if he accepts it as a duty generally. In Bridg. 49. 52. S. C. it does not appear the lord had notice of the surrender when he accepted the rent. *Vide* 2 Sid. 61. S. P. *per Twisden arguend.* admitted, and Style, 146. S. P. *per* Roll. Ch. Just.

So, if a fine (a) be accepted of one as of a copyholder, this amounts to an admittance. 3 Bulst. 239. *arguendo.*

(a) *Secus*, if the steward had only assessed the fine. 3 Bulst. 239. *arguendo.*

But, if a copyholder in fee surrenders to the use of B. in fee, and B. surrenders to the use of C. for life, who is admitted, the admittance of C. shall not by implication be taken to be an admittance of B. for the admittance ought to be of a tenant certainly known by the steward, and entered on a roll by itself. Yelv. 144. Wilson and Weddel, adjudged. Brownl. 143. S. C. But *vide* Roll. Abr.

505. Cro. Eliz. 504. *cont.* and 3 Bulst. 237. S. P. *dubitatur.*

If a copyholder, according to the custom of the manor, surrenders into the hands of two customary tenants, to the use of J. S. and his heirs, and this is presented at the next court, and by the steward entered in the rolls of the court, in these words, *viz. ad hanc curiam compertum est per homagium*, that the copyholder *sursum reddidit*, &c., *ad usum J. S. & hæredum suorum*, and the steward afterwards delivers a copy thereof to J. S., yet this does not amount to an admittance; for here is no act done by which it appears the lord hath consented that J. S. should be admitted, or that he should have the land according to the surrender. Bridg. 81. adjudged. Poph. 127. S. C. adjudged. 3 Bulst. 237. *adornatur*; and afterwards ended by mediation of friends.

If a woman that hath right to her free bench, comes into court, and prays to be admitted, and is denied, (supposing nothing vests in her before admittance,) the law will supply the admittance. || Howard v. Bartlett, Hob. 181. Rennington v. Cole, Noy, 29. Newton v.

Shafto, 1 Lev. 172. Jurden v. Stone, Hutt. 18. Vaughan v. Atkins, 5 Burr. 2787. The estate of the widow is considered as a continuance of that of the husband rather than as a devolution in nature of a descent. Watk. Gilb. Ten. Note xvii. || If the steward refuses to admit, but the surrenderee enters, and occupies the land; in an ejectment brought by the lord, he may well plead not guilty. Yelv. 16.

7. Of the Construction to be made when the Surrender, Presentment, and Admittance differ.

If A. surrenders for life, and the admittance is in fee, the estate of the copyholder is according to the surrender, not according to the admittance; for the lord hath only a customary power to make admittances according to the surrender; and so far as he executes that power the admittance is good; but, where he Co. Copyh. 110. 4 Co. 28. b.

he goes beyond that power, he acts without a warrant, and then his acts are void.

Co. Copyh.
110.

So, if the surrender be absolute, and the admittance conditional, the admittance is good, and the condition void; for when the lord acts according to his power in one thing, but beyond it in another, for what he acts according to his power he hath a warrant; but for what he acts beyond it he hath no warrant, and so it is void.

4 Co. 25.
Roll. Abr. 501.
(a) So, the
mis-entry of
the date of

If a conditional surrender be presented, and the steward in entering thereof omits the condition, (a) upon sufficient proof thereof the surrender shall not be avoided, but the roll shall be amended.

the court shall not prejudice the copyholder, but he may give in evidence the truth of the matter, and shall not be bound by the rolls. Leon. 290.

Co. Copyh.
110.

If the surrender be to the use of *J. S.*, and the lord admits *J. N.*, this is void; and he afterwards may admit *J. S.* So, if he admits *J. S.* and a stranger, *J. S.* takes all, for the stranger's admittance is void.

Lex Custom.

137. 4 Co. 29.
Cro. Ja. 403.
(b) For an ad-

If a surrender be made, and there be a wrong presentment of this surrender, if the admittance is according to the surrender it is (b) good.

mittance upon a surrender without any presentment at all, is good; and a void presentment is as none. Co. Copyh. 105.

8. *Of the Time of making the Surrender, Presentment, and Admittance, and where they shall be effectual, though any of the Parties die before they are completed.*

Co. Copyh.
105.
Style, 275.

By the general custom of manors, every surrender ought to be presented on the next court-day after it is made; but, by the special custom, it may be good, if done on the second or third court-day: the reason hereof is to prevent disputes, and for the security of purchasers, who may be otherwise defeated, if it were admitted to have an old surrender trumped up, and presented at any time.

4 Co. 29.

Cro. Ja. 403.
S. P. 3 Bulstr.
214. S. P. ad-
judged. Roll. Abr. 501. S. P.

If a copyholder in fee surrenders out of court, and dies before it is presented in court, yet the surrender being presented after his death according to the custom, is good.

Co. Lit. 62.

Cro. Ja. 403.

3 Bulstr. 214.

adjudged, the

custom being found generally, that it must be presented at the next court, without saying by

whom. 4 Co. 29. b.

So, if the customary tenants, by whose hands the surrender was, die, yet if the surrender be presented, upon good proof thereof, it will be sufficient.

4 Co. 25. a.

29. b. 2 Sid.

38. 61.

Dyer, 192.

So, if he to whose use the surrender was, die before admittance, yet his heir shall be admitted; for upon admittance the estate is in *cestui que use* from the surrender by relation.

(H) *Of the Operation of the Surrender in passing the Estate: And herein,*1. *Of the Persons to take, and what shall be sufficient Certainty in the Description of them.*

SURRENDERS have the same operation and effect in passing copyhold estates, as grants have at common law, and must regularly be directed by the rules and maxims of the common law in the transferring thereof. Co. Copyh. 97. Cro. Jac. 376.

If a copyholder surrenders to the use of the right heirs of *J. S.*, he being (*a*) alive, the surrender is void; for it cannot take effect *in presenti* as he would have it. Leon. 101. (a) If a man surrenders to the use of his

own right heirs, whether the lord shall not hold it till his death, *Qu.* and *vide* Co. Copyh. 97. Lit. Rep. 17. — If a surrender be made to the use of *B.* and his heirs, to the use of such person as *A.* shall name by his will; *Qu.* whether such person can take. 2 Bulst. 274.

If *B.*, a copyholder, surrenders into the hands of the lord, by the hands of tenants, according to the custom, &c., without saying to whose use the surrender shall be; and at the next court *B.* is admitted, *habend.* to him and his wife in tail, the remainder to the right heirs of *B.*; the subsequent admittance explains the general surrender, and the wife shall take by the surrender, though not named in the premises, but in the *habendum* only; though it was agreed it was otherwise in feoffments and grants at common law. Poph. 125. adjudged. Cro. Ja. 434. S. C. 2 Roll. Abr. 67. S. C.

A man may surrender copyhold lands immediately to the use of an infant *in ventre sa mere*; for a surrender is a thing executory, and nothing vests before admittance; and therefore if there be a person to take at the time of the admittance, it is sufficient, and not like a grant at common law, which putting the estate out of the grantor, must be void, if there be nobody to take. Co. Copyh. 9. *Qu.* and *vide* Moor, 637. *cont.*

A copyhold is granted to the father and his son; he having but one son, this grant is good, for the apparent certainty of it; but, if the father hath several sons, or, if a surrender be to the use of a man's cousin or friend, or to the use of *J. S.* or *J. N.*, all these surrenders are void for incertainty. Cro. Ja. 374. Co. Copyh. 95. *vide*; and whether such uncertainty may be helped by any averment.

If a surrender be made to the lord, without expressing any use, it shall be to the use of the lord; for it cannot be imagined that the surrender was made to no end or purpose whatsoever. Co. Copyh. 95. Q.

|| It hath been determined that a surrender to the use of *A. B.* and *C.* and their heirs, equally to be divided between them, creates a tenancy in common; a resolution, which it would seem difficult to reconcile with the doctrine that a surrender is to be construed as a conveyance at common law; for certainly at common law these words would be a joint-tenancy. It hath however been approved in later cases. || Fisher v. Wigg, 1 Ld. Raym. 642. 1 P. Wms. 14. S. C. Com. Rep. 88. S. C. 12 Mod. 296. S. C. 1 Salk. 392. S. C. Idle v. Cook,

1 P. Wms. 70. *contr.* But Rigden v. Vallier, 2 Ves. 257. Goodtitle v. Stokes, 1 Wils. 341. Denn v. Gaskin, Cowp. 660. *acc.*

2. *What shall be said to pass by the Surrender.*

In this likewise the same rules obtain as in the exposition of grants; for a man may, with the same certainty in a surrender, describe whatever he intends to pass, as he may in any other conveyance.

3 Leon. 18.

A man seised of copyhold lands, devised part thereof to his wife for life, the remainder to his brother and his heirs; and afterwards, in the presence of three persons of the court, said to them, "I have made my will as I will have it, and here I surrender all my copyhold lands into your hands accordingly;" in this case only those mentioned in his will shall pass; for he had respect to that in making his surrender, and he said, he surrendered all his copyhold lands accordingly; which shewed his intent was to pass those lands only that were devised by the will.

Dyer, 251.

(a) A surrender of a house *cum pertinentiis* will pass only the house, orchards, yards, and not the lands; for copyhold and freehold, as to this, must be construed alike. Cro. Ja. 526. adjudged. Kitchen, 81. Co. Copyh. 93.

A. covenants with B. to assure him all his copyhold lands, and after he surrenders divers parcels by name, and some by abutments and boundings; at the next court the surrender is presented and enrolled, but with this addition, by the name of all his copyhold land; there no more shall pass than what was (a) named in the surrender.

3. *What Estate or Interest passes by the Surrender.*

4 Co. 21. b.

Roll. Abr. 828.

1 Roll. Rep.

109. 138. 253.

Co. Copyh. 97.

A copyholder having a fee-simple, according to the custom of the manor, may make what disposition of it he pleases, and may surrender it absolutely, or for any limited time.

But such disposition is not to receive the same favourable interpretation that wills and devises do at common law; for a man may as well order a surrender in his life-time, according to the rules of law, as he may any deed to pass a freehold estate.

Cro. Car. 366.

Brownl. 127.

Noy, 152.

adjudged.

Therefore, if a copyholder in fee surrenders to the use of A. and B., and the longer liver of them; and that for want of issue of A. the lands shall remain to the youngest son of J. S.; in this case A. has but an estate for life, for an estate-tail in copyhold lands shall not pass by implication.

Cro. Ja. 376.

Sympson and

Southern, ad-

judged.

2 Bulst. 272.

S. C. Godb.

264. S. C.

|| 2 Roll. Abr.

791. S. C. *Dubitatur* Id. 794. S. C. adjudged.

But 1 Roll. Rep. 109. 137. 253. S. C. said to

have been differently adjudged. But see 1 Watk. Copyh. 198—210. || (b) So, if he surrenders

post mortem suam in manus domini ad usum, &c. 4 Leon. 8. Cro. Eliz. 29. Roll. Rep. 252.

Bulst. 274. Godb. 451.

So, if a copyholder surrenders (b) *habend. a tempore mortis* of the copyholder, to the use of another and his heirs, this is merely void; for a copyholder in fee can no more surrender, *habend.* after his death, than a tenant in fee can convey his lands, *habend.* after his death; for then he should leave a particular estate in himself, which is against the rules of law.

4 Co. 29. b.

(c) The sur-

render was to

the use of a

If the limitation of the use be (c) general, then *cestui qui use* taketh but an estate for life; for copyhold estates, as a necessary consequence upon the custom, shall be directed by the rules of law,

law, unless within the manor there be a special custom to the contrary; as that *sibi & suis*, or *sibi & assignatis*, or such like words, shall create a fee. stranger for ever, and the lord admitted the surren-

derer, *habend.* to him and his heirs, and what estates he had, Godb. 137., *dubitatur.*

If *A.* be tenant for life, the remainder to *B.* in fee of copyhold lands, and *B.* surrender to the use of *A.* for his life, the remainder to *C.* this shall enure as an immediate settlement upon *C.*, and not by way of remainder; for though it is void as to *A.*, and his estate is not increased thereby, yet being in the nature of a limitation of an use, the interest vests in *C.* immediately. Sand. 149. Sid. 360. 2 Keb. 341. S.C. adjudged.

¶ If a copyholder having an estate *pur autre vie* surrender all his estate in remainder, reversion or expectancy, to the use of his will, and afterwards take the fee by descent, and then devise the fee, the fee will not pass; for the surrender to the use of the will only operates on the estate which the surrenderor has at the time of making the surrender. Doe v. Cowling, 6 T. Rep. 63.

4. *Of the Power and Authority of the Lord and Steward, and therein of the Difference of their Acts.*

Every lord of a copyhold manor hath, as (a) incident to such manor, a court, which he is (b) compellable to hold for determining the (c) controversies of his (d) tenants, accepting their surrenders, &c. (a) If there is an honour consisting of several manors and there are several copyholders

belonging to the several manors, though there is but one court held for them, yet they are *quasi* several and distinct courts. Cro. Car. 366. Jones, 342. S. C. (b) Not by action on the case, but by *subpœna* in Chancery. Cro. Ja. 368. 2 Bulst. 336. (c) A copyholder surrenders to the use of *A.* in trust, that he shall hold the land until he hath levied a certain sum of money, and that afterwards he shall surrender to the use of *B.*; the money is levied; *A.* refuses to surrender; *B.* exhibits a bill to the lord of the manor against *A.*, who, upon hearing the cause, decrees against *A.* that he shall surrender; *A.* refuses; the lord may seise, and admit *B.*, for he is chancellor in his own court. 1 Leon. (d) But not, where he is a party interested himself. Salk. 185.

The lord himself may make admittances or grants at any place (e) out of the manor, for he is not confined any more than any other person, from granting an estate at will where he pleases. 4 Co. 26. b. Co. Lit. 59. a. b. (e) But a copyholder cannot surrender to the lord into the hands of tenants, &c. out of court, without a particular custom. Co. Lit. 59.

But it being only custom which enables the steward to make such admittances or grants, that which he doth he must do (f) upon the manor, (g) unless there be a custom to keep a court out of the manor. 4 Co. 26. b. 27 a. (f) But of this there are diversity of opinions. By Co. Copyh.

and 4 Co. 26, 27. Roll. Abr. 527., the steward cannot make any grants or admittances at a court held off the manor. By Cro. Eliz. 103., if the lord grants the freehold of the copyhold lands, the grantee may hold a court where he will to make admittances and grants. By Co. Copyh. 121. Leon. 289. Roll. Abr. 505., the steward may make admittances at a court holden off the manor. By Cro. Ja. 526., surrenders to the steward out of court, adjudged good; and by 1 Salk. 184. a steward of a manor, with power to make a deputy, makes *B.* his deputy: *B.*, by writing under his hand and seal, makes *C.* his deputy to take a surrender of *G.* *C.* takes the surrender out of court, and well. Ld. Raym. 658. S. C. Com. 84. S. C. 12 Mod. 466. S. C. There is as much reason that the steward should take surrenders out of the manor as the lord; *per Cur.* (g) As if a lord being seised of two or three manors, hath,

hath, time out of mind, within one of his manors, kept courts for all his said manors, &c. Co. Lit. 58. Cro. Car. 367.

4 Co. 30. b. A steward retained by parol is a good steward to (a) all intents
Cro. Ja. 536. and purposes, either to take surrenders or make admittances up-
Godb. 122. on voluntary grants; but, if the retainer be (b) general, the lord
Leon. 227. may discharge him at pleasure.
(a) Things of necessity done

by a steward, though he acts by a counterfeit authority, or one that is voidable, are good; as admittances upon descent or surrender; for if in shew and appearance he is steward, it is sufficient, for he acts only as custom's instrument. Co. Copyh. 124. But voluntary grants by such a steward are not good. So, if a lord commands his steward not to grant such lands by copy, and he doth, it is void. So, if in his grants he diminishes the ancient rents and services. Co. Copyh. 125. — Also, if one, who has no manner of pretence or colour for keeping courts, assumes the steward's place, whatever he doth will be void, especially, if a precept be not given to the bailiff of the manor to give him warning. Co. Copyh. 125, 126. (b) But a general retainer by patent is for life. 4 Co. 30.

Co. Copyh. A steward cannot *de communi jure* make an under-steward,
129. Nov. 2. unless he have power by his patent, or be an infant, that hath
29. (c) The office by (c) descent, or a person of that quality, that it will
grant of a be a disgrace to him to hold the courts; as if he be an earl, &c.
stewardship to an infant in reversion, *exercend. per se vel per sufficient. deputat. suum*, held good. Cro.
Car. 556.

Cro. Eliz. 48. A lord of a manor makes a steward *ad exequend. per se vel*
Leon. 289. *sufficient. deputat. suum*, who makes *A.* his deputy *pro hac vice* to
S. C. ill report- take a surrender of baron and feme, to the use of the baron and
ed. (d) A copy- feme for their lives, remainder over in fee, & *ulterius ad faciend.*
holder being in & *exequend. quantum in me est.* *A.* by force of this deputation takes
Ireland, the a surrender from the baron and feme upon condition, that the
steward of a lord shall grant it to them for their lives, remainder over in
manor made a fee, it was agreed, that the deputation *pro hac vice* (d) was good,
commission to and that though the authority to take the surrender was abso-
one to receive lute, and *A.* took it upon condition, yet it was good by reason
a surrender of the words *et ulterius ad faciendum*, &c.
from him
there; and it
was holden a
good surrender. 4 Leon. 111. || So, a surrender to the deputy of a deputy-steward out of court
hath been holden to be good. Parker v. Keck, 1 Com. Rep. 84. 1 Lord Raym. 658. S. C.
1 Salk. 95. S. C. 12 Mod. 466. S. C. || — If one cannot come into court to surrender in per-
son, the lord may appoint a special steward to go to him and take the surrender. Leon. 36.

(I) Of Fines payable by Copyholders: And herein,

1. Where a Fine shall be said to be due, and by whom, and to whom payable.

Co. Litt. 59. b. A FINE may be due by custom on every change of the tenant,
Roll. Abr. 52. whether by act of God or the party, and on every change
(c) For a cus- of the lord, by act of God (c) only.
tom to have a
fine on the change of the lord of the manor, by alienation or demise, is against law; for by
this means the tenant might be oppressed by a multitude of fines. Co. Lit. 59. b.

Duke of So- [Where by the custom of a manor, general fines are due on
merset v. the death of the last admitting lord; husband, tenant for life
France, 1 Str. under a marriage-settlement, is entitled to a fine upon the death
654. Fort. 41. of his wife, the last admitting lady.]

If a copyholder in fee surrenders to the use of one for life, and tenant for life dies, he may enter without any new admittance, or paying any fine, for he has his old estate in him. Roll. Abr. 505. 9 Co. 107. Co. Copyh. 157.

If a copyholder in fee surrenders to the use of one for life, the remainder to another for life, remainder to another in fee, by this but (a) one fine is due, for the particular estates and remainders are but one estate. Roll. Abr. 505. Moor, 358. 465. Cro. Eliz. 504. S. C. 3 Lev. 308. S. P. adjudged.

(a) [In Ventr. 260. it is resolved, that the lord may assess one fine for the particular estate, and another for the remainder. And in the same case, 1 Mod. 120. Holt C. J. saith, "If a fine be assessed for the whole estate, there is an end of the business: but if a fine be assessed only for a particular estate, the lord ought to have another."] || If the lord remit the fine upon the admission of the tenant of life, he does not thereby discharge the remaindermen; nor can he in that case charge the whole upon the remainders. 13 Ves. 246. 252.]

|| It would seem, that a fine may be taken by special custom on the accession of a remainder-man. Barnes v. Corke, 3 Lev. 308. Doe v. Jenney, 5 East, 522.

But on the surrender of a remainder to a person to whom it was not originally limited, that person must be admitted and pay a fine: for though the admission of the particular tenant was the admission of the original remainder-man, it was not of the purchaser. Cro. Ja. 31. 1 Burr. 213. Watk. Copyh. 297. Watk. Gilb. Ten. N. lxxvii.

So, if a remainder-man die, the admission of the particular tenant will not extend to his heir; for the heir takes from the person in remainder and not immediately from the original surrenderor. 1 Burr. 213.

Tenant for life, and he in remainder join in a grant of their copyhold; but one fine is due; for if a surrender be made, and after a recovery be had by plaint, in nature of a writ of entry in the post, for the better assurance, &c., but one fine is due. 3 Leon. 9.

Tenant in (b) dower, or by the curtesy, of copyhold lands where the custom allows of such estates, shall pay a fine. Co. Copyh. 154, 155. (b) In case of a widow's estate, it is said to be resolved and agreed in Lex Customar, 156., that no fine is due; but *qu.* of this; for though the estate be adjudged in the woman, yet that is no argument she shall pay no fine; for the estate is in the heir by descent, and yet he shall pay a fine.

If there be a custom for a copyholder's lands to be extended, the extendor, upon his admittance, shall pay a fine. Co. Copyh. 154, 155.

If there are two jointenants of copyhold lands, and one dies, the survivor shall have all without admittance or paying a fine. Co. Copyh. 158.

[But tenants in common shall be severally admitted, and pay several fines. 1 P. Wms. 21. 1 Ld. Raym. 631.

The lord is entitled to a fine from the assignees of a bankrupt; to avoid which, it was recommended by Lord *Hardwicke* to except copyholds out of the deed of assignment, that when a purchaser should be found, the commissioners might assign to him in the first instance. Drury v. Mann, 1 Atk. 95.

|| The lord is entitled to a fine from the executor of a termor, if the term be limited on a surrender, or created by devise: not so, if it be created by demise on licence; for in this case the term

Earl of Bath v. Abney, 1 Burr. 260.

Hauchert's
case. Dyer.
251

term is not a copyhold, but a common law interest; the termor does not become tenant to the lord, and requires no admittance; and of course his executor requires none: but in the other case the term is holden of the lord by copy; the termor is his tenant, and of course must himself, as well as his representative, be admitted and pay his fine.||

2. At what Time and Place payable.

Roll. Abr. 506. No fine is due, either upon a (a) descent or surrender, (b) till admittance, for that is the cause of the fine; and therefore, if 4 Co. 28. a. (c) after admittance, the tenant deny to pay, it is a forfeiture. Hob. 135. Co. Copyh. 160. Holder v. Preston, 2 Wils. 401. Graham v. Sims, 1 East 632. (a) And therefore if the heir waves the possession, and refuses to be admitted, he shall pay no fine. Sid. 58. 1 Watk. Copyh. 322. Watk. Gilb. Ten. N. cxli. If the heir, as he may, surrenders before admittance, *qu.* Whether the lord be obliged to admit the surrenderee before the heir has paid his fine? and if he does, what remedy the lord has afterwards for such fine? *Vide* 4 Co. 22. b. 23. b. Leon. 174. — (b) [In some manors no fine is due upon the admission of the heir. 3 T. Rep. 162. *A fortiori*, not upon a mere covenant by the copyholder to surrender, though such covenant be presented by the homage. Rex v. Lord of the Manor of Hendon, 2 T. Rep. 484.] (c) If the fine be uncertain, the tenant is not bound to pay it presently, because he could not tell what it would be; but he must pay it in convenient time, else the lord may appoint a day for him to pay it in; but a fine certain he must pay presently upon admittance. 4 Co. 28. a. 13 Co. 2. Co. Copyh. 160. — But by Cro. Eliz. 779., Moor, 622., when a fine is certain, the heir ought to tender it upon his prayer to be admitted. || If the lord assess an uncertain fine, when in truth the fine should be certain, the tenant, in order to prevent forfeiture, should tender what he conceives to be the certain fine. Gardiner v. Norman, Cro. Ja. 617. ||

4 Co. 22.
Mod. 120.

Although the admittance of tenant for life, is an admittance of him in remainder to vest the estate in him; yet the lord, where by custom he is entitled to a fine from such remainder-man, shall not have it before the death of tenant for life, for then the remainder man becomes his tenant.

Yaxley v.
Rainer, 1 Ld.
Raym. 44.

[As the lord may assess a fine out of the manor, so also may he appoint a place for payment out of the manor. || But in case of forfeiture the Court said it might have been otherwise. But *qu.* the difference; and *qu.* whether the lord can, in any case, oblige the tenant to go out of the manor, except it be by custom, to a Court within the same honour. In this case of Yaxley v. Rainer, the fine was for licence to alien, which may be payable by special custom; for there is an express provision in the statute, 12 Car. 2. c. 24. § 6. to prevent the abolition of any fines for alienation due by particular customs of particular manors and places, other than fines for alienations of lands or tenements holden immediately of the king *in capite*. ||

3. Of the Certainty and Reasonableness of the Fine.

Co. Lit. 59. b.
60. a. (d) A
few instances
of uncertain
fines, shall not
destroy the
custom for fines certain.

Fines (d) uncertain must be (e) reasonable, and (f) their reasonableness shall be discussed (g) by the justices, (h) upon the true circumstances of the case, for (i) if the fine is unreasonable, the copyholder is not bound to pay it.

Godb. 265. For there are scarce any copyholds on the rolls of which it does not appear, that sometimes more, and sometimes less has been paid. Lit. Rep. 252. *Vide*

Vide 2 Bulst. 32. (e) What shall be adjudged a reasonable fine or not, *vide* 13 Co. 3. Roll. Rep. 75. Cro. Car. 196. Cro. Ja. 671. And where lords shall be restrained in equity from demanding arbitrary and unreasonable fines. 2 Chan. Rep. 134. 2 Vern. 367. Abr. Eq. 120. [A bill in equity cannot be brought by a single copyholder to be relieved against an excessive fine, in regard the fine insisted on to be excessive ought to be tried by a jury. But Lord Chancellor *King* admitted, that a bill might lie in order to settle a general fine to be paid by all the copyhold tenants of a manor, to prevent a multiplicity of suits. *Cowper v. Clerk*, 3 P. Wms. 156.] (f) The lord is not bound to aver or shew that the fine assessed is reasonable; but it is on the copyholder's part to shew from the circumstances of the case, that it is unreasonable. Hob. 135. (g) For this *vide* Roll. Abr. 123. 2 Roll. Abr. 578. (h) Appearing upon demurrer, or upon evidence to a jury, upon confession or proof of the yearly value of the land. 4 Co. 27. [The court and jurors shall be judges of the fine without suit in Chancery. *Moor*, 623. But the modern practice is to resort to equity. *Dougl.* 726-7.] (i) 4 Co. 27. b. S. P.

Two years' value for a fine for an admittance upon a surrender, was adjudged to be unreasonable; but in cases where copyholds are only for life, and come into the lord's hands, there the interest passes from the lord, and so *arbitrio domini res æstimari debet*; but in case of a surrender he is only an instrument.

13 Co. 3.
Vide 2 Bulst. 32. || It would seem to be now settled, that where the lord is compellable

to admit, and the heirs of the person admitted are also subject to fines on the devolution of the estate, the fine must not exceed two years' improved value of the lands without deduction for the land-tax, or any thing but quit-rents: but, that where the admission is not compulsory, in voluntary grants; or in copyholds for lives, where there is no right of renewal; or, where in cases of inheritance the fine is only payable on admission of the *purchaser*, whose heirs are not *fineable*; the lord is under no restriction, and may exact a fine to any amount. See *Watk. n. cii.* and *elv. to Gilb. Ten.* 443, 444. 2 *Wils.* 401. *Grant v. Astle*, *Dougl.* 727. *Wharton v. King*, *Anstr.* 659.||

A custom to pay on admittance *tantam denariorum summam, quantum terræ vel tenementa valebant tempore talis admissionis, & non amplius*, is a good and reasonable custom, although objected, that the value of land is uncertain, and it would be in the power of the tenant to make the fine of a very low value by not cultivating the land.

Carth. 12. adjudged between *Par-kius* and *Titus*. 2 *Show.* 507. pl. 471. *Skin.* 247. pl. 2. *Comb.* 43.

3 *Lev.* 255. 3 *Mod.* 132. S. C. [That the fine was to be according to the improved value was ruled by Lord *Hardwicke*, C. J. at *nisi prius*. *Halton v. Hassel*, 2 *Str.* 1042.]

Where a copyholder hath several parcels of land by several tenures, the lord ought to assess and demand his fine severally for both; for the fine for one may be reasonable, and for another unreasonable; and if such a copyholder surrenders to the use of another, and he is admitted *tenend. per antiqua servitia*, the fine must be severally assessed.

4 Co. 28. a. *Hubard* and *Hammond*. *Cro. Eliz.* 779. *Moor*, 622. S. C. resolved by the name of *Dalton* and

Hammond. See *acc.* *Dougl.* 722.

[4. Remedy for the Fine.]

|| When the fine is regularly assessed, (for a regular assessment (k) is absolutely essential, though it is not necessary (l) that it be entered on the rolls,) the specifick sum so assessed must be demanded of the person (m) of the tenant by the lord or his steward; for if a larger sum than is due be demanded, a new demand of the precise sum must be made before he can recover at law: for he shall not, on such former demand, recover what is actually due, but judgment shall be given against him (n).

1 *Watk. Copyh.* 318. (k) *Dougl.* 727. 731. in not. (l) Lord *Northwick v. Stanway*, 6 *East*, 56. (m) *Denny v. Lemman*, *Hob.* 135.

Trotter v. Blake, 2 Mod. 229. (n) Titus v. Perkins. Skin. 249. Lord Northwick v. Stanway, *ubi supra*.

In the cases of feme coverts and infants who are entitled by descent or surrender to the use of a will, it is provided by stat. 9 Geo. c. 29. that if they do not come in to be admitted in person, or the former by their attornies (which they are thereby empowered to make), or the latter by their guardians, or having no guardians, by their attornies (which the act empowers them to appoint), at one of the three then next courts, the lord or steward, due proclamations having been made in such several courts, may appoint such guardians or attornies for the purpose of admission, and thereupon impose the just fines. And if such fines, having been demanded by the bailiff or agent of the lord, by a note in writing signed by the lord or his steward left with the infant or feme covert, or with the guardian of the infant, or husband of the feme covert, or with the tenant or occupier of the tenements to which the infant or feme covert was admitted, shall not be paid or tendered to the lord or steward within three months after such demand made, the lord is empowered to enter and take the profits, (but without liberty to fell timber,) until such fines, and the consequent expences are satisfied, rendering an account of such profits annually, and paying over the surplus to the persons entitled.

But, if the husband of a feme covert, or the guardian of an infant, pay such fines, the act directs them to reimburse themselves out of the profits of the estates.

Lord Kensington v. Mansell, 13 Ves. 240.

This act is confined to the two cases expressed, *viz.* by descent or surrender to the use of a will; and does not apply to a title under a deed; and therefore to a bill by the lord, stating a title in remainder by deed of appointment under a settlement, and an admission of the tenant for life without fine, he having paid a fine upon a former admission under his original title, and upon his death praying a discovery and production of the deed in aid of an action under the statute, a demurrer was allowed.||

1 Lutw. 597.
Cliff, 244.
3 Lev. 261.

[If a copyholder refuse payment of a fine, debt lies against him. And it will lie at the suit of the lord's executor.

Whitfield v. Hunt, Dougl. 727. n.
Berant v. Astle, 11 731. n.

General *indebitatus assumpsit* will also lie. But in *assumpsit* for the recovery of an arbitrable fine, the plaintiff must prove that the sum stated in his count to have been assessed, amounts to two years' value of the estate, because he cannot recover a less sum than that laid in the declaration.

11. *Ibid.*

If the action be for several fines, the declaration may state generally, that the defendant was indebted to the plaintiff in such a sum, (*viz.* the amount of all the fines due,) for reasonable fines due and payable to him. But if, in such case, any count state *one* fine, although the other state *several*, and there

there are entire damages, and judgment for the plaintiff, it is error.

And independently on the above act of 9 Geo. 3. c. 9., *assumpsit* will lie for a fine assessed on the admission of an infant, as it semed to *Yates J.*, whilst he is an infant; but certainly after he comes of age, and continues to enjoy the estate.]

¶ But a fine will be no charge on the lands; and therefore the persons entitled to fines unpaid can have no action or bill, or other remedy, against a purchaser or surrenderee for any fines, which became payable before the purchase.¶

Evelyn v. Chichester, 3 Burr. 1717.

Hitcham v. Finch, 1 Roll. Abr. tit. Chancery, (P).

(K) Of the Extinguishment of the Copyhold: And herein,

1. Where the whole Copyhold shall be extinguished or suspended.

IF a copyholder in fee (a) accepts a lease for years of (b) the same land from the lord, this determines his copyhold estates. *2 Co. 16. b. Godb. 11. 101. Moor, 184. and vide 2 Leon. 72. Lev. 70. Latch. 213. Cro. Ja. 84. 3 Bulst. 81. Brownl. 32. 4 Co. 31. (a) So, if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct. 2 Co. 17. Leon. 170. And. 191. Gouldsb. 34. Roll. Abr. 510. S. C. (b) But if he takes a lease for years of the manor, that is only a suspension of his copyhold during the term. Per Cro. Ja. 84. Sav. 70. But per Cro. Eliz. 7. Moor, 185. it is extinguished. — But the lessee may re-grant the copyhold again to whom he pleases. 4 Co. 31. b. — If the copyholder joins with his lord in a feoffment of the manor, his copyhold is thereby extinct. Godb. 11.*

If a copyholder accepts to hold of his lord by bill under the lord's hand, this determines his copyhold: so, if he accepts an estate for life by parol, if livery be made; otherwise, not; for else nothing but an estate at will passes, which cannot merge an estate at will.

And. 199. Latch. 213.

If a copyholder release to his lord, this extinguisheth the copyhold: so, if the lord sell the freehold of the inheritance of the copyhold to another, and then the copyholder (c) release to the purchaser, this extinguisheth the copyhold interest.

Hut. 81. Keb. 808. Leon. 102. Cro. Eliz. 21. (c) For though a release cannot in

its own nature pass away a possession, yet it may amount to a signification of the tenant's mind to hold the land no longer; and the rule is, that any thing amounting to a determination of the copyholder's will to hold no longer, extinguisheth his copyhold. *Vide the authorities supra.*

If *A.* is tenant in tail of a copyhold, and it is found, that by the custom it cannot be barred but by seizure of the lord, for forfeiture, & *non aliter nec alio modo*, and *A.* accepts a feoffment of his copyhold lands; the copyhold is suspended but not destroyed, *quoad* his issue: but, if *A.* afterwards levies a fine of the land, though the copyhold interest cannot pass, yet it may be barred and extinguished by the fine.

Carter, 6. 22. Taylor and Shaw, adjudged. If one seised of a manor in right of his wife, lets lands by indenture for

years, this doth not destroy the custom as to the feme; for, after the death of her husband, she may demise it by copy again. *Cro. Eliz. 459. — A copyholder intermarries with the feme seignior, this is no extinguishment, but only a suspension. Sav. 66. Co. Copyh. 172. — So, if the copyholder hath the manor in execution. Co. Copyh. 172.*

Dunn v. Green, 3 P. Wms. 9. Wynne v. Cookes, 1 Br. Ch. Rep. 515. Challoner v. Murhall, 2 Ves. jun. 524. And see Parker v. Turner, 1 Vern. 393. 458.

|| It seems to be now settled, that if tenant in tail of a copyhold accept a feoffment or other conveyance of the freehold, the entail will be destroyed even as to the issue.||

Hut. 65. Winch. S. C. adjudged. 1 Jones, 41. S. C. adjudged; for, that in respect of the lord his estate may be determined by any act that shews it to be the will of the tenant to hold no longer by copy.

If a copyholder bargains and sells his copyhold to the lessee for years of the manor, his copyhold is thereby extinguished.

2 Sid. 82. If a copyhold is in the hand of a subject, who after becomes king, the copyhold is extinct; for it is below the majesty of a king to perform such servile services; yet after his decease, the next that hath right shall be admitted, and the tenure revived.

2 Co. 17. [4 Co. Eliz. 103. 252. 2 Leon. 208.] The severance of the freehold, and inheritance of the land holden by copy of the manor, does not (a) extinguish or determine the copyhold estate; for the custom hath established his estate, so that the lord cannot oust the copyholder so long as he pays and performs his customs and services.

(a) But such copyholder cannot after alien otherwise than by decree in Chancery; by which it is said, the interest in the land is not bound, but the person only. 4 Co. 25. a. Cro. Eliz. 252.

2 Co. 26. b. adjudged. || The decision in this case was upon a writ of error given up as insupportable; and the judgment declared to be "a strange judgment," never entered up by the direction of the court: and all the justices and barons in the Exchequer-chamber held clearly, that the grant by copy by the grantee of the freehold was void. Cro. Eliz. 103-4. 443.||

If a lord of a manor, having many ancient copyholds in a town, grants the inheritance of all those copyholds to another, the grantee may keep a court for the customary tenants, and accept surrenders, and make admittances and grants; for though it is not a manor in law for want of freeholders, yet, as to the copyhold tenants, the grantee hath such a manor that he may keep courts.

2. *Where Part only, or what is incident to it, shall be extinguished.*

Sav. 66. Co. Copyh. 172. If a copyholder hath had time out of mind, &c. a way over another's copyhold, and he purchases the inheritance of his own copyhold, yet the way remains.

8 Co. 63. Moor, 811. S. C. adjudged. Brownl. 251. S. C. adjudged, because the lease being for years, the trees excepted remained parcel of the manor; otherwise, if the lease had been for life.

If the king is seised of a manor, parcel of the duchy, in which by the custom copyholders may take fire-wood, &c. growing upon their copyholds, to be spent in their houses, and for fences, &c. and by lease under the duchy seal he demises the manor, *exceptis omnibus boscis, subboscis, arboribus, & maerem.*, &c., for twenty-one years, and after grants the reversion & *præmissa sic except.* to J. S. and his heirs; and after the assignee of the lessee makes a voluntary grant of a copyhold for life, according to the custom of the manor; this grantee shall have the estovers; for the estate of the copyholder is not derived out of the estate of the lord, for he is but an instrument to make

make the grant; but by the custom of the manor it is established and made firm to the grantee.

So, if copyholders for life, according to the custom, have used to have common in the waste of the lord, or estovers in his woods, or other profit apprender in any parcel of the manor, and the lord aliens his wastes or woods, &c. to another in fee, and after grants a copyhold messuage, &c. for life; such grantee shall have common of estovers, &c. notwithstanding the severance; for the title of the copyholder is paramount, and the custom unites the common, &c., which are but as accessories or incidents, so long as the messuage, &c., being the principal, is maintained by the custom.

pyholder continues to have a right of common thereon by immemorial custom. And after a grant of the soil of those wastes to trustees for the use of the copyholders in free socage, the lands, when inclosed, will be freehold, and not copyhold. *Revell v. Jodrell*, 2 T. Rep. 415.]

8 Co 63. resolved *per Cur. Moor*, 812. S. C. Brownl. 211. S. C.

[By a grant of a manor with an exception of the wastes, the wastes are severed from the manor, though the copyholder continues to have a right of common thereon by immemorial custom.

If by custom all the copyholders for life have common in the (a) waste of the lord, and the lord grants and confirms to one of them and his heirs all his copyhold messuage and land *cum pertinentiis*, he shall not have common; for by the custom, that was annexed to his customary estate, which being destroyed by his own act in making it a freehold, his common is destroyed also, and cannot continue without (b) special words.

Cro. Ja. 253.

Marshall v. Hunter, adjudged. *Yelv.*

189. S. C.

Noy, 136.

Bulst. 2.

Brownl. 220.

2 Brownl. 209.

S. C. adjudged; though the lord granted the messuage, &c. and all common thereto appertaining, for the common appertained to the customary estate, which is determined. *Cro. Ja.* 253. cited. (a) Otherwise, if they have common in the soil of a stranger. 2 Sid. 84. *per Glyn.* Hob. 190. (b) *Viz.* All commons before used. *Bulst.* 2 *Vide* 2 Vern. 250. *Styant v. Staker*; where it was decreed, that the copyholder should enjoy the common as before, though it was extinct at law.

[Where a copyholder claims common in the wastes of a manor, it properly and strictly belongs to his estate, and if he enfranchise his copyhold, in that case his common is lost: but, where he claims it out of the manor, it belongs to the land, and not to the estate, and if he enfranchise the estate the common continues.]

1 Salk. 366.

per Holt C. J.

(L) Of Forfeiture : And herein,

1. Of forfeiture for Non-attendance at Court, and not doing Service.

IF a copyholder, being (c) duly summoned, refuses to appear in court, it is a (d) forfeiture of his copyhold; for unless the copyholders attend, there can be no court holden.

Roll. Abr.

506. (c) By some opinions, a general war-

rant within the parish is sufficient; but now, by the better opinion, a general notice is not sufficient, but there must be a personal summons to make a forfeiture. *Mo.* 350. 3 *Bulst.* 80. 268. *Cro. Eliz.* 505. *Noy*, 58. (d) The forfeiture is a determination of the will, and the estate is immediately in the lord, as his reversion, and he may grant it to another before seizure. *Lev.* 26. adjudged. *Jones*, 249. — Where there may be relief in equity against a forfeiture. *Vide* *Abr. Eq.* 121. *Chan. Ca.* 95. *Skin.* 142. pl. 13. *Preced. Chan.* 574 to 586. 2 Vern. 537.

Co. Copyh. 159. (a) So, if a copyholder is in debt, and is afraid to be arrested, or is a bankrupt and keeps his house, it is a good (a) excuse for his weakness, or a great office. not coming.

Co. Copyh. 159.

Roll. Abr. 506. Also, if the lord comes to the copyholder, and requires him to do his (b) services, and the copyholder answers, if they are due he will do them, but it shall be tried at law first, whether they are due by law; this is no forfeiture, being no wilful refusal. 429. 3 Bulst. 80. 268. 4 Co. 21. b. (b) For the non-performance of services the lord may either distrain or seise the land. Noy, 135.

Stile, 241. So, if the copyholder says, if it be a court he will appear at it; (c) But, if there (c) if not, he will not; this is no forfeiture. were no controversies about the court, but that is only used as a shift; then it seems a forfeiture, *ibid.*; and *vide* 1 Leon. 104., that continual default at court amounts to a wilful refusal.

Dyer, 211. If the jury or homage refuse to present the articles according to their oath, this is a forfeiture of the copyholds.

Where it is necessary that the cause of forfeiture should be found by the homage, *vide* Godb. 47. Palm. 417. Latch. 227. 2 Vent. 38. [It is holden by Lord Coke, that a presentment is necessary to make a forfeiture in those cases, where the lord cannot be presumed to have notice of himself, as if the tenant commit felony. But it is said, *per Cur. alibi*, that a presentment is not of necessity, but only for the lord's better instruction, and he may take notice himself, if he will. And indeed the reason given by Coke is of no cogency, *viz.* that because the lord cannot by intendment have notice of them himself, that therefore he shall have no advantage of them without presentment; for if he can take notice of them, why should he not, since presentment is not that which gives title, but only lets him know what he hath a title to. However, it is safe to get such things presented, and if there be a custom for it, it must be pursued. Gilb. Ten. 231.]

2. Of Forfeiture for Non-payment of Rent.

Roll. Abr. 506. If a copyholder be to pay a certain rent yearly by his copy to (d) Non-payment his lord, and the lord come upon the land and demand his rent at the day, and the copyholder being present (d) refuse to pay it, this is a forfeiture. at the day is no forfeiture without a refusal to pay. Moor, 622. Lit. Rep. 268. — And *note*, that for non-payment of rent, fines, &c. where a value may be set on them, and a compensation made the lord for any laches in point of time, &c. equity will relieve. Prec. Chan. 568, 569.

Co. Copyh. 162. My Lord Coke says, that (e) if the lord demands his rent of (e) But the copyholder, and he says, that he wants money, and entreats this case does the lord to forbear till he be provided, that this is a forfeiture; not seem to be and that (f) if the lord makes continual demand upon the land, law; it is contradicted by a and the copyholder is not there, this is a forfeiture; but, if he solemn resolution demand once, and nobody is there, this is no forfeiture. for his designing to pay, signifies the continuance of his will, and cannot any way amount to a wilful refusal. Roll. Abr. 506. Moor, 623. Latch. 122. Cro. Eliz. 505. But, if he appoints him to pay it at a day after, at a certain place within the manor, and he neglects, this is a forfeiture. Latch. 122. cited. N. Dyer, 211. in margin. (f) This likewise seems not to be law, being only a denial at law, which cannot amount to a wilful refusal; for which *vide* Hob. 135. Noy, 58. Latch. 14. 122. Roll. Abr. 506. Cro. Eliz. 350. 505.

Lit. Rep. 268. A widow had copyhold lands, and divers persons came for the rent, whom she put off with delays; at last comes a young gentleman

tleman and demands it; she answered, that she did not know him, but if he would dance before her; if she liked his dancing she should pay him; this denial was adjudged no forfeiture, not being wilful.

[The non-payment of a reasonable fine upon demand is a cause of forfeiture. *Secus*, if it be unreasonable; or it be doubtful whether it be reasonable; or, whether it be due or not; or, if there be no express refusal; or, though there were such, if it be paid within the limited time.]

1 Roll. Abr.
507. 3 Lev.
309. Co.
Ent. 647.

3. Forfeiture in the Copyholder's taking upon him to dispose of the Copyhold, and make Leases.

If a copyholder takes upon him to convey his copyhold estate to a stranger, it is a determination of his will, and consequently a forfeiture; for thereby he would introduce a tenant on his lord without his admittance, and also destroy the evidence of its being copyhold.

Co. Lit. 59. a.
Co. Copyh.
163.

But, if a man makes a (a) charter of feoffment of his copyhold estate, or a lease for life, but makes (b) no livery, it is no forfeiture, because nothing passes till then. hold, it is said to be a forfeiture, though the deed be not enrolled; for this would determine an estate at will. Roll. Abr. 507. (b) That if he makes a letter of attorney to give livery, it is a forfeiture. Roll. Abr. 507.

Co. Lit. 59. a.
(a) If a man
bargains and
sells his copy-

My Lord Coke says, that if tenant for life of a copyhold suffer a recovery by plaint in the lord's court, as a copyholder of inheritance, this is a forfeiture. otherwise adjudged in the case of Bird and Kirk, and Mod. 199. 2 Mod. 32. adjudged no forfeiture without a special custom; for the lord is party to it, and can take no advantage of it. || Besides, the estate recovered can be only a copyhold, and not a common-law estate, and therefore the dependency is not denied.||

Co. Copyh.
163. But by
Lex Custom
206. it was

If a copyholder makes a lease for years not warranted by the custom, and without the lord's licence, this is a forfeiture, but yet it is no disseisin; for such a lease is good against every body but the lord.

Moor, 184.
Salk. 186.
pl. 5. 187.

Also, a lease for years by parol to commence *in futuro* is a forfeiture, because of the unlawful contract made to the lord's disherison.

Cro. Eliz. 498.
Roll. Abr. 507.
Moor, 392.
Gilb. Ten. 219.

A lease, that will amount to a forfeiture, ought to have a certain beginning and certain end, else it is void, and carries but an estate at will at most, which is no forfeiture.

Bulst. 189.

If a copyholder for life makes a lease for a year, and then makes another lease to the same person for another year, to commence one day after the first year, and then surrenders his copyhold to the lord; this second lease not being warranted by the custom is a forfeiture; for the land is charged with a double interest, the one *in presenti*, and the other *in futuro*.

But for this
vide Roll. Abr.
508. 510.
Bulst. 189. 215.
Jones, 249.
Cro. Ja. 301.
308. Gilb.
Ten. 218.

But, if A. makes a lease of his copyhold to one for a year, and then (c) covenants that the lessee shall enjoy it *de anno in annum*,

Cro. Ja. 301.
By the better
opinion of the

book; but the judgment was given principally on another point. (c) For though these words by construction may make a lease where the lands may be let; as in *Cro. Car.* 207., *Cro. Ja.* 92.; yet it would be an injurious construction to make words, which only import a covenant, a lease, and so a forfeiture. 2 *Keb.* 267. And this seems to be law, though it has only the authority of *Keb.*

Gilb. Ten. 255.
and *Watk.*
n. cxviii.
p. 451. *Hargr.*
n. 3. to *Co.*
Litt. 59. a.

|| Neither the making of a bargain and sale, though it be enrolled, nor the executing of a deed of feoffment with a letter of attorney to deliver seisin, if seisin be not actually given, seems to be a cause of forfeiture. ||

4. Of Forfeiture in committing Waste; and herein of the Lord's and Tenant's Interest in the Trees.

Roll. Abr. 507.
Hut. 103.
Lit. Rep. 266.
4 Leon. 241.

(a) That turning ploughed lands to hop ground or a piscary, is a forfeiture. [*Lit. Rep.* 267-8. *Hetl.* 8. S. C. cites the opinion of Popham, that turning it into hop ground is not waste. *Gilb. Ten.* 221.]—Whether a copyholder in fee may dig for mines. *Sid.* 152. *Q. & vide Winch.* 8. and title *Waste*. || It seems that he cannot without a special custom; and it hath been determined that the lord cannot, as such, without a special custom, open a mine in the copyholder's lands, for the great prejudice he would do to the copyhold estate. *Bourne v. Tayler*, 10 *Ves.* 189. *Bishop of Winton v. Knight*, 1 *P. Wms.* 406. *Grey v. Duke of Northumberland*, 13 *Ves.* 236. 17 *Ves.* 281. *Townley v. Gibson*, 2 *T. Rep.* 707. || (b) *Secus*, if he erects a mill. *Latch.* 123. *N. Dyer*, 211. *Bulst.* 50, 51. adjudged.

Co. Lit. 63. a.
(c) Voluntary waste is a forfeiture by the common law, but negligent waste is not, without a custom. *Noy*, 51.—By *Owen*, 18. it is adjudged, that permissive waste, without any special custom, is a forfeiture.—But this must be understood of waste in letting the house decay, &c. for if a stranger, or the copyholder's lessee, commit waste in cutting down trees, it is no forfeiture, for every forfeiture ought to be the wilful act of the copyholder, so as it may amount to a determination of his will. 4 *Co.* 27. a. *Lit. Rep.* 267. *Roll. Abr.* 508. But *Moor*, 49., *Dals.* 49. cont.

Waste, (c) voluntary or permissive, is a forfeiture of copyhold lands, unless there be a custom to cut trees, &c.

13 *Co.* 68.
Roll. Abr. 508.
Godb. 172.
2 *Brownl.* 329.
But *Cro. Eliz.*
5. cont. but
said, that a
custom to take,
is good; but *vide* 2 *Salk.* 638. pl. 6. where the case in *Croke* is denied to be law.

By the common law, every copyholder may take house-bote, hedge-bote, fire-bote, and plough-bote on the copyhold lands, though this power may be restrained by custom, as that a copyholder shall not take it, unless by the assignment of the lord, or his bailiff.

13 *Co.* 68.
Leon. 272.
Where it is
trespass for
cutting trees.
(d) A copyholder for life
alleged that
his house was
in decay, and
that there was
not sufficient,
&c.; and on
demurrer, it
was adjudged
in B. R. that
the copyholder
had an interest
in trees, that
the fruit, acorns,
&c. belonged

The lord of the manor may cut down the timber trees growing upon the copyhold lands, provided he leave (d) sufficient for house-bote, &c.: also, by custom, where a copyholder of (e) inheritance may take the shrowds of trees, by custom he may cut them down; for otherwise the timber may stand and rot, and nobody be the better for it.

and on demurrer, it was adjudged in B. R. that the copyholder had an interest in trees, that the fruit, acorns, &c. belonged

belonged to him; and judgment accordingly: but reversed in the House of Lords; for as the tenant could not cut down the timber, if the lord could not, it must rot. 2 Salk. 628. pl. 6. [1 Ld. Raym. 551. Com. Rep. 71. 12 Mod. 378. S. C. determined by a majority of a single lord.] And *vide* 8 Co. 64., that if a copyholder be entitled to shrods of the trees by custom, if the lord takes the body, an action on the case lies against him. (e) But a custom that every copyhold tenant may cut down trees at his will and pleasure, is unreasonable. Cro. Ja. 30. Cro. Car. 220. Bulst. 50. Noy, 2. Roll. Abr. 560. || The Court of King's Bench has said, no custom can give the timber to the tenant. 4 Ves. 703. ||

Where a copyholder may take trees for reparation, the lop- 3 Bulst. 281.
pings and top belong to him, and though he cannot repair with them, he may sell to help to defray the charges.

If a copyholder cut down trees for repairs, and employ some, Roll. Abr. 508.
and keep the rest ready to be employed in reparations, this Cro. Eliz. 499.
is no forfeiture; for he could not, perhaps, precisely know what Moor, 508.
would do. S. C. adjudged
though em-

ployed five years after cut down, and after an entry for a forfeiture.

But, if a copyholder cut trees to repair his house, and after 2 Roll. Abr.
do not employ them accordingly, but suffer them, after the 508. Moor,
cutting, to be rotten and perish; this is a forfeiture. 392. S. P. per
Cur.

5. Forfeiture by Inclosure.

Inclosing copyhold lands one from another, and also defacing Lit. Rep. 267.
land marks are forfeitures; for by these means the evidence of Chan. Preced.
their being copyhold will be destroyed. 571.

But, if *A.* is seised in fee of fifteen acres, by copy of court- Hut. 102. ad-
roll, and there is a custom within the manor, that the lord hath judged. Hetl. 5.
had a fold-course within the manor for 500 ewes, in the field in S. C. *adjornatur*. Lit. Rep.
which the fifteen acres lie, from *Michaelmas* to *Lady-day*, and 267. S. C. ad-
that no copyholder might inclose without the licence of the lord; judged; be-
and that if any inclosed without licence, then a reasonable fine cause by the
should be assessed by the lord, or his steward, if the lord would custom the co-
accept thereof; and if not, that then the copyholder so inclosing pyholder may
should be punished at every court till he opened the inclosure; be amerced,
and *B.* incloses the fifteen acres, with an hedge and fence of till, &c. so that
quickset three feet deep and six feet broad, and leaves four the lord had
spaces of nine feet broad in the said fifteen acres; this is no another reme-
forfeiture, because a prejudice only to the lord's fold-course; dy: But it was
and that which makes a forfeiture ought to be so to the copy- resolved, that
hold tenement; and this is no inclosure, because all is not in- notwithstanding
closed; and forfeitures, which are odious in law, shall be taken the gaps,
strictly. this was an in-
closure against
the custom.

|| Where an inclosure had been made for twelve or thirteen Doe v. Wilson,
years, and seen by the steward, (the same lord and steward con- 11 East, 56.
tinuing all the time,) the jury were directed to presume a licence
from the lord to inclose; in which case the tenant could not be
made a trespasser without previous notice to throw it up. ||

6. Forfeiture for Treason and Felony.

If a copyholder commits treason or (a) felony, it is a for- Co. Copyb.
feiture of his copyhold to the lord, without any particular cus- 150. 164. 13
tom; Co. 3. Leon. 1.

(a) If convicted of manslaughter, and allowed his clergy, does not forfeit without a special custom. Lev. 263. 2 Keb. 451. Nor for outlawry, unless it be for a capital crime. Lit. Rep. 234. Hetl. 127. and *vide* Leon. 99.

(a) 1 Lev. 263. By an attainder of treason or felony, of common right the
2 Keb. 251. copyhold is forfeited, (a) but not by a conviction only; but
(b) 1 Bulst. 13. (b) by custom it may be forfeited for treason or felony, even
acc. 2 Brownl. without a conviction.
217. to 220.
2 Ventr. 38. acc. Godb. 267. *contr.*

3 Lev. 94. If a copyhold is granted to *A.* for life, and after, according to
Strode and Denison ad- the custom, the reversion is granted to *B.* for life *immediate post*
judged upon a writ of error, *mortem, forisfacturam sive aliam determinationem stat. predict. A.,*
and the first judgment affirmed accordingly. Skin. 8. and *A.* is attainted of felony, by this his estate is determined;
9. S. C. *adjoined* made by the lord.
natur.

7. In what Cases a Forfeiture of Part shall be a Forfeiture of the Whole.

4 Co. 27. a. Where a copyhold is holden by one tenure, it is said, that a
forfeiture of any part is a forfeiture of the whole; for there is a
condition in law annexed to the whole estate.

Roll. Abr. 509. Therefore if such a copyholder commits waste in cutting down
(c) But Q. For a single tree, this is a (c) forfeiture of his whole copyhold; for
though committing waste by the cutting of the tree which is to be employed in repairing
in part of the the houses, &c., the whole copyhold is impaired.
house may be
a forfeiture of the whole house, yet it seems unreasonable, that committing waste in one acre,
should be a forfeiture of the whole; but *vide* title *Waste*.

4 Co. 27. a. Also it is said, that if a copyholder makes a feoffment of an
but *vide* 1 Roll. acre of land, parcel of his tenement, that this is a forfeiture of
Abr. 509. *cont.* the whole.
and that if a
copyholder by licence lets for years, and the lessee makes a feoffment, he only forfeits his
lease. Hob. 177.

4 Co. 27. But, if a copyholder holds three several acres by three several
Taverner and copies, and commits waste in one acre, he shall forfeit that acre
Cromwel. only; for though they are all in one hand, yet every acre is se-
verally holden, and to every acre there is a several condition in
law tacitly annexed.

4 Co. 28. So, if such copyholder, that holds three acres by three several
copies, surrenders to the use of *A.* and his heirs, and the lord
admits *A. tenend. per antiqua servitia inde prius debita & de jure*
consueti, and after *A.* commits waste in one acre, he shall forfeit
that acre only; for the *tenend.* continues the several tenures,
though the parcels are now all put in one copy.

So, if several copyholds escheat to the lord, and he grants them again *tenend. per antiqua servitia* to one, and he commits a forfeiture in part, this extends not to the whole.

per Cur. Cro. Eliz. 353. S. C. and S. P. adjudged; there being to each parcel a *several habendum and reddendum.*

4 Co. 28. b.
per Curiam.
 3 Leon. 109.
 S. C. and S. P.

8. Who shall be affected by a Forfeiture, or take Advantage thereof.

If there be a tenant for life, the remainder in fee of a copyhold, and the tenant for life commits a forfeiture, (a) this shall not bind the remainder-man.

and Dals. 49. *cont.* (a) But by the special custom it may bind the remainder.

Roll. Abr. 509.
 Cro. Eliz. 598.
 880. Noy, 42.
vide Moor, 49.
 9 Co. 107.

But, though this shall not affect the remainder man, yet, if there be a copyholder for life, the remainder to another for life, or in fee, and the first copyholder commit a forfeiture, he in remainder shall not (b) enter, but the lord shall hold it during the life of the first copyholder; for copyhold estates are not like those at common law, where in such case the estate for life being ended, he in remainder may enter immediately.

forfeiture, or determination of the estate for life, and the copyholder commit a forfeiture, and the lord will not enter, the lessee may. 2 Leon. 73. 9 Co. 107.

9 Co. 107.
 Roll. Abr. 568.
 (b) But, if there be a copyholder for life, and the lord make a lease to commence after the end,

If a surrender be made to the use of A. for life, the remainder to B. in fee, and A. suffer three proclamations to pass, and make no claim, yet shall not B. forfeit his remainder, for the custom shall be taken strictly.

Cro. Eliz. 879.

If a copyholder lease for years by licence of the lord, and after the lessee make a feoffment, this shall forfeit (c) only his estate, and not the estate of the copyholder.

Roll. Abr. 509.
Vide Hob. 177.
 Palm. 384.
 2 Roll. Rep.

372. (c) If a copyholder make a lease for a year, and another lease in reversion not warranted by any custom, though this second lease be a forfeiture, yet the first lease is good.

Roll. Abr. 508. Cro. Car. 234.

If a copyholder tenant in tail commit a forfeiture, his issue is bound by it.

Co. Copyh.
 135. *Vide*
 Sid. 314.
 2 Sand. 422.

Lessee for years shall take advantage of a forfeiture committed by a copyholder of the manor, for he is *dominus pro tempore.*

Roll. Abr. 509.

If there be a lord of a manor, in which there are copyholders tenants of the manor, and the lord grant to a stranger the freehold of a copyhold in fee; though by this the tenement is divided from the manor, and not demisable by copy again, yet the (d) grantee of the freehold shall take advantage of a (e) forfeiture committed (f) after by the copyholder, for he ought to pay his rent to the grantee.

Brownl. 132.
 Cro. Eliz. 499.
 Roll. Abr. 509.
 (d) So, if the grantee makes a lease for years of the freehold, the lessee shall take advantage

of a forfeiture committed after. Roll. Abr. 510. Cro. Eliz. 499. Moor, 393. Owen, 63. — After the lease made, and before the commencement of it. Moor, 393. (e) Such forfeitures as accrue by reason of the custom are discharged, but not forfeitures at common law; as waste, &c. Moor, 393. Owen, 63. 4 Co. 24. b. 25. a. (f) But not of a forfeiture committed before the grant; for the grant of the freehold made by the lord before entry, implies an

an assent that the copyholder shall continue his estate, and so is in nature of a confirmation. Owen, 63. and *vide* Latch. 227. Palm. 416. — The copyholder commits treason, and the lord aliens the manor; and after the copyholder is attainted by act of parliament, whether the alienee shall take advantage of the forfeiture, 2 Vent. 38. *dubitatur*.

Cro. Ja. 301. If a copyholder commit a forfeiture, and the lord of the manor die before entry or seizure for the forfeiture, he in reversion or remainder shall not take advantage of the forfeiture committed before his time.

per Cur. The succeeding lord shall not take advantage of waste done in the time of the preceding lord; but, if there be lord and two coparceners copyholders, and one makes a feoffment in fee of her part, and then the lord makes a lease of the manor; though the lessee can take no advantage of the forfeiture, yet the heir of the lessor may. Palm. 446. Latch. 227. adjudged. Q. The diversity between a feoffment and other forfeitures; and Q. If the lessor outlives the lease, whether he may take advantage of the forfeiture. [If there be a transmutation of possession by a feoffment or fine, it divests the lord's right, because it gains a fee-simple to the person to whom it is made or levied. In that case, therefore, and in that case only, the succeeding lord may take advantage of the forfeiture, because the act of forfeiture destroys the estate. Doe v. Hellier, 3 T. Rep. 173.]

Salk. 186. pl. 5. If a copyhold manor descends on two coparceners, and a copyholder commits waste, and makes a lease, which are agreed to be forfeitures, and after one of the sisters dies, the surviving coparcener shall not take advantage of the forfeiture; for the election to take advantage of the forfeiture must be made by them both, *cont. Powell*; who held also, that where there are two coparceners, and one will take advantage of a forfeiture, and the other not, there must be an apportionment. *Vide* title *Coparceners*.

9. What Persons shall be excused from a Forfeiture.

Cro. Eliz. 499. There were several cases, in which feme coverts and infant copyholders, &c. were obliged, on pain of forfeiting their copyholds, to observe the customs of the manor.

As, if the husband denied to pay rent, or do suit, this was holden a forfeiture for ever; for the lord must have his services.

Roll. Abr. 509. So, if the husband commits (a) waste, and dies, this shall bind the wife.

Palm. 384. 2 Roll. Rep. 372. (a) *Secus*, if he made a lease, unless she did any thing to confirm it after his death. Gilb. Ten. 228. Saverne v. Smith, Cro. Car. 7. Palmer, 383. S. C. 2 Roll. Rep. 344. 361. 372. S. C. Godb. 345. S. C. 1 Roll. Abr. 509. S. C. See too, Hedd v. Chalener, Cro. Eliz. 149.

But for this *vide* 8 Co. 100. Also in copyhold manors, where the custom is, that the heir shall come in and be admitted, and if he doth not, proclamation shall be made for him to come in, and so on in the two next courts, otherwise that the lord shall seise as forfeited; it was holden, that a feme covert was bound; and by some opinions, the lord, after such proclamations, might seise the copyhold of an infant heir till he came in and was admitted, and might receive the mesne profits without being answerable for them.

But now by 9 Geo. 1. c. 29. it is enacted, "That no infant or feme covert shall forfeit any copyhold messuages, &c. for their neglect or refusal to come to any court or courts, to be kept for any manor whereof such messuages, &c. are parcel, and to be admitted thereto; nor for the omission, denial, or refusal,

“ refusal, to pay any fine or fines imposed or set upon their or
 “ any of their admittances to any such copyhold messuages, &c.”

10. *Where the Forfeiture shall be said to be dispensed with.*

If the tenant appear not in court after personal warning, and the lord (a) amerce him, (b) this is a dispensing with the forfeiture. Brownl. 149.
(a) Although it is not es-
treated or

levied. Leon. 104. (b) Acceptance of rent after a lease made, is a dispensation; so is the accepting of any services. Keb. 15. — If the lord does not enter before the tenant repairs, the forfeiture is purged: also it hath been adjudged, that employing trees in repairs five years after they were cut down, was a purgation of the forfeiture. 2 Sid. 8.

But, if a copyholder makes a lease for years, and after surrenders to the use of the lord, and he, (c) not having notice of the lease, accepts the surrender; this is no dispensing with the forfeiture. Cro. Car. 233.
Jones, 249. ad-
judged. Roll.
Abr. 510. S. C.
(c) But the
lord shall be

presumed to have notice of the failure of suit of court, non-payment of rent, &c. 2 Vent. 38.

If he that is *dominus pro tempore* of the manor, admits one to a copyhold, he thereby dispenses with all precedent forfeitures, not only as to himself, but also as to him in reversion (d); for such new grant and admittance amounts to an entry for the forfeiture and a (e) new grant. (f) Lev. 26.
adjudged.
Keb. 25. S. C.
adjudged.
(d) Winch. 67.
Cro. Ja. 101.
(e) If a copy-

holder commits a forfeiture, and then he that hath right releases to him; this is a dispensation; for now he hath, as it were, another estate, of which he hath committed no forfeiture. Moor, 393. Latch. 227. (f) [Any acts equally solemn will amount to a dispensation; as presentment by the homage of the death of the tenant who committed the forfeiture, proclamations for the heir to come in and be admitted. 3 T. Rep. 171, 2, 3.]

But the lord by wrong or disseisin cannot by such admittance purge the forfeiture as to the rightful lord. Lev. 26. per
Curiam.

|| It would seem, that the lord's right of entry for a forfeiture after twenty years is barred by the statute of limitations. Doe v. Hellier.
3 T. Rep. 172.

In some cases a court of equity will relieve against forfeiture, as, where waste has been inadvertently done (g); or done by a stranger (h); or fines or rents have been unpaid. (i) (g) Nash v.
Earl of Derby,
2 Vern. 537.
(h) Taylor v.
(i) Taylor v.

Hooe, Toth. 237. cited Vin. Abr. tit. Copyh. (E. d.) pl. 2. (i) 2 Str. 453. Pr. Ch. 572.

So in the case of a Quaker, who refused to swear fealty. Edmore and
Craven, cited in Pr. Ch. 574.

But it will not relieve against a voluntary act; nor unless a compensation can be made to the lord. || Peachy v.
Duke of
Somerset,

Pr. Ch. 568. 1 Str. 447. S. C. Thomas v. Bp. of Worcester, 1 Ch. Ca. 95. 2 Freem. 137. S. C. Dench v. Bampton, 4 Ves. 704.

(M) *Copyholds, where and how to be sued for and recovered.*

IN all real actions, or actions concerning the realty, a copyholder cannot (k) emplead or be empleaded anywhere but in the lord's Co. Lit. 60. a.
4 Co. 21. b.
Moor, 68.

(b) Shall make their plaint in the lord's court, and make protestation to follow it in nature of one of the king's writs, as formedon, assise, &c. Co. Lit. 60. a. Co. Copyh. 142.

Co. Copyh. But actions (a) merely personal, the copyholder may sue at common law.

143. (a) If lessee for years of a copyholder cuts down the trees, the copyholder shall sue in the lord's court to punish this offence. Co. Copyh. 143. Where a copyholder may have case against the lord or a stranger for an injury done the common belonging to his copyhold, vide Roll. Abr. 106. 2 Leon. 201. 2 Brownl. 146.

Cro. Eliz. 524. The lord of the manor (b) may plead or be empleaded, and Roll. Abr. 374. avow for the rent or services of his copyholder in any court of *Westminster*; for he hath an estate at common law in the rent, and it is due to him on the same grounds in law as the rent of freehold lands.

Dench v. Bampton, 4 Ves. 700. ||The lord of a manor has no equity for an injunction and account on waste committed by a copyholder; but is confined to his legal remedy.||

Co. Lit. 60. a. If upon a plaint in the lord's court an erroneous judgment be given, no writ of false judgment lies, in respect of the baseness of the estate, being in the eye of the law but an estate at will (c); but he shall have a petition to (d) the lord in nature of a writ of false judgment, and therein assign errors, and have remedy according to law.

Chancery. Lane, 98. Roll. Abr. 373.—But a bill exhibited in Chancery to compel the lord to receive a petition for reversing a common recovery was dismissed; Vern. 367. and the dismissal affirmed in the House of Lords; for common recoveries not being adversary suits, but common assurances, equity ought rather to supply defects, than assist in annulling them. Show. P. C. 67. (d) Where the king is lord, the tenant may be relieved by bill, or petition to the king in the Exchequer-chamber. Roll. Abr. 539. Lane, 98.

Leon. 2. If a copyholder surrenders to the use of *B.* upon trust, that (e) And may do right according to conscience. he shall hold the land until he hath levied certain money, and that after he shall surrender to the use of *C.*; the money is levied, and *B.* is required to make a surrender to the use of *C.*, and refuses, and *C.* exhibits his bill to the lord of the manor against *B.*; if *B.* refuses, the lord may seize, and admit *C.* to the copyhold; for in such cases he is (e) chancellor in his own court.

—So, if a surrender be made to the use of another, without expressing what estate he shall have, a custom, that the lord may grant it in fee to him for whose use the surrender was made, is good; for he is chancellor in his own court, and therefore it is reasonable that he should determine a thing left thus uncertain. Cro. Eliz. 392.

4 Co. 26. A (f) lessee of a copyholder for a year shall maintain an ejectment, for the common law warrants his term, and therefore gives him remedy in case he be ousted: so, may lessee (g) by licence: also, where by custom a copyholder may make a lease, such lessee may maintain an ejectment.

an infant according to custom, till, &c. and the committee is ejected, he may have an *ejectione custodiæ*. Leon. 328. Cro. Eliz. 224. (g) For by the licence, the lord gives up his power of judging or determining about the lease: But Q. Whether a lease without licence, and not warranted by the custom, being good against all persons except the lord, the lessee may maintain an ejection; and *vide* Cro. Eliz. 462. 676. Moor, 569. pl. 776. Owen, 18. Style, 380. Hetl. 127. By which, it seems, he may; but Cro. Eliz. 395. 469. Moor, 50. Brownl. 40. *cont.* See Watk. Gilb. Ten. 213-4-5. No. xci. xcii.

If the wife of a copyholder in fee, by special custom recovers dower by plaint in the court of the manor, and 50l. damages, an action of debt will not lie at common law for the damages.

was holden by three judges, that the action lay, because the court baron could not award execution for so great damages, though they were well assessed there. Cro. Eliz. 426. S. C. *adjournatur*. Roll. Abr. 600.

|| It would seem, that a man who has a *primâ facie* title to a copyhold has a right to inspect the court-rolls, and take copies of them, so far as relates to the copyhold he claims, though no cause be depending for it at the time.

R. v. Shelley, 3 T. Rep. 141.

To entitle him to this inspection, it is sufficient that he claims an interest under the rolls: it is not necessary to shew by affidavit that he has an interest.||

Rex v. Lucas,
10 East, 235.
Vide R. v. All-
good, 7 T.
Rep. 746.

By Heath J.
4 Taunt. 162.

CORONERS.

CORONERS, so called (a) because they deal principally with pleas of the crown, are very (b) ancient officers at common law; who, in former days, were the principal (c) conservators of the peace within their counties: there still ought to be a certain number of them in every county, in some more, in others less, according as the usage hath been.

peace who makes an affray in his presence. 2 Hawk. P. C. c. 8. § 5. F. N. B. 397. 2 Inst. 175. 4 Inst. 271.

[Coroners are of three kinds, viz. 1. *Virtute officii*. 2. *Virtute cartæ sive commissionis*. 3. *Virtute electionis*.

1. The coroner *virtute officii* is the chief justice of the King's Bench (d), who by virtue of his office is chief coroner of *England*. And though no man who is killed in open rebellion can forfeit lands or goods, for he cannot be attainted after his death; yet, it is said (e), that if the chief justice of the King's Bench, as supreme coroner, upon view of the body of one killed in rebellion, makes a record of it, and returns it into the King's Bench, he shall forfeit his lands and goods. But Lord Coke is mistaken

(a) 4 Inst. 471.
2 Inst. 31.
(b) 2 Inst. 3.
S. P. C. 48.
(c) And the
coroner may
now bind any
person to the

2 H. H. P.
C. 53.

(d) The other
judges of this
court are sove-
reign coroners.
4 Inst. 173.
(e) 4 Co. 57.

mistaken as to the forfeiture of lands: goods indeed may be forfeited by such a record.

2. Coroners *virtute cartæ sive commissionis*, are where, by a grant to a lord or a corporation, they have power to make or be coroners within their franchise. Thus, the mayor of *London* is, by charter, coroner of *London*; the bishop of *Ely* has, by charter of H. 7., power to make coroners within the isle of *Ely*; and Queen *Catherine* had the hundred of *Cobridge* granted to her by the King in 35 H. 8., with power to nominate coroners. And in stat. 28 E. 3. c. 6., which confirms the election of coroners to the counties, there is a saving to the king and others who ought to make coroners within their franchises.

The admiralty claim a jurisdiction upon arms of the sea *infra corp. com.*; but this, at most, is only a concurrent jurisdiction with the county coroners. 1 Str. 1097.

There are two great precincts too, that by the king's grants have power of granting or having coroners, *viz.* the jurisdiction of the admiralty, and the verge; the former, for inquisitions of death on the high seas; the latter within the verge. The coroner of the admiralty is appointed by the lord high admiral: the appointment of coroner of the verge is settled in perpetuity in the lord steward, or lord great master of the king's house for the time being.

3. Coroners *virtute electionis*, are those who by stat. West. 1. c. 10. and stat. 28 E. 3. c. 6. are eligible by the county in the county court, by the king's writ *de coronatore eligendo*.]

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- (A) Of the Qualifications, and Manner of choosing and appointing a Coroner.
 - (B) In what Places he hath Jurisdiction.
 - (C) Of his Authority and Duty in taking Inquisitions.
 - (D) Of traversing and quashing such Inquisitions.
 - (E) Of his Power as to Bills of Appeal, Appeals of Approvers, and the Abjuration of a Felon.
 - (F) Where the Act of one Coroner shall be as effectual as if done by all.
 - (G) Of the Fees that he may lawfully take.
 - (H) Of discharging him, and for what Misdemeanours punished.

(A) Of the Qualifications and Manner of choosing and appointing a Coroner.

BY Westm. 1. made 3 Ed. 1. c. 10. it is enacted, "That through all shires sufficient men shall be chosen to be coroners, of the most loyal and wise (a) knights, which know, will, and may best attend upon such offices, and which law-fully shall attach and present pleas of the crown."

(a) In ancient time, none under this degree were chosen.

2 Inst. 32. 176.

The statute of Merton, made

before this act, supposes them to have been knights. 23 Ass. pl. 7. — And in the writ *de coronatore exonerando*, his not being a knight is mentioned as a sufficient cause for the discharge of a coroner. Register, 177. F. N. B. 164. 4 Inst. 271. But as the chief intent of this statute was to prevent the choosing of persons of mean ability, it seems the design of it is sufficiently answered by choosing men of substance and credit; and as the constant usage for several ages past has been accordingly, it seems to be no objection at this day, that the person chosen is not a knight. 2 Leon. 160. 2 Hawk. P. C. c. 9. § 3.

By the 14 E. 3. stat. 1. c. 8. it is enacted, "That no coroner be chosen, unless he have land in fee sufficient in the same county, whereof he may answer to all manner of people."

By the 28 E. 3. c. 6. it is enacted, "That all coroners of the counties shall be chosen in the full counties, by the (b) commons of the same counties, of the most meet and lawful people that shall be found in the same counties, to execute the said offices; (c) saving always to the king, and other lords who ought to make such coroners, their seignories and franchises."

(b) But none but freeholders have votes.

F. N. B. 164.

S. P. C. 19.

2 Hawk. P. C.

c. 9. § 10.

For none but such are

suitors to the county court. 2 Inst. 99. 1 Roll. Abr. 121. (c) Such franchise may be claimed by the king by prescription; but is a privilege of so high a nature that no one can well entitle himself otherwise than by grant from the crown. Co. Lit. 114. a. 2 Hawk. P. C. c. 9. § 11.

Although they are chosen by the county, yet it must be pursuant to the king's writ issuing out of and returnable into Chancery; but, as their authority proceeds from the election, it does not determine by the demise of the king; hence also, if they prove insufficient to answer the fines and duties incumbent on them, the county, as their superior, shall answer for them.

2 Hawk. P. C.

c. 9. § 5.

2 Inst. 174.

The writ for the election of a coroner first recites the death or discharge of one or more former coroners, and then commands the sheriff to cause one other, or more as the case is, to be chosen in a full county-court, by the assent of the county, according to the form of the statute in that case made and provided; who having taken his (d) oath in the usual manner, may do all things which belong to the office of a coroner, &c. and then it concludes with commanding the sheriff to (e) certify to the court the name of the person chosen.

2 Hawk. P. C.

c. 9. § 6.

(d) Shall be

administered

to him by the

sheriff.

2 Hawk. P. C.

c. 9. § 7.

(e) See the

form of such

certificate in

Rast. Ent. 133.

(B) In what Places he hath Jurisdiction.

3 Inst. 113.

5 Co. 107.

2 Hawk. P. C.

c. 9. § 14.

(a) By some it is laid down

A CORONER hath no jurisdiction of offences committed on the (a) open seas, between the high and low water mark, when the tide is in; but he hath an authority over offences committed in such places when the tide is out.

as a rule, that he may inquire of a felony committed on the arms of the sea, where a man may see from the one side to the other. Owen, 122. Moor, 892. H. P. C. 171. S. P. C. 51. [It is said, that this is not part of the sea. Fitz. Coron. 399. 4 Inst. 140. 2 Roll. Abr. 169. An information was granted against a captain of a man of war lying in *Portsmouth* harbour, for refusing to let the coroner of *Portsmouth* come on board to hold an inquest on the body of a person who had destroyed himself in the cabin. R. v. Solgard, 2 Str. 1097. Andr. 231.]

2 Inst. 550.

2 Hawk. P. C.

c. 9. § 15.

At common law, the coroner of the county could not intermeddle with offences done within the verge of the king's court; nor the coroner of the hostel or king's house, with those committed in the county without the verge; which proved inconvenient, by reason of the removal of the king's court before an inquest could be taken.

By the statute of *articuli super chartas*, c. 3. it is ordained, "That from thenceforth in cases of the death of men, whereof the coroner's office is to make view and inquest, it shall be commanded to the coroner of the county, that he, with the coroner of the king's house, shall do as belongeth to his office, and enrol it, &c."*

* See the last clause under this head.

4 Co. 46.

Wyat and

Wigges, 2 Inst.

550. 2 Hawk.

P. C. c. 9. § 16.

If an indictment, taken before the coroner of the county and the coroner of the king's house, do not appear, on the face of it, to have been of an offence within the verge, it is insufficient; for it shall not be said to be good, as taken before the coroner of the county; and void as taken before the other; for it was taken entirely before them both, and perhaps the coroner of the house was the principal actor, and the jury mostly swayed by his directions.

If the same person be coroner of the county, and also of the king's house, an indictment of death within the verge, taken before him as coroner both of the county and of the king's house, is good. (b)

4 Co. 46. a.

3 Inst. 134.

2 Leon. 160.

S. C. but no

resolution.

2 Hawk. P. C.

S. C. c. 9. § 17. agreed, because the mischief is remedied as well when both offices are in the same person, as when they are in divers. (b) But it must be laid to be within the verge.

2 Hawk. P. C. c. 9. § 16.

By the 33 H. 8. c. 12. it is enacted, That all inquisitions upon the view of persons slain within any of the king's palaces or houses, or other house or houses, at such time as his majesty shall happen to be there demurrant or abiding in his royal person, shall be taken by the coroner for the time being of the king's household, without any adjoining or assisting of another coroner of any shire within this realm, by the oath of twelve or more of the yeomen, officers of the king's household, returned by the two clerks controllers, the clerks of the check,

and the clerks marshals, or one of them for the time being of the said household; to whom the said coroner of the same household shall direct his precept; which coroner shall be from time to time appointed by the lord great master, or lord steward for the time being; and that the said coroner shall certify under his seal, and the seals of such persons as shall be sworn before him, all such inquisitions before the said lord master or lord steward.

(C) *Of his Authority and Duty in taking Inquisitions.*

BY 4 E. 1., " These things are to be inquired by the coroners
 " of the lord the king. First, when the coroners of the lord
 " the king have a command from the king's bailiffs, or from
 " the good men of the country, to go where any are slain or
 " suddenly dead, or wounded, or where houses are broken, or to
 " a place where it is said that treasure is found, they ought
 " forthwith to go, and to command four of the next towns, or
 " five, or six, to be before them in such a place; and when they
 " shall be come thither, the coroners ought upon the oath of
 " them to make inquiry in this manner; to wit, if it be of a per-
 " son slain, it is first to be inquired where he was slain; to wit,
 " whether it were in a field, or in a house, or at any wrestling,
 " or at a tavern, or in any company, and whether any and who
 " were there. In like manner it is to be inquired whether any
 " and what persons were culpable, either of the fact or of the
 " force, and who were present, men or women, of what age
 " soever they be, so as they can speak and have any discretion.
 " And how many soever shall be culpable by inquisition in any of
 " the manners aforesaid, shall be taken and delivered to the
 " sheriff, and committed to gaol. And such as be found who
 " are not culpable, shall be attached until the coming of the
 " justices, and the names of all of them shall be written in the
 " coroner's rolls. But if any such man be slain in the fields, or
 " in the woods, and be found there, it is first to be seen whe-
 " ther he were slain there or not; if he were brought thither,
 " let them trace the steps if they possibly can, of those who
 " brought the body thither, whether horses brought it or a cart,
 " if perchance it were brought by horse or cart. Let it be in-
 " quired also, whether the person slain were known, or were a
 " stranger, and where he lodged the night before. But if any
 " such be slain, of whose murder any be found culpable, let
 " the coroners immediately go to their houses, and inquire what
 " chattels they have, and what corn they have in their grange;
 " and if he be a freeman, what land he hath, and what is the
 " annual value of it, and what corn he hath in the ground; and
 " when they have thus inquired of every thing, they shall cause
 " the land, corn, and chattels to be appraised, as if they were to
 " be immediately sold, and they shall be delivered to the whole
 " township to answer before the justices for the same; in like
 " manner

“ manuer of the freehold, how much it is worth yearly over and
 “ above the service due to the lords of the fee, and let the land
 “ remain in the hands of the lord the king until the lords of the
 “ fee shall have made fine for it. These things being inquired,
 “ the bodies of the persons dead or slain shall be forthwith buried.

“ In like manner it is to be inquired of them that are drowned
 “ or suddenly dead; and afterwards it is to be seen of such
 “ bodies, whether the persons were so drowned, or slain, or
 “ strangled, by the mark on the neck, or by a mark on any
 “ of the limbs, or by any hurt found on the body; and so
 “ they are to proceed in form aforesaid: if they were not slain,
 “ then ought the coroner to attach the finders and all others in
 “ company. Of treasure-trove, the coroner ought to inquire
 “ who are the finders, and in like manner who are suspected
 “ thereof; and this may be well perceived, where one usually
 “ haunteth taverns, and hath done so of long time; on such
 “ a suspicion he ought to be attached by four or six pledges,
 “ or by more, if he can find them. Further, if any be appealed
 “ of rape, he must be attached, if the appeal be fresh, and
 “ if they see sign of truth by effusion of blood, or cry (a) raised;
 “ and such must be attached by four or six pledges, if they can
 “ be found: but if the appeal were without cry, and without
 “ any manifest sign, then two pledges are sufficient. Upon
 “ appeal of wound and such like, if the wound be mortal, the ap-
 “ pellee shall be taken immediately, and kept until it be known
 “ whether the party hurt shall recover or not, and if he die, the
 “ guilty persons shall be kept; but if he recover, they shall be
 “ attached by four or six pledges, according as the wound shall
 “ be. And for a maim, they shall be attached by more than
 “ four: and for a simple wound without a maim two pledges
 “ are sufficient. Also of all wounds it must be seen what is the
 “ length, breadth and depth, and with what weapons the person
 “ was wounded, and in what part of the body; and whether many
 “ are guilty thereof, and whether there are many wounds, and
 “ who gave them and what sort of wounds; and so ought all things
 “ to be enrolled in the coroner's roll. But if any be appealed,
 “ he who is appealed of the fact shall be taken; and those ap-
 “ pealed of the force shall be safely attached, until the appellee
 “ of the fact shall be convicted. Concerning horses, boats,
 “ carts, whereby any one is killed, which are properly called
 “ *vavi*, they shall be appraised and delivered to the towns.

“ Concerning wreck of the sea, wheresoever it be found, if
 “ any one lay hands upon it, he shall be attached by good and
 “ safe pledges, and the price of the wreck shall be valued, and
 “ delivered to the towns. But if one be accused of the death
 “ of any one, he shall be taken and imprisoned as above. In
 “ like manner of all homicides and burglaries hue shall be
 “ levied, as elsewhere is used in *England*. And all shall follow
 “ the hue and steps, if they can do so, and they who shall not,
 “ and shall be thereupon convicted that they would not, shall
 “ be attached to be before the justices.”

(a) *Hutesium*.

In the construction of this statute, the following points seem to be agreed on:

That the statute being wholly directory, and in affirmance of the common law, the coroner is not thereby restrained from any branch of his power, nor excused from any part of his duty not mentioned in it, which was incident to his office before; and therefore though the statute mentions only inquiries of the death of persons slain, drowned, or suddenly dead, yet the coroner ought also to inquire of the death of those who die in prison.

An inquisition of death, by the oaths of lawful men of the county, is (a) sufficient, without saying that they were of the next towns; so (b) that it appears at what place, and by what jurors, by name, it was taken, and that such jurors were sworn.

Eliz. 31. 2 Hawk. P.C. c. 9. § 22.

It is clearly (c) agreed, that the inquest shall be taken on the view of the dead body, although the statute be silent in this matter; and that an inquest otherwise taken by the (d) coroner, is void.

c. 9. § 23. (d) Therefore where the body cannot be found, or is so putrified that a view would be of no service, the coroner, without a special commission, cannot take the inquest; but in such cases it shall be taken by justices of peace, or other justices authorised, by the testimony of witnesses. H.P.C. 170. Vent. 352. 2 Hawk. P.C. c. 9. § 23. [If the coroner take his inquisition on view of the body, after long putrefaction, it is in the discretion of the court of K.B. whether they will receive it or not. R. v. Causey, Hil. 3 Geo. 1.]

If a dead body, whereon an inquest ought to be taken, be interred, or suffered to putrify, before the coroner hath viewed it, the gaoler or township shall be amerced.

Also it hath been (e) resolved, that a coroner may lawfully, within (f) convenient time after the death, take up a dead body out of the grave, in order to view it, not only for the taking of an inquest, where none hath been taken before, but also for the taking of a good one, where an insufficient one hath been taken before (g).

2 Hawk. P.C. c. 9. § 23. and in Carth. 72., where the coroner, after an inquisition that was quashed for insufficiency, took a second *super visum corporis* a year after the body had been buried; and the court refused to quash it, for *factum valet quod fieri non debet*; and note, that this seems to be a matter discretionary in the court into which the inquisition is returned. (g) [But this he cannot do without the leave of the King's Bench, Str. 167. the granting of which is discretionary in the judges, according to the time and circumstances. 1 Salk. 377. 1 Str. 22. 533.]

It is not necessary that the inquisition be taken in the very same (h) place where the body was viewed; and it hath been resolved, that an inquisition taken at D. on the view of the body lying dead at L., may be good.

cannot, by way of punishment, for not finding according to the evidence, adjourn the jury

jury to places at a great distance from where the fact was committed; but an adjournment to the assise is proper, and well enough. Comb. 386. *per Holt Ch. Just.*

4. H. 7. r8. b. A coroner cannot inquire of any accessories after the fact;
 Keilw. 67. and therefore it hath been resolved that an indictment of *J. S.*
 Dalis. 32. before a coroner, for having received and comforted one who had
 Moor, 29. pl. been guilty of a murder, is void.
 95.

2 Hawk. P. C. But he may make inquiry of the accessories before the fact;
 c. 9. § 27. and also may inquire whether any so guilty have fled for the
 2 Lev. 141. same; for which they forfeit all their goods and chattels.

Keilw. 61. A coroner may, and ought to inquire of all the circumstances
 2 Hawk. P. C. of the party's death, and also of all things which occasioned it;
 c. 9. § 28. and (a) therefore it is said, that if it be found by his inquest, that
 (a) Allen, 51. the person deceased was killed by a fall from a bridge into a
 river, and that the bridge was out of repair, by the default of
 the inhabitants of such a town, and that those inhabitants are
 bound to repair it, the township shall be amerced.

1 Burr. 17. [If the coroner neglects to take an inquisition, it may be done
 by justices of gaol-delivery, oyer and terminer, or of the peace:
 but it must be done openly: if it be done secretly, it may be
 quashed.]

(b) S. P. C. 51. According to (b) some opinions, a coroner *ex officio* hath no
 H. P. C. 171. power to take any indictment, except of the death of a man.
 4 Inst. 271.

2 Inst. 147. [In *Northumberland* he may, by custom, inquire of other felonies. 35 H. 6. 27.
 But, without custom, he hath no authority to take any inquisition other than on death. 2. H.
 H. P. C. 65.] But by others, he ought to inquire of the breakers of houses. 2 Hawk. P. C.
 c. 9. § 35. And by the 4 E. 1. *de officio coronatoris*, *supra*, he may inquire of rape, and the
 breach of a prison. Britton, 3. — And by the said statute, a coroner ought to inquire of
 treasure that is found, who were the finders, and likewise who is suspected thereof; and that
 it may be well perceived, where one liveth riotously, haunting taverns, and hath done so of
 long time; hereupon he may be attached for this suspicion, by four, or six, or more pledges,
 if he may be found. — Also, it is said, that a coroner may inquire of royal fishes, as sturgeons,
 whales. S. P. C. 51. Bracton, 120. 2 Hawk. P. C. c. 9. § 37.

(D) Of Traversing and Quashing such Inquisitions.

(c) 13 Ed. 4. THE law gives such high credit to an inquisition of death,
 c. 3. pl. 7. and found before a coroner, that (c) anciently the judges would
 2 Hawk. P. C. not receive a verdict, acquitting a person of the death of a
 c. 9. § 33. that man found against him by the coroner's inquest, unless the jury
 now exploded. finding such acquittal, had also found what other person did the
 fact, or by what other means the party came to his death;
 because it appeared by the coroner's view, on record, that a
 person was killed.

13 H. 4. 13. Also, it has been formerly holden, that if a person were slain,
 pl. 6. 5 Co. and upon the coroner's inquest *super visum corporis*, it were found
 109. Dyer, that *J. S.* fled, though *J. S.* were afterwards acquitted both of
 238. H. P. C. the felony and flight, yet he forfeited his goods; for the coroner's
 29. 2 Inst. 147. inquest is so solemn, that it is not traversable: also, when the
 3 Keb. 366. goods are once lawfully vested in the king, by that inquest the
 564. 2 Lev. property of them cannot be devested.
 141. But by
 2 Hawk. P. C.

c. 9. § 54. this opinion is harsh and unreasonable, that a man shall be liable to forfeit all his
 goods, which may perhaps be all that he is worth, by an inquest taken in his absence, with-
 out either hearing him, or giving him an opportunity of defending himself.

The coroner's record of an abjuration, or of the confession of breaking prison, or of the confession of a felony by an approver, estops the party, not only from traversing the confession, but also from alleging that it was taken from him by *duress*, &c. And it is said, that if the party plead that he is not the same person, he shall be concluded by the coroner's recording that he is the same person: yet in these cases, it seems, that the judge may in discretion, to inform his conscience, take an inquiry from the people living next the place, of the whole circumstances of the matter.

If it be found by a coroner's inquest, that a murder was committed in such a town, and that the murderer escaped untaken, the township cannot traverse such escape, because it makes them only liable to an amercement, & *de minimis non curat lex*.

Also, it is strongly holden in some books, that an inquest of self-murder, found before a coroner, cannot be traversed: but the contrary opinion being also holden by books of as great authority, and seeming also to be more agreeable to the general tenor of the law, in other cases, it seems to be the better opinion, that such inquest being moved into the King's Bench by *certiorari*, may be there traversed by the executor or administrator of the person deceased; or, in case the coroner's inquest find him to have been a lunatick, by the king or the lord of the manor.

coroner to return the depositions he hath taken upon an inquisition of *felo de se*, if there be nothing depending before them to make it necessary. 2 Str. 1073.]

(a) If a coroner appear to have been corrupt in taking an inquest, it seems that a *melius inquirend.* shall go to special commissioners, who shall proceed not on view, but upon testimony, and the coroner shall have nothing to do with such inquest; but, (b) where his inquest is quashed for want of form only, he shall take a new one in like manner as if he had taken none before.

198. (b) 2 Roll. Abr. 32. pl. 5. 21 E. 4. 70. b. Salk. 190.

(E) Of his Power, as to Bills of Appeal, Appeals of Approvers, and the Abjuration of a Felon.

BY the common law, the coroner might, without the concurrence of any other, receive an appeal of felony or mayhem, on the plaintiff's finding sufficient pledges to the sheriff for the prosecution; but it being provided by Westm. 1. c. 10. that the sheriff shall have counter-rolls with the coroner, it seems that no appeal, since that statute, is well commenced before the coroner, unless the sheriff be present to take a counter-roll of the proceedings; yet the coroner seems still to be the only judge.

A coroner cannot receive a bill of appeal of an offence done out of the county, because there can be no trial thereof by the

2 Hawk. P. C. c. 9. § 40. county; but he may receive the appeal of an approver, or take the abjuration of one who confesses a felony done in any county; because after such confessions there is no need of any trial.

2 Hawk. P. C. c. 9. § 41. and several authorities there cited. A coroner may certainly award process, till the exigent on a bill of appeal before him, and such process shall be awarded by him only, and not by him and the sheriff jointly, and he may proceed thereon till outlawry; but since *Magna Charta*, by which it is enacted, c. 17., *That no sheriff, constable, coroner, or other bailiff of the king, shall hold pleas of the crown*, he cannot proceed to the trial of the appellee.

H. P. C. 171. 2 Inst. 176. An appeal before the coroner may be removed into the King's Bench or Chancery, by *certiorari*, directed to the coroners and sheriff, but not by one directed to the sheriff only.

2 Hawk. P. C. c. 9. § 43. The coroner may receive the appeal of an approver for an offence in the same or in a different county; and if the appellee be in the same county, he may award process against him to the sheriff till it come to the *exigent*: but, if the appellee be in a foreign county, the coroner cannot award process against him, but must leave it to the justices of gaol-delivery, or others before whom the appeal is afterwards recorded.

2 Hawk. P. C. c. 9. § 44. A coroner may take the confession and abjuration of a felon, and also the confession of any felony by an approver. And as to abjuration, it is to be observed, that at the common law, if a person accused of any felony, (except sacrilege,) whether in the same or any other county, for which he was liable to judgment of death, and not charged with treason, had fled to any church or church-yard, and within forty days confessed himself guilty before the coroner, and declared all the particular circumstances of the offence, and thereupon taken the oath in that case provided, (the substance whereof was, that he abjured the realm, and would depart as soon as possible at the port which should be assigned him, and never return without leave from the king, &c.) he saved his life, if he observed the terms of the oath, by going with all convenient speed the nearest way to the port assigned, &c.; but he was attainted of the felony by such abjuration, without more, and, consequently, forfeited his lands, goods, &c. And now by 21 Jac. 1. c. 28. it is enacted, *That no sanctuary, or privilege of sanctuary, shall be admitted or allowed in any case.*

(F) Where the Act of one Coroner shall be as effectual as if done by them all.

(a) S. P. C. 53. a. 14 H. 4. 34. (b) 39 H. 6. 40. b. Comb. 435. & *quare*. [One coroner may execute the writ, as in (a) **W**HEREVER coroners are authorized to act as judges, as in the taking of an inquisition of death, or receiving an appeal of felony, &c., the act of any one of them who first proceeds in the matter, is of the same force as if all had joined in it: but it is said, that after such proceeding by one of them, the act of any other will be void: also, it is certain that (b) where coroners

coroners are empowered only to act ministerially, as in the execution of a process directed to them, upon the default or incapacity of the sheriff, all their acts will be void wherein they do not all join.

county, the return must be in the name of all. 2 H. H. P. C. 56.]

(G) *Of Fees that he may lawfully take.*

BY Westm. 1. c. 10. it is enacted, "That no coroner de-
mand or take any thing of any man to do his office, upon
" pain of great forfeiture to the king."

Vide 2 Inst.

176. that this

statute was

made in af-

firmance of the common law.

But it is enacted by 3 H. 7. c. 1. "That a coroner have
" for his fee, upon every inquisition taken upon the view of a
" body slain, 13s. 4d. of the goods and chattels of the slayer or
" murderer, if he have any goods; and if he have no goods, of
" such amercements as shall fortune any township to be amerced
" for the escape of the murderer, &c."

But the coroners endeavouring to extend this statute to persons slain by misadventure, it was enacted by 1 H. 8. c. 7.
"That upon a request made to a coroner to come and inquire
" upon the view of any person slain, drowned, or otherwise
" dead by misadventure, the said coroner shall diligently do his
" office, without taking any thing therefore; upon pain to every
" coroner that will not endeavour himself to do his office, (as
" afore is said,) or that taketh any thing for doing his office upon
" every person dead by misadventure, for every time forty shillings." *

|| By 25 G. 2. c. 29. "For every inquisition not taken upon
" the view of a body dying in a gaol or prison, which shall be
" duly taken within that part of *Great Britain* called *England*
" by any coroner or coroners in any township or place contri-
" butory to the rates directed by the act of 12 G. 2. *for the more*
" *easy assessing, collecting, and levying of county rates*, the sum
" of twenty shillings, and for every mile which he or they shall
" be compelled to travel from the usual place of his or their
" abode to take such inquisition, the further sum of nine pence:
" over and above the said sum of twenty shillings shall be paid
" to him or them out of any monies arising from the rates
" before mentioned by order of the justices of the peace in their
" general or quarter sessions assembled for the county, riding,
" division, or liberty, where such inquisition shall have been
" taken, or the major part of them, which order the said jus-
" tices of the peace so assembled, or the major part of them,
" are hereby authorized and directed to make; for which order
" no fee or reward shall be paid to the clerk of the peace or any
" other officer."

§ 2. "For every inquisition which shall be duly taken upon
" the view of a body dying in any gaol or prison within that
" part

“ part of *Great Britain* called *England* by any coroner or
 “ coroners of a county, so much money not exceeding the sum
 “ of twenty shillings shall be paid to him or them as the justices
 “ of the peace in their general or quarter sessions assembled for
 “ the county, riding, or division, wherein such gaol or prison is
 “ situate, or the major part of them, shall think fit to allow as
 “ a recompence for his or their labour, pains, and charges in
 “ taking such inquisition, to be paid in like manner by order
 “ of the said justices, or the major part of them, out of any
 “ monies arising from the said rates; which order the said jus-
 “ tices of the peace so assembled, or the major part of them, are
 “ hereby authorized and directed to make; for which order no
 “ fee or reward shall be paid to the clerk of the peace, or any
 “ other officer.”

§ 3. “ Provided, that over and above the recompence hereby
 “ limited and appointed for inquisitions taken as aforesaid, the
 “ coroner or coroners, who shall take an inquisition upon the
 “ view of a body slain or murdered, shall also have the fee of
 “ thirteen shillings and four-pence payable by virtue of the act
 “ made in the third year of King Henry the Seventh out of the
 “ goods and chattels of the slayer or murderer, or out of the
 “ amerciaments imposed upon the township, if the slayer or
 “ murderer escape: any thing, &c. notwithstanding.”

§ 4. “ No coroner to whom any benefit is given by this act
 “ shall by colour of his office, or upon any pretext whatsoever
 “ take for his office doing in case of the death of any person
 “ any fee or reward, other than the said fee of thirteen shillings
 “ and four-pence limited as is aforesaid by the said act 3 H. 7.
 “ and other than the recompence hereby limited and appointed,
 “ upon pain of being deemed guilty of extortion.”

§ 5. Excepts from this act the coroner of the king's house-
 hold, of the verge of the king's palaces, of the admiralty, of the
 county palatine of *Durham*, of the city of *London*, and borough
 of *Southwark*, or of any franchises belonging to the city; and
 the coroner of any city, borough, town, liberty, or franchise not
 contributory to the rates directed by 12 Geo. 2. or within which
 such rates have not been usually collected, and allows them to
 take such fees as they were before entitled to.||

(H) Of discharging him, and for what Misde-
 mesnours punished.

F. N. B. 163.

S. P. C. 48.

8 Co. 41.

2 Inst. 32.

(a) Vide Godb.

105.

That
 by choosing
 another, the
 power and au-
 thority of the

IF any coroner be so far engaged in any other publick business
 in the county, that he cannot have leisure enough to attend
 the office of a coroner; or, if he be chosen verderor of a forest;
 or, if he have not sufficient lands in the same county whereon to
 live according to his state and degree; or, if he be disabled,
 either by old age or any inveterate disease, as the palsy, or the
 like, to execute his office as he ought; and, as some say, if he
 follow any common trade; he (a) may be discharged by the writ
 de

de coronatore exonerando, which being directed to the sheriff, after a recital of the particular cause of the discharge of such coroner, commands him to cause another to be chosen in his room.

first, *ipso facto*, ceases. [As it is an office of freehold, the court of Chan-

cery will not suffer this writ to issue, but on affidavit that the defendant hath been served with notice of the petition for it. 3 Atk. 184.]

But, if any writ of this kind be grounded on an untrue suggestion, the coroner may procure a commission from the Chancery to inquire of the truth of it, and to return the inquiry before the king into Chancery; and if upon such commission the suggestion be disproved, the king may make a *supersedeas* to the sheriff, that he do not remove such coroner, or if he have removed him, that he suffer him to execute the office as he did before.

Register, 117.
b. 178. a.
F.N.B. 164.
S.P.C. 49.

If a coroner be remiss in coming to do his office when he is sent for, &c., he shall be (a) amerced by virtue of the above-mentioned statute *de coronatoribus*.

S.P.C. 51.
Salk. 377.
pl. 21.
H.P.C. 170.

(a) That if he returns a wrong presentment, an information will be granted against him. Comb. 386. [If he imposes an improper inquisition upon the jury, he will be committed. 1 Str. 69.]

Also by the 3 H. 7. c. 1. "If any coroner be remiss, and make not inquisitions upon the view of the body dead, and certify not as by the act is directed, he shall forfeit for every default one hundred shillings."

And by the 1 H. 8. c. 7. it is enacted, "That if any coroner shall not endeavour himself to do his office or taketh any thing for doing his office upon any person dead by misadventure, he shall forfeit forty shillings."

|| By 25 G. 2. c. 29. § 6. "if any coroner, who is not appointed by virtue of an annual election, or whose office of coroner is not annexed to any other office, shall be lawfully convicted of extortion or wilful neglect of his duty, or misdemeanour in his office, it shall be lawful for the Court before whom he is convicted, to adjudge that he shall be removed from his office; and thereupon if such coroner shall have been elected by the freeholders of any county, a writ shall issue for the removing of him from his office, and electing another coroner in his stead, in such manner as writs for the removal or discharge of coroners, and for electing coroners in their stead, are in any cases already directed by law. And if the coroner so convicted shall have been appointed by the lord or lords of any liberty or franchise, or in any other manner than by the election of the freeholders of any county, the lord or lords of such liberty or franchise, or the person or persons entitled to the nomination or appointment of any such coroner, shall, upon notice of such judgment of removal, nominate and appoint another person to be coroner in his stead."

CORPORATIONS.

- (A) Of the Nature and different Kinds of Corporations.
 - (B) By whom and in what Manner created.
 - (C) Of the Names of Corporations.
 - 1. *Of the Name in its Creation.*
 - 2. *How far it may be varied from in Grants by or to a Corporation.*
 - 3. *How far it may be varied from in Pleading and Judicial Proceedings.*
 - (D) What Things are incident to a Corporation.
 - (E) How Corporations differ from natural Persons.
 - 1. *Of Grants made by and to them.*
 - 2. *How they are to sue and be sued.*
 - 3. *What things they may do without Deed.*
 - 4. *What things they may take in Succession.*
 - 5. *Where they shall be liable in their natural Capacities.*
 - 6. *[Of the Qualifications requisite to Members and Officers of Corporations.]*
 - 7. *Of the Concurrence required in corporate Acts.*
 - 8. *Of the Regularity of their Proceedings.*
 - 9. *Of the Election and Amotion of the Members.*
 - (F) How they are visited.]
 - (G) Of the Dissolution of Corporations.
-

- (A) Of the Nature and different Kinds of Corporations.

CORPORATIONS are of several natures, all of them instituted for the better government of a people combined together, and living under a regular system of laws.

Of

Of corporations some are sole (*a*), and some are aggregate; a sole corporation consists of one person only, as the king (*b*): so, a clergyman by being made a bishop (*c*), prebendary, parson (*d*), or vicar, is said to be a sole corporation.

corporation is pointed out by Sir *W. Blackstone*, in 1 Comm. 469, 470. But his successor in the Vinerian chair thinks, "that it might have been better to have given sole corporations some other name. For, except the incapacity of purchasing in mortmain, very few points of corporation law are applicable to them. The power of making valid bye-laws, the right of electing new, and of removing old members, and the necessity of a common seal, as well as other matters, have little or no relation, except to corporations aggregate." 1 Wooddes. Syst. 471, 2.] (*b*) Who is a corporation sole by the common law, and has thereby several privileges and prerogatives distinct from a common person, for which *vide tit. Prerogative*. (*c*) These are founded by the king, and are under ecclesiastical government; yet the common law takes notice of them, though not originally. (*d*) If he holds his possessions singly, he is a corporation sole; but if with others he makes a chapter, he is thereby member of a corporation aggregate; so, the same person by being incumbent of the same preferment may be both a corporation sole, and a member of a corporation aggregate. Comp. Incumb. 372.

A corporation aggregate is an (*e*) artificial body of men, composed of divers constituent members *ad instar corporis humani*, the ligaments of which body politick or artificial body are the franchises and liberties thereof, which bind and unite all its members together; and in which the whole frame and essence of the corporation consist.

act of parliament, or the king's charter; for though some corporations are said to be by prescription, yet such prescription always supposes an original grant from the crown, which being lost, or worn out by time, yet having run out into a prescription, still continues to unite them. 45 E. 3. 2, 3. Co. Lit. 130. 2 Buls. 233. *Vide* in the argument of *quo warranto* against the city of London, 115. Kelw. 138.

Also, corporations are said to be ecclesiastical or lay; of ecclesiastical corporations some were called (*f*) *regular*, as abbots, priors, &c. others, *secular*, as bishops, deans, &c.

certain rules, and had vowed true obedience, wilful poverty, and perpetual chastity; but are now dissolved. Co. Lit. 93.

Of lay corporations some are said to be for general government; as those of mayor and commonalty, &c.; some for a particular purpose, as for the advancement of (*g*) learning, (*h*) charity, or some (*i*) particular trade or branch of business: these receive their sanction from the crown, and must be by the king's licence; though a private person may be founder, and may give them laws to which they must square themselves in their future conduct.

rations of the universities of this country are lay corporations. 3 Burr. 1647. (*h*) Such are hospitals. (*i*) As *Trinity-house* for regulating navigation, *South-Sea Company*, &c. *Vide tit. Mandamus*.

(B) By whom and in what Manner created.

THE king, by virtue of his prerogative, is the (*a*) only person that can erect either an (*b*) ecclesiastical or (*c*) lay corporation. could not have founded or incorporated a college, &c. here, but it ought to have been done by the king himself. 4 Co. 107. b. (*b*) 5 Co. 26. a. Cawdry's case. (*c*) 40 R. 3. 4. 49 Ass. 9. Bro. Prescription, 12. 10 Co. 33. b.

Yet

10 Co. 29. b.
31. b. 1 Roll.
Abr. 512.
(*a*) [The use
of the institu-
tion of a sole

4 Mod. 54.
Carth. 217.
Show. 280.
(*e*) And is said
to be invisible
and immortal,
and can only
be created by

Co. Lit. 250. a.
3 Inst. 202.
(*f*) Those
lived under

(*g*) Which by
the civil law
are called col-
leges or uni-
versities, yet
are considered
as lay corpo-
rations.
Carth. 92.

[The corpo-
1 Bl. Rep. 547.]

10 Co. 33. b.

Yet the king may give power to a common person to name the corporation, and the persons it is to consist of; but when he hath so done, this corporation does not take its essence from the common person, but from the king.

Vide 2 Inst.

720., this statute expounded.

(a) By the common law, he that gives the first possession to

Also, by the 39 Eliz. c. 5. every person seised of an estate in fee-simple, may by deed enrolled in the high court of Chancery erect an hospital or house of correction, which shall be incorporated, and have perpetual succession, and shall be visited by such persons as shall be nominated by the (a) founders thereof, &c.

the corporation, is the founder. 38 Ass. 22. 50 Ass. 6. Bro. Corody, 12. 1 Co. 33. b. — But, if the king and a common person give possessions to a corporation at one and the same time, the king only shall be the founder by his prerogative. 5 Ass. 6.

10 Co. 30.

Style, 198.

(b) As constitutus the men of

such a town a corporation, viz. mayor, &c. 2 Roll. Abr. 197.

In the creating of a corporation the law does not seem to require any set form of words to be made use of, as *incorporo, fundo, crigo*, &c. but any words (b) equivalent will be sufficient.

(c) By a special

act of parliament

it was

enacted, that

there may be

built one meet

house, &c. that

the same may

be called, &c.,

and the lord,

&c. may be

governors, &c.

and the said

governors, &c.

shall for ever

hereafter be

incorporated,

&c., it was

resolved, that

no hospital was

incorporated

by this act,

because all the

words are *de futuro*. 10 Co. 24-5.

The king may grant to the commonalty of *D.* that they shall be incorporate by the name of mayor, &c. and that they may choose a mayor, &c. and this is a good corporation, though the election of a mayor is *in (c) futuro*; for there is a diversity between a power, liberty, franchise, or other thing newly created, which may take effect *in futuro*, and an estate or interest which none can take without a present capacity.

(d) Roll. Rep.

226.

(e) 2 Brownl.

100.

3 Mod. 13.

(f) Of ancient

time, the in-

habitants of a

town were in-

corporated when

the king granted

to them to have

*guildham**mercatoriam*. Reg. 219. 10 Co. 30.

A patent procured by some few persons only shall not (d) bind the rest; nor (e) can the inhabitants of a town be incorporated without the assent of the major part of them.

As it is the king's charter that creates corporations, so such charter (f) may mould and frame them as it shall think fit.

21 E. 4. 56.

7 E. 4. 3. 2 H.

7. 13.

(g) If the king

grants *homini-**bus de Islington*

to be discharged

of toll, this is

a good corpora-

tion to this in-

tent, but not to

purchase. 21 E.

4. 59. — Where

the king, in giving

lands to the in-

habitants of a

town, on a sup-

position that

they were in-

If the king grants lands to the men or inhabitants of *D.*, *heredibus & successoribus suis*, rendering (g) rent; (h) for any thing touching (i) these lands (k) this is a corporation, but not to other purposes.

(h) By this they

have capacity

to take, but

not to grant

the lands to

another. Cro. Eliz.

35. (i) Where

a charter made

to aliens may

incorporate

them *quoad*

the king, and

not *quoad*

others. Roll

Rep. 148. 296.

(k) But if the king releases the rent, the corporation is *ipso facto dissolved*. Dyer, 100. pl. 70.

One corporation may be made out of another ; but it must be by the king's charter ; therefore where the mayor and commonalty of *London* prescribed to make another corporation in the city, though their customs are confirmed, yet it was holden not to be good, without the king's charter.

10 Co. 31.
49 E. 3. 4.
49 Ass. 8.
Moor, 584.
Sid. 291.
2 Keb. 52. 63.
88. || In the

case of *Caddon v. Eastwick*, 1 Salk. 192. it is said, that a corporation may make a fraternity ; but this point is not noticed in the other reports of that case (6 Mod. 123. Holt's Rep. 433.) and Lord Kenyon in the case of *The King v. The Cooper's Company*, Newcastle, 7 T. Rep. 548. says, he cannot conceive that they have such a power ; that it can only be effected by the legislature or by the crown. But see the case of *Fazakerley v. Wiltshire*, 1 Str. 462. ||

|| If the crown, after the foundation of a college, grants an advowson or land to the senior fellow, such grant will operate to make him a sole corporation. ||

1 Ves. 473.

(C) Of the Names of Corporations : And herein,

1. Of the Name in its Creation.

THE names of corporations are given of necessity ; for the name is, as it were, the very being of the constitution ; for though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts ; for it is no body to plead and be empleaded, to take and give, until it hath (a) gotten a name.

5 E. 4. 201.
Leon. 307.
Dyer,
11 Co. 21.
Perk. 8. 27 H.
6. 3. Hob. 32.
Lit. 201.
11 Co. 20.

Owen, 35. Dals. 78. (a) 2 Bendl. 2. 10 Co. 28. 2 Inst. 666., that the name of a corporation is as the name of baptism.

The names of corporations are usually taken, first, from the persons of which they consist ; secondly, from the use and design of their being ; thirdly, from the names of the patrons that first procured their institution ; fourthly, from the place where they reside ; fifthly, from the names of saints.

But, though a corporation must have a name, yet that must be understood to be either expressed in the patent, or implied in the nature of the thing ; as, if the king should incorporate the inhabitants of *Dale* with power to choose a mayor annually ; though no name be given, yet it is a good corporation, by the name of mayor and commonalty. So, the city of *Norwich* is incorporated to be a mayor and sheriffs, by the charter of *Henry the Fourth*, and are called mayor, sheriff and commonalty.

Salk. 191. pl. 3.
Per Holt Ch.
Just.

Also, the king may incorporate a town by one name, and after by another name, and then they shall use their name according to their second corporation ; and (b) yet they shall continue their (c) possessions they had before by the other name.

21 E. 4. 59.
Fitz. Grant,
30. S. C. [See
acc. Knight v.
Mayor, &c. of
Wells, 1 Ld.

Raym. 80. 1 Lutw. 508. S. C. — But with respect to the extinction of the old name by a new charter, *Holt C. J.* took this distinction ; where the new charter alters the constitution of the corporation, and new models it, there they shall lose their old name ; but if the constitution as to all its integral parts remains the same, though the new charter give them a new name, the old one remains. As, if a mayor be added, or a mayor and masters be made mayor and aldermen, or an abbot and convent a dean and chapter, where they lose their old name, because new integral parts of the corporation are added. But, if the bailiffs and burgesses *villæ de Gippo*, accept a charter constituting them bailiffs and burgesses *villæ Gippici*,

Gipwici, and giving them farther privileges, this is a new name only, for the old corporation remains in its integral parts. *Regina v. Bailiffs, &c. of Ipswich*, 2 Ld. Raym. 1239. 2 Salk. 433. S. C.] (b) So, a debt to the corporation remains, though their name is changed by a new charter. 3 Lev. 238. (c) And all other franchises and privileges. 4 Co. 87. b.

Jones, 261. So, a corporation may be incorporated by one name, and College of Physicians and power given them to sue and purchase lands by another name. Butler. Lit. Rep. 168. 212. 350. Cro. Car. 256. S. C.

5 Mod. 327. The college of physicians were incorporated by the name of College of the president, college or commonalty of the faculty of physick; Physicians v. Dr. Salmon, and afterwards in the patent it was granted that the president of the college should sue and be sued in behalf of the college. 2 Salk. 451. The college brought an action against Dr. Salmon, upon the S. C. pl. 2. statute for practising without licence under the seal of the Ld. Raym. college, and declared by the name of the president and college, 630. S. C. or commonalty; and the court allowed to sue by either; and so were the precedents; for though it was a rare instance that the corporation should be incorporated by one name, and have leave to sue by another name; yet when it is so, it is proper.

2. How far the Name may be varied from, in Grants by or to a Corporation.

10 Co. 125. Although the names of corporations are not merely arbitrary sounds, yet if there be enough said to shew that there is such an Goulds. 122. artificial being, and to distinguish it from all others, the body politick is well named, though the words and syllables are varied from; and this the rather in grants, which are to have a favourable construction.

10 Co. 125. So, if the name be expressed by words (a) synonymous, it is sufficient; as, if a college be instituted by the name of *guardianus & scholares domus sive collegii scholarium de Merton*, and they make a lease by the name of *custos & scholares*, it is good. (a) So, if the grant be made by *præpositus & socii*, where it should be *scholares*, it is good. 11 Co. 20. — So, if *J. S.* abbot of *B.*, makes a lease, by the name of *J. S. clericus de B.* 11 Co. 21.

10 Co. 125. If there be a corporation founded by the name of *major & burgenses burgi dom. regis de Lynn Regis*, and an obligation be made to them by the name of *major & burgenses de Lynn Regis*, without saying *burgi dom. regis*, it is well enough; for the parties are sufficiently expressed; and all boroughs are founded by the king.

Hob. 124. If a house be founded by the name of *minister dei pauperis domus*, and a lease be made by the name of *minister pauperis domus dei*, this is well enough; for the same design is specified by both names.

10 Co. 125. But, if a house be founded by the name of *guardianus & scholares domus sive collegii scholarium de Merton*; and a lease be made by them, by the name of *guardianus & scholares domus sive collegii de Merton*, it is a material variance of the name, since they have not expressed the design of the house, which is a substantial part of the name.

But,

But, if a college be instituted by the name of *aula scholarium regine*, to be governed by a provost, and they are confirmed by the king, by the name of *præpositus & scholares aule regine*, and they make a grant of an advowson by that name, this is good; for that college would never have a name according to the words of the first charter, for then it would be a sole corporation, which is contrary to the general convenience of such a body, for the name would be *præpositus scholarium aule regine*, which cannot be intended, and the word *scholares* is not required as in the former case; and the placing it where it is confirms the establishment; and this confirmation of the king, and common appellation, are good interpreters of the original intent of the name.

11 Co. 20.
Ayray's case.

Edward the Fourth incorporated the dean and canons of *Windsor*, by the name of *The King's Free Chapel of St. George the Martyr*; and in the time of *Philip* and *Mary* they made a lease, by the name of *The Dean and Canons of the King's and Queen's Free Chapel, &c.* this was holden a material mistake of the name; for it takes its name from the founder, which is here mistaken, and the name of a different person substituted in its room.

10 Co. 124.

If a corporation be founded by the name of the dean and chapter of the cathedral church in *Oxford*, and they make a lease by the name of the dean and chapter of the cathedral church in the university of *Oxford*, this is well enough; for the (a) place of the situation is well and sufficiently shewn.

Poph. 57.
(a) A corporation must be named of such a place as will distinguish its situation from Roll. Abr. 513.

that of others. Vide 10 Co. 29. b. 32. b. 2 Brownl. 244. And. 196.

If the prior of *St. Michael of Coventry* makes a lease by the name of *The Dean of Coventry*, this is good; so (b), if the convent grant an annuity or corody, and the name of the saint be omitted.

10 Co. 124.
(b) So, if a corporation be instituted in honour of *St. George the*

Martyr, and in the lease they omit the word *Martyr*, it is well enough; for the name of dedication is but an empty sound, and no otherwise requisite than to distinguish the corporation from all others. Poph. 59.

If there be an immaterial addition, this does not hurt; as, if *the president and scholars of Corpus Christi college in Oxford* make a lease by the name of *president and scholars of Corpus Christi college in Oxon, com. Oxon*, this is good; for *utile per inutile non vitiatur*. Cro. Eliz. 816.

[If a bond be given to *A. B.* (master) and the fellows and scholars of *Sussex* and *Sidney college*, to be paid, &c. to the master, fellows, and scholars; this is a bond to the master, &c. in their corporate capacity, and not to the master, whose name is mentioned in the beginning of the bond, in his natural capacity.]

Master, &c. of
Sussex and
Sidney Col-
lege v. Daven-
port, 1 Wils.
184.

In devises, if the name of the corporation be mistaken, yet if there be words sufficient to shew that the testator could only mean and intend such an one, it will be sufficient; as a devise to *George Bishop of Norwich*, when his name is *John, &c.*

Leon. 307.
Dyer, 106.
11 Co. 21.
Perk. 8.
Owen, 35.
Dalis. 78.

Hob. 33.
19 H. 8. 8.

But, if a devise be to the abbot of *St. Peter*, where it is really the abbot of *St. Paul*, the devise is void; for here the saint's name is the only specification of the party in the devise, which is mistaken.

Mayor, &c. of
Carlisle v.
Blamire,
8 East, 487.

|| Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture declared on by *A. B.* were known by a certain other name, by which name *A. B.* granted to them a certain watercourse, and covenanted for quiet enjoyment; it was holden, that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact.

Dean and
Chapter of
Christ Church,
and Parot's
Case, 4 Leon.
190.

If the king grants lands unto a corporation by another name than that which they were named before; yet the lands shall pass, and the letters patent shall be to them as a new incorporation.||

3. *How far it may be varied from in Pleading and Judicial Proceedings.*

6 Co. 65.

(a) A corporation was instituted by the name of

præfecti & guardianorum naupegor. de Rederiffe, and the writ was directed *præfati, et guardianis & sociis*, and held ill. 2 Bulst. 233. Tipling and Pexal, and 11 Co. 21. — In pleading a lease by a dean and chapter, the name of the dean must be shewn. Co. Lit. 3. a. [But see 1 Leon. 307. Dy. 86. a. in marg. and *infra*.]

There is a difference between writs, declarations, &c., and obligations and leases, &c., for if the name of a corporation be mistaken in a writ, a new writ may be purchased of common right; but, if it were fatal if mistaken in obligations and leases, the benefit of them would be wholly lost; and therefore one ought to be supported, though not the other; as, (a) where *John Abbot of N.* granted common of pasture to *J. S.* by the name of *William Abbot of N.* this was holden good; but, if this name had been thus mistaken in a writ, it had been fatal.

Hob. 211.

Noy, 54.

2 Brownl. 292.

Latch. 229.

11 Co. 94.

Dyer, 279.

3 Mod. 6. Cro. El. 351.

There is also a difference between an ancient corporation and a corporation newly erected; for an ancient corporation, by use, may have a special name differing in substance; but otherwise of a corporation created within memory; for this regularly can only have the name by which it is instituted.

10 Co. 57.

Chancellour of
Oxford's case.

If the advowson of popish recusants convict be given to the chancellour and scholars of the university of *Oxford*, and they bring their action by the name of the chancellour, masters and scholars of the university of *Oxford*, this is well brought; for a corporation by act of parliament may take by another name than that by which it was instituted; for in acts of parliament, the subject and design of the legislature must be respected; and those that have the power wholly to change the name, have certainly power to alter it in any act of theirs; and all inferior jurisdictions are bound to support the sense of the law.

A parson

A parson must be empleaded by christian and surname, and not *John*, parson of *D. &c.* but in other sole corporations, the christian name only is sufficient; as *John* Bishop of *Canterbury*; *Thomas*, Abbot of *D.*, &c.

2 Inst. 666.
Yelv. 34. 49.

But, where the corporation is aggregate of many capable persons, as mayor and commonalty, dean and chapter, &c., none of them in pleading are named by their proper christian and surnames; and the reason is, because, in the first place, the death of the individual is a good plea in abatement, for a new successor comes in his place, that was not party to the former writ; but bodies aggregate are immortal and invariable; and therefore the parties to the first writ are always the same.

2 Inst. 666.
Skin. 2. pl. 2.

If a writ is brought by the (a) warden and college of *All Souls*, for lands, &c., *quod clamant esse jus & hæreditatem suam*, this is well enough, though it is not said *jure collegii*; for they have no other capacity.

Cro. Eliz. 232.
Leon. 153.
And. 272. S.C.
(a) If a parson pleads he was seised, he must

say *jure ecclesiæ*, for that he hath two capacities; *secus* of an abbot, dean, and chapter, &c. Leon. 153. *per Anderson*. — So, in case of a bishop, it must be shewn *quo jure*. 2 Lev. 68. Vent. 223. — Where it cannot be alleged that a man was seised *jure presbyteratus*, but ought to be *jure cantariæ*, *vide* Cro. Car. 215. — If a dean and chapter, being parsons *impars nee* of the church of *D.*, demand the whole church, &c., they shall say they were seised *jure ecclesiæ de D.* Plow. 503.

Where the corporation were named by their name, which was afterwards mistaken; as where judgment was given in an action of debt, that the mayor or commonalty and citizens should recover the debt and 6*l.* costs *eisdem major. communitati* adjudged (omitting *civibus*); it was holden to be error; but afterwards upon motion in *C. B.* and upon examination of the doggett-roll (where it was well entered) it was awarded to be amended.

Cro. Car. 574.
Healing and
the Mayor of
London.

[However, in legal proceedings, any variation from the true name of a corporation is fatal, even though the corporation be not a party to the proceedings. As, where in an action on a *South-sea* contract, the plaintiff declared it was for stock in the company trading *ad maria Austrialia, Anglicè vocat.* the *South-sea* company. Again, an act of parliament gave power to the justices of the county of *Surry*, at their quarter-sessions, on the application of “the mayor, aldermen, and commons of the city of *London* in common council assembled,” to issue a precept to the sheriff to summon a jury to inquire into the value of certain estates: an order was made by the justices at their quarter sessions, stating, that on the application of “the mayor, and “commonalty, and citizens,” they issued a precept, &c.; this order being removed by *certiorari* into the King’s Bench, it was objected, that it stated the application to have been made by *the mayor, commonalty, and citizens*, instead of the *mayor, aldermen, and commons*, according to the directions of the act. The court allowed the objection, for that the bodies described in these different terms were distinct, the one being a select body, the other the corporation at large, and that they could not go into the examination of any fact tending to reconcile

Turvill v.
Aynsworth,
2 Str. 787.
2 Ld. Raym.
1515. Rex
v. Croke,
Cowp. 26.

such distinction, or to shew that in truth the former were the proper persons.]

(D) What Things are incident to a Corporation.

3 Mod. 13.
Roll. Abr. 513.
(a) That when a corporation is duly created, all other incidents are tacitly annexed.

A CORPORATION is a creature of the charter that constitutes and gives it being, and prescribes bounds and limits to its operations, beyond which it cannot regularly proceed: yet there are some things (a) incident to a corporation, which it may do without any express provision in the act of incorporating.

10 Co. 30. b., that it is incident to sue and be sued, to purchase and sell; but *vide* tit. *Mortmain*, and 10 Co. 30. Roll. Abr. 515. Hob. 211.

10 Co 31.
Hob. 211.
Moor, 584.
5 Mod. 439.
(b) That every by-law, by which the benefit of the corporation is advanced, is a good by-law, for that very reason, that being the true touchstone of all by-laws.

As, if the king creates a corporation, and does not give any express power in the letters patent to make laws, yet this power is incident to the corporation, and included in their incorporation; for a body politick cannot be governed without laws; but these by-laws (b) ought always to be subject to the laws of the realm, as subordinate thereto.

Carth. 482. *per* Holt, *vide* tit. *By-Laws*.

12 Co. 120.
3 Mod. 14.
(c) If the king creates a corporation of a mayor and eight aldermen, with a clause in the patent, *quod super mortem vel remotionem aliquis aldermanni liceat majori & ceteris aldermannis infra octo dies proximo post mortem vel remotionem, &c.* to elect another alderman into his place, though no election be within eight days after the death of an alderman, yet they may elect an aldermen at any time after. Roll. Abr. 513, 514.

Ancient corporations have, as incident to them, a power of (c) electing members; but in newly erected corporations, the charter, that gives them being, must provide for their continuance and succession.

1 Bl. Com. 475.
Dav. 44. 48.
(d) The agreement of the major part of a corporation being entered in the corporation books, though not under the corporate seal, will be decreed in equity.

[So, corporations have as incident to them a common seal. For a corporation, being an invisible body, cannot manifest its intention by any personal act or oral discourse; it therefore acts and speaks only by its common seal. For though the particular members may express their private consents to any act by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, (d) which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole.]

Maxwell v. Dulwich College, 14th July 1783, cited in Fonbl. Eq. Tr. 296. But see *contr.* Taylor v. Dulwich College, 1 P. Wms. 655.

Roll. Abr. 515.
Godb. 439.
& *vide* the statute 33 H. 8.
p. 27.

If a corporation be created of a mayor and eight aldermen, with a clause in the patent, that if any of the aldermen die, or be removed, that it shall be lawful for the mayor, and the rest of the aldermen, within eight days after the death or removal, to elect another in his place; though it is not limited that they, or

the greater number of them may elect, yet the greater number may elect.

And if in the above case the mayor, at the time of the death of an alderman, be absent from *London* till after the eight days, and the aldermen, within eight days, come to the deputy, and require him to make an assembly of them to elect another within the eight days, and he refuse, and thereupon the greater part of the aldermen assemble themselves without the mayor or his deputy, and elect an alderman; this is a void election, for the mayor (a) ought to be present at it by the words of the grant.

dentally absents himself, by the 11 Geo. 1. c. 4. Vide *Mandamus*, D.

¶ Whether, where the mayor's presence is necessary at a corporate assembly, a business begun in an assembly once lawfully constituted by him may be proceeded in after his departure and a dissolution of the assembly, as far as depends upon him, is a point which would seem to be not yet judicially settled. In an election under a charter, (b) by the terms of which the mayor who presided was an integral part of the elective body, the court of king's bench were of opinion that it was necessary for him to be present during the whole period of the election, until it was completed, and that an election made after his departure was void. But, whether under the statute of 11 Geo. c. 4. (c) an election in such case, begun at a corporate meeting, whereat the mayor presided, may be completed, in case of his withdrawing himself pending the proceeding, under the presidency of the next in place and order to him, is still a question.¶

Also, where a charter empowers a corporation to choose officers, it impliedly obliges the persons chosen to undergo and to stand to the nomination; for by accepting any letters patent, there is an obligation on the parties accepting to perform all things thereby required, as to undergo all charges, offices, &c.

Corporations have also divers franchises, &c., as felons' goods, waifs, estrays, treasure-trove, deodands, courts, and cognisance of pleas, return of writs, fairs, markets, exemptions from serving in offices or on a jury, exemptions from payment of toll, the assise of bread and beer, a pillory and tumbrel, the office of a justice of peace, coroner, clerk of the market, &c.; but these must be mentioned in the charter, and granted by express words.

And if there be letters patent, which grant to the body politick an exemption from tolls or privileges of fairs, (d) commons, &c. all the particular members shall take advantage of these grants.

prescribe for the freeholders of the town. 2 Keb. 25.

Roll. Abr. 515.
(a) But for this vide 3 Mod. 15., and how it is now remedied, where the mayor or other officer, who ought to preside, willfully or accidentally

Rex v. Norris, 1 Barnardist. 385. Machel v. Nevinson, 11 East, 84. not. (b) Rex v. Buller, 8 East, 389.

(c) Rex v. Gaborian, 11 East, 77.

5 Mod. 440.

14 H. 8. 5.
19 H. 6. 52.
39 E. 3. 35.
Lev. 159.
Keb. 840.
Raym. 113.

5 Mod. 440.
6 Mod. 52.
(d) But a corporation of a town cannot

(E) How Corporations differ from natural Persons:
And herein,

1. *Of Grants made by and to them.*

[Here it may be observed, that corporations, in the character of *owners* or *occupiers* of houses or lands, are subject to the same burthens, to which individuals are subject in the same character. They are *inhabitants* within the purview of the statute of 22 H. 8. c. 5. for the repair of bridges. 2 Inst. 703. They are liable to be rated to the poor within the 43 El. c. 2. in respect of lands, whereof they are seised in fee for their own profit. Rev v. Gardner, Cowp. 79. They are rateable to the repairs of a church in respect of their corporate lands. Thursfield v. Jones, Sir T. Jones, 187. So they may be bound exclusively to the repair of a highway, or of a bridge, or creek, by reason of the tenure of certain lands; so, they may be compelled to do so by force of a general prescription, that they ought and have been used to do so, from time immemorial, without an allegation that they used to do so in respect of the tenure of certain lands, or for any other consideration; because a corporation aggregate, in judgment of law, never die, and therefore, if they were ever bound to such a duty, they must continue to be always so; neither is it any plea that they have always done it out of charity; for what they have always done, they shall be presumed to have been always bound to do. 2 Inst. 700. 1 Hawk. P. C. c. 76. § 8. Mayor of Lynn v. Turner, Cowp. 87.] 45 E. 3. 2. 3. (a) Such corporations are not capable of a protection *profectur.* or *moratur.*, because the corporation itself is invisible, and resteth only in consideration of law. Co. Lit. 130. 2 Bulst. 233. — It hath not been known that a corporation hath been bound in a recognisance or statute-merchant. Moor, 68. pl. 182. — They cannot do homage or fealty, because these must be done in person. Co. Lit. 66. b. 4 Co. 11. a. 10 Co. 32. b. (b) But they cannot retain without a due licence in *mortmain*. Co. Lit. 99. *vide tit. Mortmain.* *Charitable uses*

21 E. 4. 12.
Moor, 51.

[So, *e converso*,
a bond or contract entered
into by the

body in the absence of the head, will not bind; and upon this principle, if a bond be extorted from a mayor and commonalty by the imprisonment of the mayor, the corporation may plead that imprisonment in avoidance of the bond, for during the imprisonment, the corporation may be considered as without a head. 21 E. 4. 12. Cowp. 224. 226.]

*Vide tit. Re-
mainder and
Reversion.*

If a remainder be limited to such a corporation as the king shall next erect, this is no good remainder, though a corporation be erected before the particular estate determine; for though a remainder limited to the eldest son of J. S. in such a manner be good, yet this body of men is only capable of taking when they are *in esse*.

Co. Lit. 9.

(c) So, if lands
are given to
the king by
deed enrolled,
without the

word *successors* or *heirs*, a fee-simple passeth. Co. Lit. 9.

If a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable to purchase, they have a fee-simple without the word *successors*, (c) because in judgment of law they never die.

If a lease be made to a corporation aggregate for the life of the lessor, this is a good estate for life, because the life of the lessor, which is wearing and will determine, is the measure of its continuance; but, if a lease be made to a corporation aggregate for their own lives, this is no estate for life, but a fee-simple; for the lease being made to them as a body politick, which hath a continued succession, and never dies, a lease made to them during their lives, is equal to a grant made to them while they continue a body politick, which, by reason of the perpetual succession of its members, is in law looked upon to be for ever.

A corporation cannot be seised to the (a) use of another; and therefore it is said, that if one by licence, without a valuable consideration, make a feoffment, levy a fine, or suffer a recovery, or the like, to a corporation, to the use of *J. S.*, the corporation shall have it to their own use.

[Gilb. Uses and Trusts, 5. 170. Jenk. 195. Pl. Com. 102. 538. (a) That is, by the strict rules of

the common law; for corporations are in point of fact frequently made trustees for charitable uses, and are compelled in equity to perform the trusts. But the doctrine in the text still holds with respect to the king. Gilb. *ubi supra*.]

If *A.* grants to the mayor and burgesses of *D.* the moiety of a yard-land, in the waste of ———, without describing in what part it should be, or how it is bounded, the corporation cannot make their election by attorney; but are first to resolve on having the land, and then they make a special warrant of attorney, reciting the grant to them, and in which part of the said waste their grant should take effect; and according to such direction the attorney is to enter.

Leon. 30.

2. *How they are to sue and be sued.*

Corporations aggregate must sue and defend by (c) attorney; and therefore the (d) proper process against them is a *distringas*. (c) They cannot be essoined. Dals. 121. pl. 154. Ld. Raym. 79. *Argent v. Dean and Chapter of St. Paul's*, B. R. E. 23 G. 3. cited in 2 T. Rep. 16. and reported in 16 East, 8. *not*. — cannot be outlawed. 10 Co. 32. b. — No attachment lies against a corporation. Raym. 152. — [1 H. Bl. 209. If they have neither lands nor goods, there is no way to make them appear, either in a court of law or equity; for it is a rule, that for a publick concern, the sheriff cannot distrain any individual member of a corporation. *Thursfield v. Jones*, Skin. 27. 1 Vent. 351. Style, 367. *contr.* all cited Cowp. 85. But in an extraordinary case, where they have no property, and will not appear, and where, consequently, a court of equity can give no relief, the plaintiff may apply to the House of Lords, who will make a specifick order for relief. 1 Ch. Ca. 204. 2 Vern. 396. S. C. cited.] (d) Where on such process the court will order the sheriff to return good issues. Salk. 191. pl. 2.

2 Vern. 396. Preced. Chan. 128

After service of a writ of execution of a decree against a corporation, the next process is a *distringas*, and after that a *sequestration*, which being once awarded, they can never after come and pray to enter their appearance, as they might have done on the *distringas*, which issues for that very purpose to compel them to appear; but the appearing being past, the process must go, because the appearance, being only in favour of liberty, can be of no service to a corporation, which cannot be committed.

Brownl. 175. A corporation aggregate cannot distrain in their own persons,
(a) Cannot be but by their bailiff, and therefore no (a) replevin lies against them
declared by the name of their corporations.
against, as in

custodia marescalli. 6 Mod. 183. [Cannot sue as a common informer. 2 Stra. 1241. marg.
The summons to appear must be served on the mayor, or other chief officer, and that is sufficient. Pr. Ch. 131. 1 Ch. Ca. 206.]

Argent v. || An action for a false return will lie against a corporation
Dean and having the return of writs, or to which any writ is directed.
Chapter of
St. Paul's, 16 East, 8. Vid. Entr. 1.

Butler v. Bp. A *quare impedit* may be brought against a corporation.
of Hereford
and University of Cambridge, Barnes's C. P. 350.

Yarborough v. Trover lies against them. ||
Bank of Eng-
land, 16 East, 6.

10 Co. 32. a. [It is holden that a corporation aggregate cannot be sum-
Skin. 27. moned into the ecclesiastical courts: they may, however, be
made amenable to those courts: for in the court Christian they
are cited by their proper names, though in their *politick* capa-
city; and if they stand out, they must lie by the heels in their
natural capacity.]

22 Ass. p. 67. A corporation which has a head cannot sue or be sued without
Bro. Corpor. it, because without it the corporation is incomplete.
P. 43.

(b) Plowd. A sole corporation, having two capacities, natural and cor-
102, 3. Dy. porate, must always shew in what right he sues (b): but an
102. 2 Lev. 68. aggregate corporation having only a corporate capacity, a suit
(c) 1 Leon. in their corporate name can be only in that capacity; and there-
153. fore, it is not necessary that a mayor and commonalty should
(d) Cro. El. allege seisin in right of the corporation (c), or a warden and
232. 1 Anders. scholars, seisin in right of their college. (d)
272.

Hob. 211. In an action, of whatsoever kind, brought by a corporation, it
2 Ld. Raym. is unnecessary to shew how they were incorporated; but on the
1535. general issue pleaded by the defendant, it is said, they must prove
that they are a corporation.

Dutch West An action may be supported in this country by a foreign cor-
India Com- poration, in their corporate name and capacity; and in pleading
pany v. Hen- it is not necessary they should set forth the proper names of the
riques Van persons who compose the corporation, or shew how they were
Moyses. 2 Ld. incorporated; though on the general issue being pleaded, they
Raym. 1535. must prove that by the law of the foreign country they were ef-
1 Str. 612. fectually created a corporation.

Pitts v. Gaince, But in justifying a trespass committed in the assertion of a
1 Ld. Raym. franchise or privilege of a corporation, it is frequently necessary
558. 1 Salk. to shew not only the existence of the corporation, but the manner
10. in which it claims to be so, whether by charter, prescription, or
act of parliament.

In equity, corporations aggregate answer under their common
seal, and not upon oath: as therefore it is not very likely that
they

they will discover any thing to their prejudice, it is usual for plaintiffs to make the clerk or treasurer, or some of the principal members in their natural capacity, co-defendants with the corporation. This practice appears to have commenced in the time of *Charles the Second*, and was afterwards expressly recognised by Lord *Talbot*.

ration of *Chippenham*, 14 Ves. 244. Mitf.

Anon. 1 Vern. 117. Wych v. Meal, 3 P. Wms. 310. || See *Fenton v. Hughes*, 7 Ves. 2^d 9. *Dummer v. The Corporation of Pl.* 153. ||

When a person has reason to suspect that he has sustained an injury by persons acting under the authority of a corporation, but cannot ascertain how far they are concerned, he may file a bill against them and their secretary, or other officer, for a discovery, before he brings an action at law, suggesting that he intends to bring one, but cannot do it, without the discovery prayed; because as the suit against a corporation is by original, the discovery may be necessary before he can sue out his writ. But, if the discovery of any of the matters called for would be prejudicial to the corporation, and not be necessary to the plaintiff's case, the officer needs not discover those parts.

If the majority of the members of a corporation are ready to put in their answer, and the head who has the custody of the common seal, refuses to affix it to the answer, a court of equity will stay the process against the corporation, till an application can be made to the court of King's Bench for a mandamus to compel him, which that court will grant.]

Moodelly v. Morton, 1 Br. Ch. Rep. 471.

R. v. Dr. Wyndham, Cowp. 377. 1 East, 560. 1.

3. *What they may do without Deed.*

Aggregate corporations, consisting of a constant succession of various persons, can regularly do no act without writing; therefore gifts (a) by and (b) to them, (c) must be by deed.

Raym. 194. 5 East, 242. (a) They cannot attorn without deed. 6 Co. 38. b. (b) A gift to a dean and chapter, or other corporation aggregate, must be by deed. Co. Lit. 94. b. — But an abbot, bishop, parson, &c. or other sole body politick, might have been enfeoffed without deed. Co. Lit. 94. b. — (c) Where if pleaded the thing is done, it must be intended by deed. Cro. Ja. 411. 2 Saund. 305.

Co. Lit. 94. b. 6 Co. 38. b. Cro. Car. 170. 2 Saund. 305.

A corporation aggregate cannot, without deed, command their bailiff to enter into certain lands of their lessee for years, for a condition broken.

699. S. C. Cro. Ja. 411.

Roll. Abr. 514. Cro. Eliz. 815. 2 Roll. Abr. Cro. Car. 269.

[Neither can they, without deed, appoint one to seize goods as forfeited to the use of the corporation.

2 Keb. 567. cited

Horne v. Joy, 1 Ventr. 47. 1 Mod. 18. 3 P. Wms. 424.

Nor can they, without deed, present a clerk to a living.]

13 H. 8. 12. Bro. Corp. 83.

But a corporation may employ one in ordinary services without deed, as a butler, cook, &c. but not to appear for them in an assise, or any other act which concerns their interest or title.

Ventr. 47. Mod. 18.

So, a man may avow the taking cattle damage-feasant, as bailiff to a corporation, without having any precept in writing.

3 Lev. 107.

Also,

Salk. 191. pl. 3. Also, a corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler; for it neither vests nor divests any sort of interest in or out of the corporation.

Moor, 552. So, if the sheriff makes a warrant to a corporation that hath return of writs to arrest a man, they may by parol make a bailiff to execute it.

Roe v. Pierce, 2 Campb. N.P. 96. || So, a verbal notice to quit given by the steward of a corporation, will be sufficient. ||

Rex v. Biggs, 3 P. Wms. 419. [The bank of *England*, or any similar corporation, may without deed, empower their servant to make promissory notes, or bills of exchange, in their name: and this is the usual practice with the bank.]
 || 1 Str. 118. See too
 S. C. Yarborough v. The Bank of England, 16 East, 6. ||

10 Co. 68. If a lease for years be made to a corporation aggregate of (a) But, if they many, they cannot make an (a) actual surrender thereof, but by accept a new deed under their seal.
 lease thereof, this is a surrender in law of their first lease. 10 Co. 68. b.

10 Co. 68. If the churchwardens of *S.* are incorporated, &c., and the king leases, &c. to them for twenty-one years, and, in consideration of a surrender thereof, leases to them for fifty years, they may with their own hands, and without writing, (b) deliver the first letters patent into Chancery to be cancelled.
 (b) A dean and chapter in their chapter-house acknowledged a deed of grant of their lands to the king, without making an attorney. Moor, 676. held clearly by *Egerton*, Lord Keeper, that it might be done, as well as to put their common seal to a deed without attorney; but *vide* Leon. 184. Roll. Rep. 82.

Carth. 390. In *ejectment*, the plaintiff declared upon a demise made to him Patrick v. Burgesses of —, without setting forth that Balls. it was by deed, or under the seal of the corporation, and on a writ of *error*, it was holden well enough; and that this being a fictitious action to try the title, the demise need not now be set out to have been by deed.

Salk. 192. and If a *mandamus* be directed to the mayor and commonalty of vide Skin. 154. *T.*, the return may be made in the name of the corporation, Seal of a corporation, put without the common seal, or the hand of the mayor set to it; to a deed by a for though a corporation cannot do an act *in pais* without their person who is common seal, yet they may do an act upon record, by which not mayor, they are estopped to say it is not their act.
 does not make it the deed of the corporation. 12 Mod. 423.

4. What Things they may take in Succession.

Co. Lit. 46. b. A corporation aggregate may take any chattel, as bonds, Roll. Abr. 515. leases, &c. in its political capacity, which shall go in succession, because it is always in being.

Co. Lit. 46. b. But (c) regularly, no chattel shall go in succession in case of Hob. 64. a sole corporation.
 Dyer, 48.

Co. Lit. 9. a. (c) But a sole corporation by custom may be enabled by the same custom to take

take a chattel in succession, as the chamberlain of *London*, whose successor by custom may have execution of a bond or recognizance acknowledged to his predecessor for orphanage money. 4 Co. 65. Cro. Eliz. 464. 682.

Therefore if (a) a lease for years be made to a bishop and his successors, and the bishop die, this shall not go to his successors, but to his executors. Co. Lit. 46. b.

predecessor belong to the succeeding bishop, and are merely in succession, though other chattels, in case of a sole corporation, belong to the executors of the deceased, and go not in succession. 12 Co. 105. — So, the ancient jewels of the crown shall go to the successor, and are not devisable by testament. Co. Lit. 18. b. But they may be disposed of by patent, *per Berkley and Jones*. Cro. Car. 344.

If a (b) master of an house, that hath a covent and common seal, recovers in an annuity, and after arrearages incur, and after he dies, the succeeding master shall have the arrearages, and not the executor of the predecessor, because the predecessor could not make a testament. (b) 19 H. 6. 44. Roll. Abr. 515. where the successor of an abbot shall recover damages in a bodies politick.

writ of entry, though it is otherwise in case of a bishop, and other sole secular 2 Inst. 286.

But, if a parson recovers an annuity, and after arrearages incur, and after the parson dies, the executor of the parson shall have the arrearages, and not the successor, because he could make a testament. 19 H. 6. 44. Roll. Abr. 515.

By the charter granted to the college of physicians, and confirmed in parliament, the offenders in practising physick in *London*, without admission by the college of physicians, shall forfeit 5*l.* for every month, *unum dimidium regi & alterum dimidium dicto presidenti & collegio*: on this charter it was holden, that if the president of the college recovers in debt against an offender, and dies, the successor shall have a *scire facias* to execute it, and not the executor; for the predecessor recovered it as due to him and the college. Roll. Abr. 515. Atkins and Gardner, Cro. Ja. 159. Nov. 121. Brownl. 93. S. C.

5. *Where they shall be liable in their natural Capacities.*

If a corporation aggregate disseise to the use of another, they are disseisors in their natural capacity, and the persons who committed the wrong shall be charged therewith, and not the corporation, which consisting of a constant succession of various persons, and as a corporation, can regularly do no act without writing. *Vide tit. Disseisin.*

If a mayor, or any other member of a corporation, procure a false return to be made to a *mandamus*, they may be proceeded against in their private capacities. || Mayor of Thetford's case, 1 Salk. 192. Rex. v.

Pilkington, Carth. 171. Rex. v. Rippon, 1 Ld. Raym. 564. ||

|| But an action cannot be maintained against individuals for acts erroneously done by them in a corporate capacity to the injury of the plaintiff, unless, at least, there be ground to impute malice to them. || Harman v. Tappenden, 1 East, 555.

Lev. 237.—
Where a corporation
granted an
annuity, and
was afterwards
dissolved. *Vide*
Owen, 73.

2 And. 107.

(a) Where in equity, the private members of a company were made liable to the company's debt, where the company had no goods. 2 Vern. 396.

If the master and wardens of the company of woodmongers enter into bond thus, *viz. noverint, &c. magistrum & guardianos, &c., teneri, &c.*, and the common seal is put thereto, and it is signed as usual, by the principal of the company, and indorsed *Sigillat. & deliberat. in præsentia, &c.*, and the corporation is dissolved after, yet they shall not be (a) charged in their natural capacity.

[6. *Of the Qualifications requisite for Members or Officers of Corporations.*

Rex v. Morris,
Carth. 448.
1 Ld. Raym.
337. 5 Mod.
402.

A quaker, who has served an apprenticeship of seven years, is entitled to be admitted to the freedom of a corporation as well as any other person, and his solemn affirmation, by virtue of 7 & 8 W. 3. c. 34. is equivalent to taking the usual oaths; for that clause of the statute which provides that no quaker, by virtue of that act, shall have any office or place of profit in the government, does not extend to the freedom of a corporation.

5 Co. 27.
Rex v. Carter,
Cowp. 220.
Rex v. White,
Ca. temp.
Hardw. 8.

Though it be true that where an infant is *actually* mayor, or other chief officer of the corporation, this shall not avoid the acts of the corporation with respect to strangers; because these acts are not the acts of the particular persons, but of the body corporate; yet it seems that where neither the provisions of the charter, nor the usage of the corporation, *expressly* authorise the election of an infant into a corporate office, he is not capable of being elected.

(b) 1 Barnardist. 138.
1 Salk. 374.
1 Ld. Raym.
426. Carth.
503.

Residence within a corporate town is not necessarily a previous qualification for the freedom of the corporation, and the freedom, when once obtained, is not forfeited by non-residence: but by the constitution of the corporation, whether by prescription, or the *express* words of the charter, residence *may* be requisite as a previous qualification (b): and, where that is the case, the Court of King's Bench will grant leave to file an information, in the nature of *quo warranto*, against the governing part of the corporation, for admitting persons non-resident.

Cowp. 539.

Rex v. Mayor,
&c. of Cambridge,
4 Burr. 2008.

Where a man is already a member of a corporation, residence is not a precedent qualification to his being chosen to a corporate office, unless expressly required by the constitution of the borough; but, though residence be not required at the time of the election, an absent person must not be chosen collusively for any sinister purpose, and if he be, the election will be absolutely void. The corporation of *Cambridge*, on the charter-day for the election of a mayor, elected a person who was an officer in the army just gone to *North America*, and without the least probability of his returning till long after the year would be expired: the electors were sufficiently apprised of the fact, at the time of the election, and soon afterwards had express notice given them of it, but refused to proceed to a new election; and it

it appeared they had elected this absentee for the purpose that the preceding mayor might hold over, which it was pretended he might do by ancient usage, and by virtue of a charter of *Charles the Second*. The Court of King's Bench held that this was merely a colour to avoid any election at all: that the electors had chosen this person because they knew it was impossible for him to execute the office, and that the election was absolutely void.

By the provisions of a charter, residence may be required as a previous qualification for some offices and not for others.

Rex v. Heath,
1 Barnardist.
416.

See further on this head, tit. OFFICES AND OFFICERS, (E) (K).

7. *Of the Concurrence required in corporate Acts.*

Where no special provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part (a), but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not (b). So, though a particular constitution require the *presence* of a majority of the whole number, yet the *concurrence* and *consent* of a majority of the whole is not necessary; it is sufficient that a majority of the number *present* concur (c). So, where a number less than the majority of the whole, are by a particular constitution competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of the majority of the whole: thus, by the constitution of the city of *London*, forty are sufficient to form a court of common council, though the number of common councilmen greatly exceeds the double of that number, and a majority of the forty, if no more be present, bind the whole corporation. So, where it appeared that king *Edward the Sixth*, by charter, incorporated twelve persons by name, to elect a chaplain for the church of *Kirton* in *Lincolnshire*; and by a distinct clause, *three* of the twelve were to choose a chaplain to officiate in the church of *Sandford*, within the parish of *Kirton*, with the consent and approbation of the major part of the inhabitants of *Sandford*; on a vacancy, two of the three chose a chaplain, with the consent of the major part of the inhabitants of *Sandford*; the third dissented: the question, whether this was a valid election, coming before Lord Chancellour *Hardwicke*, he is reported to have expressed himself thus:—“It cannot be disputed, that wherever a certain number are incorporated, a major part of them may do any corporate act; so, if all be summoned, and *part* appear, a major part of those that *appear* may do a corporate act, though nothing be mentioned in the charter of the major part. This is the common construction of charters, and I am of opinion, that the three are a corporation for the purpose for which they are appointed, and that the major part of them may do any corporate act: this was a corporate act, and the choice too was confined, and consequently, it was not necessary that all the three should join.”

1 Kyd on
Corp. 402.

(a) 10 Mod. 75.
12 Mod. 232.

(b) Cowp. 249.

(c) 2 Burr.
1019.

Attorney-
General v
Day, 2 Atk
212.

Where

Rex v. Newsham, Say. Rep. 211.

Rex v. Grimes, 5 Burr. 2598.

Rex v. Varlo, Cowp. 248.

Rex v. Monday, *id.* 530.

Rex v. Bellringer, 4 T. Rep. 810. Rex v. Miller, 6 T. Rep. 268. Rex v. Morris, 4 East, 17.

Rex v. Blythe, 5 Mod. 404.

421. Reg. v. Sutton,

10 Mod. 74.

Cotton v.

Davies, 1 Str.

53.

2 Ld. Raym.

1236. 2 Salk.

434.

1 Kyd on Corp. 428.

Rex v. Ellis,

2 Str. 994.

more fully reported in

9 East, 252.

notes.

Ca. temp. Hardw. 151. 1 Ves. 416.

(a) || But it has been determined, that where the whole corporation are sum-

Where a charter requires an act to be done by the *major* part of a *definite* body, no corporate assembly can be composed of less than a majority of such definite body, when complete; and consequently, when the number is reduced *below* that majority, the power of acting is at an end. But in such case, if the number be indefinite, the words *major part* have no operation, and any number of the body, duly assembled, however small, is sufficient to form a corporate assembly.

With respect to the head of the corporation, there was this difference between a corporation aggregate of one person capable and many incapable, and a corporation aggregate of many persons capable, that in the former, as in the case of abbot and convent, there must have been the concurrence of the major part, and of the head besides, because the abbot only acted with the consent of the major part of the rest; but in the latter, as in the case of master and fellows, or mayor and commonalty, the head is but a member of the acting part, in the same manner as any other individual; and therefore, without a particular usage, or the express provision of a charter, he has no casting voice.

Where it appeared that an officer was removable by bailiffs and burgesses, or the greater part of them, "of whom the bailiffs to be two," and it was said in the return to a mandamus, that he was removed by the bailiffs and burgesses, the bailiffs being then present; the court held, that if the actual consent of the bailiffs had been required in this case, their consent should be intended, either as actually given, or as included in that of the major part: but they held that it was not required; for that, as in all corporate acts, the act of the majority is the act of the whole; so the bailiffs being the head of the corporation, nothing could be done without their *presence*, though it had not been expressly required, and its being so required did not render their concurrence necessary.

Where the head office of a corporation is vested in more than one person, as in the case of two bailiffs, the *presence* of both is absolutely necessary, because both fill but one office.

Where the provisions of a charter direct that the new mayor shall be sworn *before* his predecessor, the *presence* only of the latter is not sufficient: there must also be his *assent*; at least nothing must appear from which his *dissent* is manifest.

8. Of the Regularity of their Proceedings.

Where corporate acts are to be done, not on a charter day, and by a select body, there must be a summons of every member, except such as have absolutely deserted the town.

And where there are different assemblies in a corporation with distinct powers, and all the members of the smaller assembly are members of the more numerous; if the more numerous assembly be summoned to meet to exercise the powers lodged in them, those who are members of the smaller assembly cannot

separate from the rest, and exercise their distinct powers: but there must be a summons for that purpose of the smaller assembly by itself. (a)

moned for a particular purpose, as, to receive the resignation of a

common councilman, a *select body*, who are *all present and consenting*, may, at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to the election of a common councilman in the place of the other resigned; the power of election being in the select body, and the *charter* not requiring any previous summons. *Rex v. James Theodorick*, 8 East, 543. The doctrine in the text proceeds upon the case of *Rex v. Mayor of Carlisle*, which immediately follows. But the facts of that case, as stated on the record of the mandamus and return in the crown office, and to which the language of the court must be taken to refer, do not warrant it. For it appears that the mayor and all the aldermen of the select body in that case, were not present upon the occasion, but only the mayor and major part of the aldermen. *Ibid.*||

The corporation of the city of *Carlisle* consisted of a mayor, aldermen, bailiffs, and capital citizens, who together formed the common council, and had the power of electing capital citizens; the power of amotion was in the mayor and aldermen only, or the major part of them. The common council met for the purpose of transacting the business of that assembly; and the mayor and aldermen made an order for the amotion of one *Poulter*, a capital burgess, for a cause which was allowed to be legal. The court held, that the removal in this case was not regular, and that there ought to have been a summons for the mayor and aldermen to meet in their distinct capacity.

Rex v. Mayor of Carlisle, 1 Str. 385. *Machell v. Nevison*, 2 Ld. Raym. 1355. S.P. *Vide not. supra.*

It hath been said, that if all the members of the corporation be present by accident, or in consequence of a summons to attend on *one* particular business, acts relating to *any* other business done by unanimous consent will be good; ||and this would seem to be correct, with this addition, that the charter do not require a previous summons for such other business.||

Per Lord Parker in Rex v. Strange-ways, Hil. 1 Geo. 1. cited by Ld. Hardwicke, Ca. temp. Hardw.

1; 1. 1 Barnard. 80. *Musgrave v. Mayor of Appleby*, 1 Str. 584. 2 Ld. Raym. 1358. See *Kyd. Corp.* 434., &c. *Rex v. Theodorick*, 8 East, 543.

|| Where a charter empowered the mayor, justice of the peace, and the rest of the aldermen, (seven in all,) or the major part of them, when it should seem to them convenient and necessary, to elect as many free burgesses as should please them, and to the same free burgesses so elected to administer an oath; and the defendant was elected a free burgess in *October* 1804, and in *December* 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor said was holden for that sole purpose, tendered himself to be sworn in, against which three of the aldermen protested, and one of them immediately left the room, but before the other two protesters withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant; it was holden, that notwithstanding this protest, yet, as one of the protesters had withdrawn, it was competent to the majority who remained to administer the oath; no vote having been come to by the major part

Rex v. Courtenay, 9 East, 246.

part first assembled to preclude the body from doing the act at that meeting.||

Rex v. Mayor,
&c. of Shrews-
bury, Ca. temp.
Hardw. 147.

Where a summons is necessary, it is not sufficient that the usual and general orders be given to the summoning officer; the latter must actually do every thing he possibly can to summon all the members of the select body.

Per Eyre J.
1 Str. 386.

It has been said, that though the assembly of a select number held *not* on a charter-day, be irregular, unless every member within reach of summons, be actually summoned, yet that in the summons it is not necessary to specify any particular act. However well-founded this may be, as applied to the ordinary business of the corporation, it seems that, in the case of an amotion of a corporator, a *general* summons to every member is not sufficient; but that it is necessary to mention, that it is intended to consider the question of removing the particular person; perhaps even that will not be sufficient, but it may be necessary to state the *cause* of his intended amotion. This, however, does not appear to be fully settled, for in the cases where the amotion of members has been held irregular for want of a *proper* summons, the determination has generally proceeded on the circumstance of there having been no summons at all.

Rex v. Mayor,
&c. of Liver-
pool, 2 Burr.
723. Rex v.
Mayor, &c.
of Doncaster,
id. 738.

5 Burr. 2601.

But no summons is necessary where a member is not resident within the town.

Rex v. May,
&c. and Rex v.
Little, &c.
Freemen of
Saltash, 5 Burr.
2682.

It is laid down as a general rule, that where there is a *usual* method of notice, that cannot be dispensed with, though there be an actual summons of all the members, unless indeed every single member be present at the meeting, and consent to wave it.

Rex v.
Courtenay,
9 East, 246.

|| The act of swearing in a burgess, being merely ministerial, it hath been holden that it may be done by the mayor, as presiding officer, in the presence of the majority of the body by whom such act is required to be done, whensoever and howsoever assembled, and without any previous summons for that purpose; there being no dissent by the majority at the time of administering the oath. The swearing in of a burgess may well be at a time subsequent to the election, he having had a present legal capacity to be sworn in at the time of his election.||

James Bagg's
case, 11 Co.
99. a. Glyde's
case, 4 Mod.
33. 37.

Where it is intended to remove any one of the members or officers of a corporation, it is, in general, absolutely necessary, not only that he should be summoned generally to attend; but he must have a particular summons to attend and answer the particular charge alleged against him; for it would be highly unjust, upon a general summons, to remove a man for particular offences, which he may have had no opportunity of preparing to answer.

Rex v. Chalke,
1 Ld. Raym.
225. 1 Salk.
42.

But there may be particular circumstances, under which the summons may be dispensed with. Thus, says *Holt C. J.* "a man ought not to be disfranchised until he has been heard in his defence, on notice and preparation, and notice is only necessary for that purpose. Therefore, if a man be charged *in plenis comitiis*, and ordered to prepare by such a time, this will

be

be good, though there be no actual summons, because if the party be heard it is sufficient."

If a party be charged with a particular offence in one assembly, and ordered to prepare for his defence, he certainly cannot complain of want of notice; but it seems very doubtful whether his being charged and answering in the *same* assembly will cure the want of notice.

Serjeant Whitaker's case, 2 Ld. Raym. 1240.
2 Salk. 435.
See 1 Kyd.

Corp. 445, 6, 7, 8, 9.

Where a person is removable for non-residence, there is no necessity to summon him before he is removed, because he has abdicated the town, and is out of the reach of summons (a). But if he be removable for non-attendance at the corporate assemblies, he must have had personal notice to attend, and that his presence was necessary; for the *usual* notice of the intended meeting will not be sufficient, unless that *usual* notice be personal (b).

(a) Comb. 198. 270.
1 Show. 259.
364. Reg. v. Trubody,
2 Ld. Raym. 1275. cited in
Doug. 152.
157. Vide Sty.

151. 446. Palm. 451. 1 Sid. 14. 2 Sid. 97. Fortesc. 205. (b) Rex v. Richardson,

1 Burr. 517. 520.

A man *may* be constituted a burgess, or appointed to an office, by deed under the common seal, and *then* he ought to be discharged in the same manner: but, where the party is constituted or appointed by election, nothing more is required than an entry in the books of the corporation; and he may be discharged by an order entered in the same manner.

1 Ld. Raym. 226. 1 Kyd. Corp. 450.

So, where an office is granted by deed, the *resignation* or *surrender* ought also to be by deed; but, where an officer is appointed by election, the corporation may accept his resignation or surrender by parol before them: "if, indeed," says *Holt*, "a man speak at large, and say he will be no longer alderman, &c. that signifies nothing: but, if he come in an open assembly of the corporation, and there resign his office, declaring that he will not continue in it any longer, and desire them to accept his resignation, and they accept it and elect another in his room, this is a good resignation."

1 Ld. Raym. 563. 2 Salk. 423.

|| Neglect to be sworn into an office for above twenty years after the party's election to it, is evidence of his refusal to accept the office; as his acquiescence unexplained for so long a time in the election of another person into the office is evidence of his renunciation of it, and of the acceptance of such renunciation by the body.||

Rex v. Jordan, Ca. Temp. Hardw. 255.

With respect to the presiding officer, it is to be observed, that where strangers are not interested, all *voluntary* acts not *necessary* to carry on the business of the corporation, done by an usurper or a mayor *de facto*, or under the authority of either, seem to be void: and that some *necessary* acts are void in both cases. For though in the case of *The King v. Lisle*, the court dwelt upon the circumstance of the election of the defendant, not being a *necessary* act, yet it appears from subsequent cases, that the circumstance of the act being *necessary* is not alone sufficient to make it good.

2 Str. 1090.
Andr. 163.

1 Kyd. Corp. 454.

In the *King* and *Hebden*, the defendant made a title to the office of bailiff of *Scarborough*, from an election under the bailiff-

2 Str. 1109.
Andr. 388.

ship of *Batty* and *Armstrong*, and on issue joined whether these were bailiffs or not, a record of a judgment of ouster against them was read in evidence; and on a motion for a new trial, it was holden, that it was properly admitted; and the same evidence was said to have been lately admitted in a trial at bar, in a case relating to the corporation of *Oxford*.

5 Burr. 2601.

In the case of the *King* and *Grimes*, a question having been made, whether the *special verdict* found on the information against *John Leigh*, for usurping the office of mayor, and the judgment given thereupon against him, were evidence in the present case against *Grimes* for usurping the office of capital burgess; and to what degree it ought to be allowed; the court held it to be admissible, but not conclusive, and, in fact, gave judgment against him, on the ground that *Leigh*, who had presided at his election, was not a rightful mayor. In the first of these cases, if not in both, the election was an act *necessary* to the preservation of the corporation.

(a) Reg. v.
The Bailiffs of
Ipswich,
2 Ld. Raym.
1237. (b) Rex
v. Corry,
5 East. 372.

|| It is said, “(a) that as in all corporate acts, the act of the majority is the act of the whole, so the bailiffs being the head of the corporation, nothing can be done without their presence; and that this is so, though no special provision be made for it in the charter.” But (b) this must be understood of general corporate acts required to be done by the whole body corporately assembled, and which, of course are not well done, if the chief officer, being an integral part of such body, be wanting. But the rule does not apply to cases where acts are required or authorized to be done, by any one integral member, or branch of the corporation, acting separately and apart from the rest.||

9. Of the Election and Amotion of their Members..

Skin. 45.
2 Kyd. Corp. 5.

There cannot properly be any election to an office which is not actually vacant, for though it may be a practice in some cases to choose a person before hand, which may be called an inceptive election, and on the death of the predecessor, to admit the person before nominated, which completes the election; yet such an inceptive election is not binding on the electors; and when the vacancy really happens, they may elect another.

2 Kyd. Corp. 6.

If the election of a particular officer be, by ancient charter, vested in one body, a subsequent one cannot of itself alter the mode of election; but, if the subsequent charter be accepted by the corporation at large, or if they acquiesce under it, and act in conformity to it, which is evidence of acceptance, the latter mode of election is valid.

Skin. 574.

By a charter of *Henry IV.* it was granted, that the mayor, aldermen, and citizens of *Norwich*, might elect two to be sheriffs of that city: *Charles II.*, in the 18th year of his reign, by his charter granted, that the mayor and aldermen might elect one sheriff, and the citizens the other. — The subsequent elections were made according to the provisions of the latter charter, and were held good by the opinion of two justices against one.

The

The privilege of election may be in one body, and the privilege of approbation in another: thus, the privilege of election to the office of alderman in *London* and in *Norwich* is in the ward, and that of approbation in the mayor and aldermen; but, if the mayor and aldermen reject, without reason, one chosen by the ward, a peremptory *mandamus* will be granted to admit him.

A charter may give a power of election to a less number than the majority of a definite body; and in a prescriptive corporation a usage to this effect is evidence of such a charter; so that in either case a person is well elected by a majority of the subsisting members, as distinguished from a majority of the full body.

Where the person elected is unqualified, and the electors at the time have notice of the want of qualification, their votes to him are thrown away, and the person who has the next greater number to the qualified person, is to be considered as duly elected, and is entitled to be sworn in; (a) but, if the want of qualification arise from not having complied with the requisitions of the corporation act of 13 Car. 2. st. 2. c. 1. § 12., until he be sworn in, the office is not legally filled up and enjoyed by him, within the exception in the annual indemnity act; so that if the disqualified person, who had the greatest number of votes, be sworn into the office, and afterwards qualify himself by taking the sacrament, and within the time allowed by the indemnity act, he is thereby freed from all disability, and his title to the office protected; the office not having been then already vacated by judgment, or legally filled up and enjoyed by another person.||

Where a candidate is proposed in a corporate meeting duly assembled, and a majority of the persons assembled protest against any election, and do not propose any other candidate, the minority may elect the candidate proposed.

Monday, Cowp. 530., and 2 Kyd. Corp. 17, &c.

Where the time and manner of election are not fixed by charter or prescription, it is competent to a corporation to make regulations respecting them.

It seems now to be acknowledged, notwithstanding the opinion of Lord *Coke* (b) and others, that every corporation aggregate hath, as incident to it, a power of removing its members for reasonable cause.

Richardson, 1 Burr. 517. (b) James Bagg's case, 11 Co. 99. a. Yates's case, Sty. 477. Rex v. Mayor of Coventry, 1 Ld. Raym. 392. Rex v. Mayor, &c. of Doncaster, 2 Ld. Raym. 1566.

But this power, like every other incidental power, is incident to the corporation at large, and cannot be exercised by any select body, unless given it by charter, or claimed by prescription, or in consequence of a by-law made by the body at large. And it is laid down as a general principle, that where by custom a particular body has acquired that power, and a subsequent charter

2 Salk. 436.

Rex v. Hoyte,
6 T. Rep. 430.

Reg. v. Bos-
cawen, P. 13.
Ann. B. R.
Rex v. Wi-
thers, P. 8.
G. 2. B. R.
cited in 2 Burr.
1020. Cowp.
537. Taylor v.
the Mayor of
Bath. M. 15.
G. 2. B. R.
cited in Cowp.
537. 3 Luders,
324. S. C.
14 East. 558.
S. C. (a) Rex
v. Hawkins,
10 East 211.
Rex v. Parry,
14 East, 549.
Oldknow v.
Wainwright,
2 Burr. 1017.
See the case
of the King v.

Macell v.
Nevinson,
2 Ld. Raym.
1355. Newling
v. Francis, 3 T. Rep. 189.

Tidderley's
case, 1 Sid. 14.
Lord Bruce's
case, 2 Str.
819. Rex v.

Sty. 477. Rex v.

2 Kyd. Corp.
56. Dougl.
149.

Haddock's
case, Sir
Thomas
Raym. 435.

ter in some respects new models the constitution of the corporation, but retains the particular body, without restraining its customary power of disfranchisement, the power still continues in the particular body.

2 Kyd. Corp.
57. Rex v.
Taylor, 3 Salk.
231.

This power, whether possessed as incident to the corporation at large, or vested in a particular body, must appear to be exercised at a regular meeting holden in a corporate character, or at least holden in the character, by virtue of which they are empowered to amove: thus, where it appeared by the return to a *mandamus* that the common council had the power of amotion, and it was alleged as a fact, that the party complaining was removed by thirty of the common councilmen, in the council-chamber assembled, the court held this to be insufficient; because it did not appear "that the thirty common councilmen were *then and there* assembled as a common council, as they might be there to feast, or for other purposes not connected with their corporate character."

Braithwaite's
case, 1 Ventr.
19.

A *mandamus* having been directed to the mayor, bailiffs, and burgesses of the town of *Northampton*, commanding them to restore one *Braithwaite* to the place of common councilman; they returned, that by letters patent of incorporation, power was given them of holding a common council, consisting of a mayor, two bailiffs, and forty-eight burgesses; that the power of removing any common councilman from his place upon just cause, was given to the mayor, bailiffs, and *such* burgesses as had been mayors; that *Braithwaite* had been a common councilman, and committed several offences, which were particularly expressed; and that the *common council* assembled together and procured *Braithwaite* to be summoned, but that he did not appear to answer; on which he was removed from his office and place in the common council, "*by the mayor and burgesses*, by the authority, and according to the charter aforesaid."

It was objected, that this amotion was not according to the authority given by the charter; for that it was said to be by the mayor and burgesses, so that it might have been by the mayor and *all* the burgesses, many of whom might not have been mayors, whereas the charter confined the power to the mayor and *such* of the burgesses as *had* been mayors: but the objection was overruled, on the ground, that it must be intended that *all* the burgesses were present, and agreed to the amotion; and that as it was alleged to be by the mayor and burgesses *according* to the charter, the dissent of the burgesses who were qualified, was not to be presumed.

2 Kyd. Corp.
58. Dy. 332.
in marg.

Sir T. Jones,
52. Sir T.
Raym. 188.
1 Ventr. 77. 82.

This power of amotion, when possessed as incident to the corporation at large, cannot be exercised without reasonable cause; nor can it be so exercised either by the corporation at large, or by a select body, whether given by charter or claimed by prescription, if it be given or claimed only in general terms: but, if a charter, by express words, empower either the corporation at large, or a select body, to remove an officer at pleasure, or empower them to choose him *during* pleasure, they may in either case

case

case remove him without cause. So, a corporation by prescription may, by custom, have the power of removing an officer at pleasure: but, in the return to a *mandamus*, commanding them to restore an officer so removed, it will not be sufficient to state "that they are a corporation by prescription, and that the king, by letters patent, reciting that they had a custom to remove at pleasure, confirmed *that* with other customs;" they must allege the custom in positive terms, and not simply by way of recital in the letters patent.

So, if an officer, either by the provision of a charter, or by custom, be eligible in the alternative for life, or during pleasure, and he be chosen to continue during pleasure, he may, at any time, be removed without cause: and where an officer is removable at pleasure, or chosen to continue *during* pleasure, the election of another is a determination of his office, without any formal removal, or notice of the intention to remove him. So, if the mayor for the time being have power to elect a town-clerk, it follows of course, that he may remove the former town-clerk at his pleasure.

But, where an officer is removable at pleasure, the corporation, in their return to a *mandamus*, commanding them to restore him, ought to rely solely on that circumstance; for they cannot take advantage of it, if they return a cause, and that cause be not sufficient; because it will then appear, that, at the time they removed him, they did not mean to proceed on their power to remove him at will.

A common freeman cannot be deprived of his freedom at the pleasure of the corporation at large, or of any select body, whether that power be claimed by charter or prescription.

The case of a common councilman is, in several books, distinguished, in this respect, from that of an alderman; it being frequently holden that a power of removal is good as to the former, and void as to the latter.

try, 1 Ld. Raym. 391. Rex v. Burgum Andover, *id.* 710.

To the power of amotion, or disfranchisement, the power of holding a corporate meeting for that purpose is necessarily incident, whether the former be in a select body, or in the corporation at large; and therefore it is not necessary that the latter should be expressly given by charter or claimed by custom.

The cause for which a member of a corporation is disfranchised, or an officer removed, must be something which has arisen subsequently to the admission of the one to the enjoyment of his franchise, or of the other to the exercise of his office: the power of disfranchisement or amotion cannot be exercised for a defect of original qualification; that can only be questioned by a prosecution by information in the nature of *quo warranto*.

The offences for which a corporator may be disfranchised, or a corporate officer removed, have been distributed into three distinct classes.

Rex v. Mayor, &c. of Coventry, 1 Ld. Raym. 391.

Pepis's case, 2 Show. 69. 1 Ventr. 342.

Rex v. Mayor, &c. of Canterbury, 1 Str. 674. 2 Keb. 641. 1 Sid. 15.

2 Ld. Raym. 1240.

Warren's case, Cro. Ja. 540.

Ibid. 2 Roll. Rep. 112. Sir T. Raym. 188. 1 Ventr. 77. 82. Rex v. Mayor, &c. of Coventry, 1 Ld. Raym. 391.

2 Kyd. Corp. 62. Dougl. 153.

2 Kyd, *ubi supr.* Dougl. 80.

Ca. temp. Hardw. 154. 1 Burr. 538.

First, such as relate merely to his corporate or official character, and amount to breaches of the condition tacitly or expressly annexed to his franchise or office.

Secondly, such as have no immediate relation to his corporate or official character, but are in themselves of so *infamous* a nature, as to render the offender unfit to enjoy *any* public franchise; such as perjury, forgery, &c.

And, thirdly, offences of a *mixed* nature, being not only against his corporate or official duty, but also indictable at common law.

2 Kyd. Corp.
63.
11 Co. 99. a.
1 Ld. Raym.
226.

To burn or deface the charters or evidences of the corporation; or to rase or corrupt the books, are offences against the corporate duty of a corporator, for which he may be removed; but in the case of a rasure of the books, the party must appear to have acted maliciously, and to the detriment of the corporation, for it might happen that the entry, as it stood, was wrong, and that he only made it as it ought to be.

Sir Thomas
Raym. 438.
Ca. temp.
Hard. 156.
Sty. 477.

So, if he make a riot in disturbance of an election of a mayor or other officer, or endeavour to hinder one of the aldermen from attending the common council, or hinder others who have a right to attend, from going thither to do the business of the corporation; so, if he continue in court and make orders, after the court is adjourned.

2 Kyd. Corp.
64. Rex v.
Taylor, 3 Salk.
231.

Circumstances which have no immediate relation to the corporation, may be a sufficient cause to remove a man from an office of magistracy, provided they be such as render him incapable or unfit to execute the office; such as habitual drunkenness in an alderman, though if a man were drunk by accident, that would not be sufficient cause to remove him.

3 Salk. 229.

So, it has been holden to be a sufficient cause to remove a man from the place of alderman, that he is poor and cannot pay the taxes, though such a cause would certainly not be sufficient to deprive a man of his freedom.

Clegg's case,
2 Burr. 732.

Bankruptcy, and not having obtained his certificate, is not alone sufficient cause for removing a man from the office of common councilman, though some *one or more* of the *consequences* of bankruptcy may eventually become so.

2 Roll. Rep. 11.

Old age is not a sufficient cause to deprive an alderman of his office.

1 Burr. 540.
See Dougl.
177.

Non-attendance at the courts of the corporation is not sufficient cause of removal, when the presence of the party is not *necessary*, and no particular business is obstructed by his absence, though his absence be wilful, and notwithstanding he may have due notice to attend.

2 Kyd. Corp.
73. City of
Exeter v.
Glide, 4 Mod.
36.

Non-residence within a borough cannot be a sufficient cause to disfranchise a freeman; because he has his freedom for his own benefit, and his residence is of little consequence to the corporation at large.

Rex v. True-
body, 2 Ld.

But a *total* desertion of the borough by an alderman with his family, is a good cause to remove him from the office, because
he

he is thereby rendered incapable of doing his duty to the corporation: but it is not a cause to disfranchise him, because, though he cease to be an alderman, he may still continue a freeman. Nor is it every temporary absence that will be good cause for removing an alderman; he may have some reasonable cause of absence, as sickness, or going to the Bath for the recovery of his health, or being employed in the service of the king: he may leave a servant in the house, which is a proof of his intention to return, and makes him virtually an inhabitant; and if he return before his actual amotion, that may cure the defect of his absence, however long continued. It has been holden, that it was not a good cause to remove an alderman, that he had left the borough for four months, *with his whole family*. The length of time which the party hath been resident seems to be immaterial, provided the residence hath been *bonâ fide*, and, in general, wherever non-residence is assigned as a cause for the removal of an alderman, or officer of similar denomination, it must appear that residence is required by the constitution of the corporation, or that the business of the corporation has been obstructed by the non-residence of the party removed.

Wherever non-residence is a cause of amotion, it does not render the office *ipso facto* void, but only voidable; and there must be an actual amotion before any proceedings can be had against the party for an usurpation.

5 Br. P. C. 287. Rex v. Heaven, 2 Term Rep. 772.

It is no cause of removal, that a corporator has used opprobrious or indecent language to the mayor, or other principal magistrates of the corporation, as, if he call the mayor a knave, or say, that he has done that in the execution of his office, which he cannot answer; though the words be in consequence of an admonition from the mayor, for a malicious act to another burgess; as, where a burgess being churchwarden, presented one of the burgesses maliciously, without cause, for being absent from the perambulation; for which being rebuked by the mayor, he said contemptuously, *I care not for Mr. Mayor, nor for any of the burgesses*: nor does it seem a good cause of amotion that a man has written a libel on the mayor, or on another member of the corporation. It may, in some of these cases, be proper to commit the offender, till he find sureties for his good behaviour; or some of the offences may be a foundation for an action at the suit of the party injured; but they can be no cause of disfranchisement: so, neither can it be a good cause of disfranchisement or amotion, that the conduct of the party is troublesome or displeasing to the body at large.

So, a *custom* to disfranchise for contemptuous words is void, even in the city of London, whose customs are confirmed by act of parliament, for that confirmation cannot extend to unreasonable customs, which this clearly is.

a dictum of Twisden J. to the contrary. See further on this point, Sir Thomas Earle's case, Carth. 173.

Raym. 275.
Rex v. Lyme
Regis, Dougl.
149.

Rex v. Mayor
of Leicester,
4 Burr. 2087.
Rex v. John
Sargent, 5 T.
Rep. 466.
Dougl. 182.
174.

Vaughan v.
Lewis, Carth.
227. Rex v.
Ponsonby,
Say. 245.
Term Rep. 772.

2 Kyd. Corp.
James Bagg's
case, 11 Co. 96.
Clerk's case,
Cro. Ja. 506.

Per Holt C.J.
Fortesc. 275.

11 Co. 94.

2 Salk. 426.
2 Ld. Raym.
777. Clarke's
case, 1 Vent.
327. Vid.
1 Vent. 302.

1 Mod. 148.
 Fortesc. 202.
 2 Ld. Raym.
 1334. 1 Str.
 557.

Though the power of conferring degrees, and of degrading, in the universities, is in the vice-chancellor, masters, and scholars, assembled in a body; yet they cannot degrade without reasonable cause: and it was decided in the case of *Dr. Bentley*, that a contempt to the vice-chancellor, as a judge, was not a sufficient cause to degrade.

11 Co. 98. b.

If a man threaten, or endeavour either by himself or in combination with others, to do a thing against the trust of his freedom, and to the prejudice of the publick good of the city or borough, but do not put it in execution; as, if he threaten the ruin of their charter or privileges, or dissuade the payment of customs due; this may be a good cause to punish him as before mentioned, but not to disfranchise him.

2 Ld. Raym.
 1564. 4 Burr.
 1999.

Misconduct in *one* corporate office is not a cause to amove the offender from *another*; thus, if a capital burgess be appointed chamberlain of the corporation, and misconduct himself in *that* office, this is not a good cause to deprive him of the office of capital burgess.

1 Ld. Raym.
 226. (a) 1 Sid.
 282. (b) Com.
 Dig. Franchise, F. 33.
 says Semb.
 contr. Raym.
 446. (c) 2 Ld.
 Raym. 1566.

Though an offence may seem to have some relation to the corporation, or the corporate character of the offender, yet, if the corporation have another remedy, it is no cause of disfranchisement: thus, the misemployment or non-payment of money, belonging to the corporation, is no sufficient cause, the corporation having a remedy by action; nor, a refusal to pay his proportion of the expence of renewing the charter (*a*); nor a refusal by a liveryman, to make the usual payments for support of the company (*b*); nor general disobedience to the laws and orders of the corporation; nor, as it would seem, the breach of any particular bye-law. (*c*)

2 Kyd. Corp.
 38.

For offences which have no immediate relation to the corporate office, but which the loss of credit renders a ground of forfeiture, the corporation cannot disfranchise or remove, without a previous conviction at common law; for in such cases the corporation cannot try the truth or falsehood of the accusation: it is for this reason, that it is no cause to remove or disfranchise a man, that he is *indicted* of felony, perjury, forgery, libelling, or other infamous crime, because he may be acquitted of the charge.

Style, 479.
 Lane's case,
 2 Ld. Raym.
 1304. 11 Mod.
 270. Fortesc.
 275. Ca. temp.

Hardw. 155. 1 Burr. 359.

Rex v. Yates,
 Style, 477.
 Rex v. Mayor,
 &c. of Derby,
 Ca. temp.
 Hardw. 153.
 and the cases
 there cited.
 Rex v. Richardson,
 1 Burr. 538.
 Rex v. Corporation of
 Doncaster, 2 Burr. 738.

With respect to those offences which are of a mixed nature, as being not only against the oath and duty of the corporator, but also matters indictable at common law, it seems to be exceedingly doubtful whether for these the corporator can be removed without a previous conviction. The difficulty ariseth from the possibility of a difference of determination by two different jurisdictions, as the party may be removed by the corporation for the same fact, of which he may afterwards be acquitted on a trial by jury. The question hath been often discussed, but hath never received a final decision.

It hath been asserted, that, after conviction, the king might, by writ issuing out of the court where the conviction remains, or out of Chancery, command the corporation to discharge the party convicted; but this doctrine has been justly disregarded. (a)

Sawyer's *arg.*
Quo Warranto,
22. cited
1 Burr. 525.
(a) 1 Burr. 530.

In some instances, too, the crown has reserved to itself the power of removing at pleasure all or any of the principal officers of the corporation; but whatever may be said as to the invalidity of such a reservation, as being repugnant to the purpose of the charter, such a power cannot certainly be exercised to such an extent as to destroy the whole body at once, and render the election of other officers impossible.

Rex v. Amery,
2 T. Rep. 516.

(F) *How they are visited.*

SPIRITUAL corporations are visited in ecclesiastical (b) matters by the ordinary: eleemosynary corporations are subject to the visitation of the founder, his heirs, or assigns; and other civil corporations to that of the king in his court of King's Bench. In respect of schools endowed, where no special visitor (c) is appointed by the founder, and (perhaps it may be added) where his heirs are unknown or do not choose to act, it is provided by the statute of charitable uses that they may be visited by commissioners appointed under the great seal.

1 Bl. Com. 480.
(b) And the ordinary may in his general visitation, by virtue of his general visitatorial power, deprive a canon or prebendary for incontinency

or other offences described in the statutes; and this, of his own authority, without observing all the preliminary forms the statutes may appoint. The King v. Bishop of Chester, 1 Wils. 106. 1 Bl. Rep. 22. But a bishop, as visitor of the dean and chapter, seems to have no jurisdiction to determine between the members on the subject of their corporate property. Rex v. Episc. Dunelm. 1 Burr. 567. It is clear, that he cannot by virtue of such power fill up a vacancy in the stalls of the cathedral by lapse. Bishop of Chichester v. Harwood, 1 T. Rep. 650. And whether he can, as visitor, decide in matters of election to such stalls, is a question which hath not yet received an entire solution. *Id. ibid.* (c) 1 Wooddes. 474, 5.

It is only over eleemosynary foundations that the visitatorial power, properly so called, extends. For this power, as now understood, is final and conclusive, exercisable voluntarily, in a summary mode, and without appeal. And as the Court of King's Bench cannot interfere till called upon, and its judgments are liable to be reversed by writs of error, it seems to want two of the essential marks of visitorship.

1 Wooddes.
474.

This kind of power appears to be of very early date, mention being made of it in the beginning of the reign of Edward the Third. It was not introduced by any canons or ecclesiastical constitutions, but is an appointment of the law, and ariseth from the property which the founder had in the lands appropriated for the support of the charity. Hence, it is in the power of the founder to vest it in any person and his heirs, or in a sole corporation and his successors; but, if he appoint no one to exercise it, it will descend to his own heirs.

8 E. 3. 69, 70.
8 Ass. pl. 29.
31. 1 Ves. 472.
2 T. Rep. 352.
If it be given to the Bishop of E., not by his christian name, the grant is to him in his politick capacity, and

it is not necessary to mention his successors. Bentley v. Bishop of Ely, 2 Str. 913. Fitzg. 308.

If

Rex v. Master, &c. of Catharine Hall, 4 T. Rep. 233. If the founder dies without making any appointment of a visitor, and without heirs, it will in that case devolve upon the king to be exercised by the great seal.
Ex parte Wrangham, 2 Ves. Jun. 609.

2 Kyd, 187. Where the persons, for whose benefit a charity is established, are not themselves incorporated, but trustees or governors are appointed, as in the case of *Sutton's hospital*, the governors have a kind of visitatorial power with respect to the objects of the charity; but, where no visitor is expressly appointed, and the legal estate of the endowment is vested in the governors, the latter, as to the management of the revenues, are subject to the jurisdiction of the Court of Chancery.
 10 Co. 31. a.
 Eden v. Foster, 2 P. Wms. 325.
 Attorney General v. Lock, 3 Atk. 164.
 Attorney General v. Middleton, 2 Ves. 327.

2 Kyd, 195, 6. As the power of appointing a visitor is entirely in the founder, he may delegate it either generally or specially; if he appoint a general visitor, without any restraint, the person so appointed hath all incidental powers. But a person constituted visitor in general terms, may be restrained in particular instances. So, the founder may appoint a *special* visitor for a *particular* purpose, and no farther. So, he may make a *general* visitor, and yet appoint an inferior *particular* power, to be executed by another person, who will then be a *special* visitor. Thus, the visitation of the corporation at large may be in one person; and that of one of the members, as of the head, may be in another: and if the founder of a college appoint a visitor of the head specially, the general power of visitation remains in the founder and his heirs. The manner too in which the visitatorial power shall be exercised, whether general or special, may be prescribed by the founder.
 Fitzg. 108. 307.
 3 Atk. 663.
 1 Ves. 78.
 2 Ves. 328.
 1 Burr. 200.

Vid. ubi sup. No technical or set form of words is necessary for the appointment of a visitor. "*Visitator sit Episcopus Eliensis*," is an appointment of a general and perpetual visitor. But a person may be a general or special visitor without any express appointment, by construction and implication from various branches of the statutes.
 || Power to interpret and determine doubts upon the statutes, if given in clear words, may itself constitute visitatorial power. *Per Lord Eldon*, 15 Ves. 315.||

Appleford's case, 1 Mod. 82. The sentence of a visitor, on subjects within his jurisdiction, is final and conclusive, and the king's courts cannot, in any form of proceeding, review it.
 Carth. 92.
 1 Lev. 23. 65.
 Raym. 56. 94. 100. 1 Sid. 94. 152. 346. Phillips v. Bury, Skin. 447. 2 T. Rep. 346. Rex v. Episc. Eliens. 5 T. Rep. 475.

3 Atk. 674. Nor will the king's courts anticipate the judgment of a visitor, or take away his jurisdiction, if the case in which they are called upon to interfere appears to be within the scope of the general visitatorial power.

Rex v. Alsop, 2 Show. 170. In a return to a mandamus directed to a college, it is sufficient to state in general terms, that such a person is visitor; for as visitor, he has power to determine all matters that come as grievances before
 Skin. 13.

before him, unless he be particularly restrained by the statutes, and such restraint will not be presumed. Nor is it material whether the grievance complained of happened in the time of the present visitor, or in that of his predecessor, and therefore it is not necessary to shew that in the return.

The question, whether there be a visitor or not, may be sometimes decided on affidavits: but, if a mandamus has been granted, commanding the party to whom it is directed to admit a person to a fellowship, on an affidavit of his election, the court will not supersede the writ on affidavits that there is a visitor, but will put the defendant to make a return; because where the point is determined on affidavits against the party complaining, he has no opportunity to do himself justice by an action.

Ingrafted fellowships in colleges, where the founders of them make no statutes for their regulation, are subject to the general laws of the college, and, consequently, to the visitor's jurisdiction.

id. 475. St. John's College v. Toddington, 1 Burr. 159.

As independent members of colleges are mere boarders, and have no corporate rights, it follows, that they are not subject to the visitor's jurisdiction, and cannot obtain redress for any grievance by appealing to him. Neither indeed can they in matters of discipline obtain redress in a court of law.

It seems rather doubtful whether a person who is not yet actually a member of an eleemosynary corporation, but who claims a right to become one, be a proper subject of visitatorial jurisdiction.

If it be questioned whether any visitatorial power exists in the person applied to in that character, this must be settled by the court of King's Bench.

So, if a visitor should assume the power of making new statutes, such usurpation would be restrained by the court of King's Bench.

If the performance of a trust is to be decreed, a court of equity must be resorted to, for a visitor is incompetent to do complete justice. So, if a college agree with a stranger to grant him a lease, and refuse to perform the agreement, the remedy is by bill in equity for a specifick performance, and not by appeal to the visitor.

If the statutes of a college give to the same person who is visitor, the power of appointing to an office one out of two persons returned to him by the college, he has that appointment not as visitor, but by virtue of such express provision, and therefore must make choice of one of the persons returned to him: if he assume the appointment of any other person, the court of King's Bench will interpose.

And the same common law judicature will interpose, if the visitor be a party. Thus, where a mandamus was directed to the Bishop of Chester, as warden of Manchester college, requiring him

Rex v. Whaley,
2 Str. 1139.

Attorney
General v.
Talbot, 1 Ves.
78. Green v.
Rutherford,
1 Burr. 159.

Ex parte
Davison, cited
in Cowp. 319.
Rex v.
Grundon,
Cowp. 315.

Rex et Reg.
v. St. John's
College,
4 Mod. 260.
Comb. 238.

1 Burr. 158.

Green v.
Rutherford,
1 Ves. 472.
1 Burr. 201.

1 Ves. 473.
Rex v.
Windham,
Cowp. 378.

Rex v. Episc.
Eliens.
2 T. Rep. 290.

Rex v. Episc.
Cestr. 2 Str.
797. In the
year after this
to

determination, an act was passed to vest in the crown the visitatorial power over *Manchester* college, whenever the wardenship should be holden in *commendam* with the bishoprick of Chester. St. 2 Geo. 2. c. 29. See too 4 T. Rep. 244.,

Bentley v. Bishop of Ely, 2 Str. 912. Fitzg. 107. 305. 4 Br. P. C. 41. 1 Wooddes. 481. In the case of Dr. Bentley, master of *Trinity-college* in *Cambridge*, who was cited before the Bishop of *Ely*, as visitor over the society, to answer sixty-four articles charged to be violations of the statutes; the King's Bench granted a prohibition, because the bishop in his citation had not set forth his genuine authority. But the House of Lords, on a writ of error, reversed the former judgment, and went into the consideration of the several articles, and, as to some, confirmed the prohibition, and, as to others, allowed the bishop to proceed. It was indeed insisted, that the king was general visitor (*a*) and the bishop special visitor only; but the King's Bench was of a different opinion; and, in this respect, their judgment seems unimpeached.

(a) Yet it seems still unsettled who is general visitor of that college.

Rex et Reg. v. St. John's College, 4 Mod. 233. Where the publick laws of the land are disobeyed, the court of King's Bench will interfere, notwithstanding there be a visitor, for his province is confined to the private statutes and domestick regulations.

Rex v. Episc. Lincoln. 2 T. Rep. 338. n. If a visitor refuse to receive and hear an appeal, the court of King's Bench will grant a mandamus to compel him.

Rex v. Episc. Eliens. 5 T. Rep. 475.

Brideoak's case, H. 11 Ann. cited in 1 Wils. 209. 1 Bl. Rep. 25. 58. But, where the visitor has actually executed a sentence of expulsion, though he may appear to have exceeded his jurisdiction, a mandamus will not lie to restore the party expelled, for that would be to command the visitor to reverse his own sentence.

(b) *Per Lsc* C. J. 1 Wils. 209. The party, however, against whom the sentence has been executed, may have a remedy by ejectment (*b*); or he may, it is said, have an action for damages against the visitor. (*c*)

(c) 1 Ves. 470. 2 Kyd, 282. Dr. Walker's case, Ca. temp. Hardw. 212. Rex v. Episc. Eliens. Andr. 176. When the visitor has pronounced a sentence, which by the statutes of the college a particular officer is to put in execution, the court of King's Bench will not compel that particular officer by mandamus, to do his duty; because that would be to interfere with the privilege of the visitor, who has power to compel the proper person to execute the sentence: but it seems doubtful, whether, if the visitor himself refuse to compel the execution of the sentence, the court will grant a mandamus directed to him for that purpose.]

(G) *Of the Dissolution of Corporations.*

(u) IF all the members of an aggregate corporation die, the body politick is dissolved; but, if the king makes a corporation consisting of twelve men, to continue always in succession, and when any of them die, the others may choose another in his place; (b) if three or four of them die, (c) yet all acts done by the rest shall be sufficient.

alty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death, because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean; but, if the dean or mayor be named by their own private name, and die or be removed, before livery, livery after seems not good. Co. Lit. 52. b. 2 Roll. Abr. 12. 14 H. 8. 3. 11 H. 7. 19. (c) The master of a college cannot devise lands to the house of which he is head; || for at the time when such devise should take effect, the college is without a head, and so not capable of the devise. || Dalis. 31. 4 Leon. 223.

[But, where a corporation consists of several distinct integral parts, if one of these parts become extinct, whether by the death of the persons of whom it is composed, or by any other means, the whole corporation is dissolved. This indeed was doubted in the case of *Colchester v. Seaber* (d); but a later adjudication (e) hath settled, "that when an integral part of a corporation is gone, and the corporation hath no power of restoring it, or of doing any corporate act, the corporation is so far dissolved, that the crown may grant a new charter to a different set of men."

appeared, that in 1740 there were judgments of ouster against all the persons then claiming in fact to be mayor and aldermen of the corporation: that those persons were all dead before the year 1763: that from 1740 to 1763 no person took upon himself to be, or claimed to be, mayor or alderman; and that in 1763 the charter under which they acted when the case occurred, was granted and accepted. The question immediately before the court was, whether the present corporation could maintain an action on a bond given to the old corporation in the year 1735? which was determined in the affirmative; for that the charter of 1763 restored the corporation to all its former rights and franchises, and subjected it to all its former obligations. (c) *Rex v. Pasmore*, 3 T. Rep. 199.

Also, a corporation may be dissolved by misuser or abuser; for as all franchises flow from the bounty of the crown, so there is a tacit or implied condition annexed to such grants, which, if broken, forfeits the whole franchise.

the *quo warranto* against the city of London, which was brought against the whole corporation, 1. For that the common council had petitioned the king, upon a prorogation of parliament, that it might meet on the day on which it was prorogued, and had charged the prorogation as that which occasioned a delay of justice. 2. That the corporation had imposed new taxes on their wharfs and markets, which was an invasion of the liberty of the subject, and contrary to law; and the judgment in that case was, that the franchise should be seised into the king's hands; but *vide* 2 W. & M. § 1. c. 8., by which this judgment is declared to be void and illegal; and *vide* the case of Sir James Smith, Show. 280., 4 Mod. 52., 12 Mod. 17, 18., 10 Mod. 174., who being chosen an alderman of the city of London, after the same judgment (which was never recorded) the question was, whether he was duly elected, so as to be obliged to take the oaths prescribed by 1 W. & M. c. 8.? and it was resolved, that though a corporation may be forfeited, yet that the proceedings and judgment in the *quo warranto* against the city, did not dissolve the body politick, or make their subsequent acts void; and consequently, that Sir James

(a) Roll. Abr. 514. (b) 10 Co. 30. b. Roll. Abr. 514. S. P. — If any corporation aggregate, as mayor and commonalty, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death, because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean; but, if the dean or mayor be named by their own private name, and die or be removed, before livery, livery after seems not good. Co. Lit. 52. b. 2 Roll. Abr. 12. 14 H. 8. 3. 11 H. 7. 19. (c) The master of a college cannot devise lands to the house of which he is head; || for at the time when such devise should take effect, the college is without a head, and so not capable of the devise. || Dalis. 31. 4 Leon. 223. 1 Roll. Abr. 514. Co. Lit. 264. Reg. v. Ballivos de Bewdley, 1 P. Wms. 207. 10 Mod. 346. (d) 3 Burr. 1866. In this case, which occurred in 1766, it ap-

2 Inst. 222. 20 E. 4. 5. But for this *vide* the arguments in the great case of

James not taking the oaths pursuant to the 1 W. & M. c. 8., was a sufficient cause to remove him from the place of alderman. See *Skin. 310. Show. Rep. 280.*

Carth. 483.

but *vide* 11 G.

1. c. 4 (a) [In

such case the

corporation is

If the members of a corporation refuse or neglect to choose such officers, as they are obliged to choose by their charter, this is a forfeiture, and consequently a dissolution of the corporation. (a)

dissolved without any legal proceeding: but for a forfeiture it is not dissolved without a judgment in a court of law to enforce it. "A *scire facias* is proper," says Mr. Justice *Ashurst*, "where there is a legal existing body capable of acting, but who have been guilty of an abuse of the power entrusted to them; for as a delinquency is imputed to them, they ought not to be condemned unheard: but that does not apply to the case of a non-existing body. A *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but who, from some defect in their constitution, cannot legally exercise the powers they affect to use." — If, in a prosecution against a corporation, the judgment be for the defendants, the form of it is, "that the liberties be allowed," *Co. Entr. 535. b.*; if it be for the crown, and the parties have continued possession of the franchise by wrong from the beginning, the judgment is, "that they be ousted;" but if they once had title, and lose it, the judgment is, "that the liberty be seized into the king's hands." *Yelv. 192. Co. Entr. t. quo warranto.* The prior judgment of seizure is called a judgment "*quousque*;" this judgment, it hath been thought, would dissolve the corporation, if the parties did not come in and avoid it the same, or at the farthest the next term, and that there was no use in a final judgment, but to shew that the king will take advantage of the forfeiture, which he may declare by the grant of a new charter. *Rex v. Amery, 2 T. Rep. 515.* But this opinion was over-ruled in the House of Lords, where it was determined, that the effect of this judgment was merely to lay the king's hands on the franchise of being a corporation, so that the corporation could not use its liberties, and the action of its vital powers was suspended; that in that situation the king might appoint a *custos*; and might introduce a new corporation by charter, to whom he might commit the custody; but that the old corporation were entitled to redeem their liberties, and remove the king's hands, upon which the power of the new corporation must necessarily cease, and the letters patent to them become void. *Vide* the Judgment in *Rex v. Amery*, in the House of Lords, in the account of that case in two volumes quarto, and 2 *Kyd, 496., &c.* — With respect to the form of a final judgment, it was determined in *Sir James Smith's case*, that the corporation of *London* was not dissolved by the judgment as recited in the act of 2 W. & M. st. 1. c. 8., which was, "that the liberty, franchise, and privilege of the city of *London*, being a body politick, &c. should be seized." For the word of being omitted before the word *being*, the judgment was not against the corporate existence of the city, but against the franchises it enjoyed, and *Holt* said, "that a corporation might subsist after its franchises were taken away; for that these were not essential to it, but only a privilege appertaining to it; that the essence of a corporation was to make bye-laws, and govern their members, which a corporation might do, though their franchises were seized." 4 *Mod. 52. Skin. 310. Carth. 217. 1 Show. 263.]*

Butler v. Palmer, 1 Salk.

191. *Piper*

v. Dennis,

12 *Mod. 253.*

A corporation may be dissolved by surrendering the charter, but a surrender of an old charter is void, for want of enrolment.

Rex v. Osbourne, 4 East, 327.

Co. Lit. 102. b.

If a prior and convent, *concurrentibus iis quæ in jure requiruntur*, are translated to an abbot and convent, or to a dean and chapter, though the name is changed, yet the body is not dissolved.

3 *Co. 75. b.*

(b) But there cannot be a guardian of a chapel, when the chapel and all the possessions thereof are aliened, 3

Though a dean and chapter have surrendered (b) all their possessions to the king, yet their corporation continues, and they remain a chapter of the bishop to assist him in spiritual matters, &c. for all their possessions were from the bishop, and a prebendary, though he hath no possession, hath *stallum in choro & vocem in capitulo.*

Co. 75. a. 10 Co. 32., for there cannot be a guardian of nothing.

If lands are given to a corporation, which is (a) afterwards dissolved, the donor shall have the lands again; for the law annexes such a condition in every grant to a body politic.

Co. Lit. 13. b.
Godb. 211.
[Mo. 283. acc.
Vide tamen

20 Ja. C. B. Johnson v. Morris, that the lands shall escheat. Hal. MSS., which also cites 21 E. 4. 1., and 21 H. 7. 9. And the case of Johnson v. Norway in Winch. 37., which seems to be the same as that cited by Lord Hale, is against the donor, though it is not mentioned in Winch, that the judges finally decided the point. See also *contr.* Lord Coke, the case of Southwell v. Wade, in 1 Ro. Abr. 816. A. p. 1., and S. C. in Poph. 91. — Co. Lit. 13th ed. 13. b. n. 2.] (a) A debt due to a corporation still remains, though their name is changed by a new charter. 3 Lev. 238. — If a corporation bind themselves in a bond, and are afterwards dissolved, they shall not be charged in their natural capacities. Lev. 237., and *vide* Owen, 73. 2 And. 107.

COSTS.

(A) Of the first Introduction of, and giving the Plaintiff Costs *de incremento*.

(B) In what cases the Plaintiff shall have no more Costs than Damages: And herein,

1. Of Actions of Trespass, where the Right of Freehold or Inheritance may come in Question, as also of wilful and malicious Trespasses.
2. Of Actions of Slander.
3. Of Actions of Assault and Battery.

(C) Where the Costs shall be doubled or trebled.

(D) Of awarding the Defendant his Costs.

(E) What Persons are entitled to or exempted from paying Costs: And herein,

1. Of Executors and Administrators.
2. Of Officers and Ministers of Justice.
3. Of Informers, and where the Prosecution may be said to be carried on at the Suit of the King.
4. Of Paupers.

(F) Of Costs in Replevin.

(G) Of Costs in a Writ of Error.

[(H) Of Costs in a feigned Issue.]

||(I) Of Costs in Actions on Judgments.||

(K) Of Costs in the several Steps and Proceedings of a Cause.

(L) Costs how assessed or taxed.

(A) Of the first Introduction of, and giving the Plaintiff Costs *de incremento*.

2 Inst. 288.

(a) [Although costs were never given at common law, *eo nomine*, yet in reality they

were always included in the quantum of damages, in those actions where damages were given; and even now, costs for the plaintiff are always entered on the roll as increase of damages by the court, the form of which entry may possibly have arisen from the abovementioned practice. 3 Bl. Comm. 399. And it is said by Lord Chief Baron Gilbert, that the justices in eyre were wont at their *iters*, before the statute of Gloucester, to assess the costs of the plaintiff, where he prevailed, at a reasonable sum, exclusive of, and unblended with the damages which he recovered; and that this custom prevailed till the introduction of the modern justices of assise and *nisi prius*; at which time it became necessary, that the costs should be taxed by the court above, and not by the judges on their circuits. Gilb. Hist. C. P. 266.]

But it being thought exceeding hard that the plaintiff, for the costs which he was out of pocket in obtaining his right, could not have any amends;

(a) This extends to all legal costs of suit, but not to his expences of travel, loss of time, &c.

2 Inst. 288.

—In a writ by journeys accounts, the plaintiff shall

By the statute of Gloucester, made 6 E. 1. c. 1. by which in an assise, &c. damages, upon the insufficiency of the disseisor, are given against him that is found tenant, and damages are given in a writ of *mort d'ancestor*, *aial*, &c., reciting that whereas before that time, damages were not taxed but to the value of the issues of the land, it is provided the demandant may recover against the tenant the (a) costs (b) of his writ, together with his damage; and that this act shall hold place (c) in all cases where the party is to recover damages.

recover his costs of the first writ, and the proceedings thereupon. 2 Inst. 288, *Secus*, if the first writ was naught through the plaintiff's default, 2 Inst. 288. as if brought against one joint-tenant only. Kelw. 127. (b) If judgment arrested, the plaintiff, in a new action, shall not recover the costs of the first. Cro. Car. 545. (c) Where a man before, or by this act did not recover damages, though single, double, or treble damages, are given by a subsequent act, the plaintiff shall recover no costs. 10 Co. 116. a. As, in a *quare impedit*. 2 Inst. 289. 10 Co. 116. a. Kelw. 26. a. *Decies tantum*. 10 Co. 116. b. So, in an action upon 5 E. 6, c. 14. of ingrossers, 10 Co. 116. b. — But in all cases where damages were recovered before, or by this act, the plaintiff shall recover his costs also. 10 Co. 116. b. [This distinction, with respect to the plaintiff's right to costs, between cases where damages are originally given by a statute subsequent to this act, and those where damages might have been recovered at common law, is impugned by Lord Coke himself, who saith, "This clause doth extend to give costs where damages are given to any demandant or plaintiff in any action by any statute made after this parliament." 2 Inst. 289. And

though

though it was recognized by three justices against *Willes C. J.* in the case of *Witham v. Hill*, 2 Wils. 97. *Barnes*, 151. and by *Aston J.* in the case of *Wilkinson v. Allott*, Cowp. 367. yet it seemeth not to be law at present, "for the statute of Gloucester is a remedial act, and, consequently, ought to have a favourable interpretation." *Per Lord Loughborough*, 1 H. Bl. 13. Costs, therefore, have been allowed in actions against the hundred upon the statute of 9 Geo. 1. c. 22. for setting fire to the plaintiff's house. *Jackson v. Inhabitants of Culesworth*, 1 T. Rep. 71. See too *Greetham v. The Hundred of Theale*, 3 Burr. 1723. Bull. N.P. 331. And it hath been repeatedly decided, that in an action of debt upon any statute, by the party grieved, for a certain penalty, the plaintiff shall have his costs, although the statute on which the action is founded give no costs. 1 Roll. Abr. 516. pl. 5. 574. pl. 1. Cro. Car. 559. 1 Salk. 206. 1 Ld. Raym. 172. 2 T. Rep. 154. *Ward v. Snell*, 1 H. Bl. 10.]

This was the original of costs *de incremento*; for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause.

And this was done in (a) all real actions in which there were damages at common law, and also in all personal actions; for even in an action of debt, there are damages given for the unjust detention.

10 Co. 116.
(a) That in a *formedon*, no damages were recovered, and consequently

no costs. Cro. Car. 425. Vent. 88. Lev. 146. Raym. 134. [The statute of Gloucester doth not extend to give damages upon the traverse of an inquisition, although damages may be found thereon for the prosecutor; for, to recover costs under this statute, there must be a plaintiff or defendant, demandant or tenant. Ca. temp. Harl. 355. 2 Str. 1069.] For costs on penal statutes, *vide infra*, letter (E), and title *Damages*, in what actions damages were recovered.

(B) In what Cases the Plaintiff shall have no more Costs than Damages: And herein,

1. *Of Actions of Trespass where the Right of Freehold or Inheritance may come in Question, or where the Trespass is wilful and malicious.*

BY the 43 Eliz. c. 6. it is enacted, "That if upon any action personal to be brought in any of her majesty's courts at *Westminster*, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and be so signified or set down by the justices before whom the same shall be tried, that the debts or damages to be recovered there in the same court shall not amount to the sum of 40s. or above; that in every such case the judge and justices, before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

The stat. 11 W. 3. c. 9. extends this statute to the principality of *Wales* and the counties palatine.

The intent of this statute was to reduce all actions where the debt or damages were under 40s. into the court-baron, or other county courts, whereby it was thought the profits of landlords would be increased, and the costs of defendants diminished; but

Gilb. Hist. C.P. 265.

(a) [No instance of a certificate upon this statute is to be met with in the books earlier than about the middle of the reign of *George the Second*. *Gilb. Eq. Rep.* 196. 3 Wils. 325.]

White v. Smith, C. B. P. 17 G. 2. cited in 2 Str. 1232. and 1 Wils. 94.

Edmonson v. Edmonson, 8 East, 294.

Walker v. Robinson, 1 Wils. 94. 2 Str. 1232.

Emmett v. Lyne, 1 N. R. 255.

Wiffin v. Kin-card, 2 N. R. 471.

Howard v. Cheshire, Say. Rep. 250.

the statute failed of effecting that purpose; for it does not put it merely upon the damages given by the jury under forty shillings, (for it would be hard, when the jury give too little damages, to punish the plaintiff with the loss of his costs,) but leaves it to the judge to certify the damages proved were not above 40s. in approbation of the verdict; but the judges thought it extremely hard to certify, in order to make plaintiffs lose their costs where they had prevailed, unless the action were exceedingly impertinent and vexatious, and therefore seldom made use of this power (a).

[In an action for taking and carrying away sand and gravel upon *Hounslow Heath* the plaintiff recovered a verdict with damages under 40s., and Lord Chief Justice *Willes*, who tried the cause, having certified, under this statute, that the damages found by the jury were the real damages to be recovered, the court held it to be a case within the act, and refused to allow any more costs than damages.]

|| So, in an action on the case for an injury to plaintiff's right of common by digging turves there, the judge certified under this statute that the damages did not amount to 40s. and the plaintiff had no more costs; for the interest or title to the land does not necessarily come in question in such an action, and did not in fact in this case, which was an action by one commoner against another commoner for a mere wrongful act.||

[So, in an action of trespass for assaulting the plaintiff, stopping his waggon, and taking away his cart-rope, the defendant justified the taking of the rope as a distress for toll due to the corporation of *Doncaster*, under whom he was collector, and likewise stated a demand and refusal previous to the making of the distress; the replication traversed any demand of the toll before the taking of the distress, and issue being joined thereon, the plaintiff obtained a verdict at the trial, with one shilling and sixpence damages. The judge who tried the cause certified under the statute. The plaintiff obtained a rule to shew cause why he should not have full costs, upon the grounds, that an *asportavit* was laid in the declaration, and there was special pleading, either of which circumstances, it was alleged, had been always holden sufficient to carry full costs; but after argument, the rule was discharged.]

|| So, where a plaintiff declared for an assault, battery, and imprisonment, and proved only a trifling imprisonment, and obtained a farthing damages, and the judge certified under this statute, the court held that the certificate deprived him of his costs. In this case the imprisonment was not considered as including a battery; but whether a battery be proved or not, the judge is equally entitled to certify, and the effect of the certificate will be the same.||

[In an action of trespass, a case was reserved for the opinion of the court, stating, that the action was brought for taking a distress; that the defendant justified as agent to General *Choldmondley*,

mondley, by virtue of a reservation in a lease of land from the general to the plaintiff; and that issue having been joined upon a traverse of the agency of the defendant, a verdict was found for the plaintiff, with one penny damages, and that the judge who tried the cause had certified pursuant to the statute 43 El. c. 6. *Dennison and Foster*, the only judges in court, held, that the issue being collateral to the plaintiff's interest in the land demised, the plaintiff could have no more costs than damages.

Where a plea of tender was found against the defendant, yet, as the plaintiff did not recover damages to the amount of forty shillings, it was holden that there might be a certificate under the statute.

A notion formerly prevailed, that the statute empowered the judges to certify only in those actions which are within the jurisdiction of the county, and other inferior courts; but it hath been holden in a late determination, that the words of the statute comprehend *all* personal actions (not being for any title to lands, or for any battery); even actions *vi et armis*, which cannot be brought in the county court.

A certificate upon this statute may be granted after the trial of the cause.]

|| Where a statute prohibits an act, and gives damages for the violation, with costs of suit, it does not take away the judge's power to certify under this act.||

By the 22 & 23 Car. 2. c. 9. for preventing trivial suits, contrary to the intention of 43 Eliz. commenced in the (a) courts at *Westminster*, it is enacted, "for the making the said law effectual, that in all actions of trespass, assault, and battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury find damages under 40s. shall not recover or obtain more costs of suit than the damages so found shall amount unto; and if more costs in any such action shall be awarded, the judgment shall be void, &c. and the defendant is hereby acquitted of and from the same, and may have his action against the plaintiff for such vexatious suit, and recover his damages and costs of such his suit in any of the said courts of record *."

This statute seems to have pursued the same purpose with that of the 43 Eliz. (b), but neither of them repealed the statute of Gloucester, (for a statute cannot be repealed by implication,) nor did the statute of Car. 2. take away costs *de incremento*, except where the judge's certificate was necessary; and that was only where the trespass was done to the freehold, or to things fixed to the freehold, and the damages under 40s.; and in battery, where the damages were under such sum; for the wording

Bartlett v. Robbins,
2 Wils. 258.

Dand v. Sexton, 3 T. Rep. 37.

Holland v. Gore, Say. Costs, 18.

Williams v. Miller,
1 Taunt. 400.

(a) The statute 11 & 12 W. 3. c. 9. enacts, that this statute shall extend to the principality of *Wales*, and counties palatine.

* This statute does not extend to the *Marshalsea*, or other inferior courts, that may hold plea in such actions; nor does it extend to any case where the defendant

justifies, or pleads specially.

Gilb. Hist. C. P. 263. *Gilb. Eq. Rep.* 197, 2 Vent. 36. 180. 195. 215. 3 Mod. 39. 2 Mod. 141. 2 Lev. 234. 1 Salk. 208. (b) [There is

this difference of the statute is, that there should be no costs in battery, trespass, or other personal actions, unless the judge certify the battery to be proved, or the title of the freehold to have come in question; hence these words in the act, *other personal actions*, were construed to extend no farther than to cases where the judge was permitted to certify, which was only in battery, and actions of trespass relating to the freehold, and things fixed to the freehold. plaintiff of full costs; the latter, by certificate entitles him to full costs. 1 Wils. 95.]

Salk. 208.

Therefore in trover, or action of trespass *de bonis asportatis* of goods and chattels not fixed to the freehold, the plaintiff shall have his full costs, though the damages be found to be under 40s. and though the judge do not certify pursuant to the statute.

Com. Rep. 19.

So, if an action of trespass to the freehold, and an action of trespass *de bonis asportatis* are joined, and the plaintiff recovers in general upon both counts, he hath no need of a certificate to obtain his costs; and therefore costs *de incremento* shall go upon the statute of Gloucester.

Anon.

1 Freem. 394.

[*A fortiori* then, if in an action of trespass *quare domum fregit et bona asportavit*, the defendant be acquitted as to breaking the house, and found guilty only of taking away the goods, the plaintiff shall have full costs, of whatever amount the damages may be; for the acquittal as to the trespass upon the freehold reduces it to a question of mere personal property, which is not within the statute of 22 & 23 Car. 2.]

3 Mod. 39.

Barnes and

Edgar ad-

judged. (a) So,

in trespass for

chasing his

cow, and his domestick fowls, viz. hares, geese, &c. with dogs which were used to bite tame fowls, by whose biting they were killed; on not guilty, verdict for the plaintiff; and he had his full costs, because this is not a trespass wherein the right of freehold may come in question. Mich. 9 Geo. 1. in C. B. Keen and Whistler, Stra. 534.—So, in trespass for breaking his close, and chasing his bull, verdict for the plaintiff, and one penny damages; and held by the court that he should have his full costs, because the 22 & 23 Car. 2. c. 9. extends only to actions of trespass where the freehold may come in question. Pasch. 9 Geo. 1. in C. B. Thomson and Berry, Stra. 551. Gilb. Rep. 197.

So, in trespass for breaking his close, and impounding his cattle, the plaintiff shall have his full costs; (a) for the impounding of his cattle is an injury to his personal property, in which no right of freehold can come in question.

Carth. 225.

Salk. 208. like

case. (b) And

note, that if

any thing

be carried

off from the

grounds, though of never so little value, it will be an *asportavit*; for the words *abcarriavit* and *asportavit* in declarations mean such a carrying as amounts to a conversion to the defendant's use. Gilb. Rep. 198. And vide 2 Vent. 215. where digging roots, and removing them about two yards in the same ground, amounted to an *asportavit*. [But from later resolutions, it should seem, that the asportation should be an absolute and entire removal of the property from the land of the owner, and not a partial conveyance of it to another part of the premises. Franklin v. Jolland, B. R. H. 8 W. 3. cited in Str. 634. Anon. Str. 633. Gilb. Eq. Rep. 198. However, if what is laid in the declaration as an *asportavit* amount to nothing more than a description of the mode in which the injury to the land was effected, and is laid as part of the same act, a certificate, although the plaintiff obtains a general verdict, is requisite to entitle him

So, in trespass for chasing his sheep, and that he the defendant *ad loca ignota eos abduxit & elongavit*, after verdict for the plaintiff, and 2d. damages, he had his full costs, principally upon the word (b) *abduxit*, which is the same in signification with *asportavit*.

him

him to full costs, unless the damages should be found to the amount of forty shillings. Clegg v. Molyneux, Dougl.. 780.]

So, in trespass *quare vi et armis* the defendant flung down certain stalls of the plaintiff's, in a market-place; on not guilty, and verdict for the plaintiff, but damages under 40s. the court held, that the plaintiff, without the judge's certificate, should have full costs; for this is a trespass done to a chattel, in which no title of freehold can come in question; and though they had been fixed to the freehold, yet, if the defendant had carried them away, it would be out of the statute. Raym. 847. Smith and Batterton, adjudged. 2 Jones, 232. and 2 Show. 258. S. C. adjudged.

But, where the trespass is merely to the freehold; as, where in trespass the plaintiff declared that the defendant *herbam depascendo, & solum & fundum carueis subvertendo, & in solo fodiendo, & cum terra inde project. aque cursum suum obstupand., per quod clausum suum inundat. fuit, &c.* the plaintiff shall have no more costs than damages. Carth. 22.

So, trespass *quare clausum fregit*, and put stakes in the plaintiff's ground, was holden within the statute. Ventr. 48.

So, in trespass *quare clausum fregit, & quendam taurum personæ ignotæ fugavit, per quod* the plaintiff's gooseberry bushes, *necon quinque perticas (angl. poles) in eodem claus. erect., affix., & existent. fregit, laceravit, & spoliavit*, after verdict and one penny damages, the court held, that the taking and pulling up the poles was not such an asportation as amounted to a conversion; and that though the trespass began by chasing the bull, yet the damage is laid to be done to the freehold; and so the title thereof might well come in question. Trin. 11 G. 1. in C. B. adjudged. Anon. Stra. 633. Gilb. Rep. 198.

So, in trespass for breaking and entering the plaintiff's house, and keeping him out of possession and use of the said house, with a *continuando* for a month, *per quod* he was put to great expence to gain the possession of his house, and in the mean time lost the profit and use thereof; after verdict for the plaintiff, and 2s. 6d. damages, the court held, that this was a plain trespass *quare clausum fregit* within the statute, and that the *per quod* was only matter of aggravation. Mich. 12 G. 1. in C. B. Blunt and Miller, adjudged. Gilb. Rep. 197. S. C. Stra. 645. S. C.

|| So, in trespass for breaking and entering the plaintiff's dwelling-house, and there making a great noise, affray, and disturbance, and continuing it for two hours, and *until* the plaintiff, &c. were compelled to give, and did give the defendant their promissory note for 6l. 17s. payable to the defendant; and a verdict for plaintiff, with a guinea damages, but no certificate from the judge that the title was in question; the plaintiff was allowed no more costs than damages; for that on the first words, viz. *breaking and entering the house*, the freehold might have come in question; and the other words, *until, &c.* were merely words of aggravation. Appleton v. Smith, 3 Burr. 1282.

So, in trespass for breaking and entering plaintiff's house, and breaking his cellar-door; the jury found for the plaintiff, as to breaking the door, damages 6d.; residue for defendants: and the court were of opinion, the plaintiff ought to have no more

more costs than damages; the door being fixed to the house, and no personal chattel.

Adlem v.
Grinaway, 6 T.
Rep. 281.

So, in trespass for throwing stones, &c. at the windows of the plaintiff's dwelling-house, and breaking the glass, &c., and damages under 40s., the plaintiff was allowed no more costs than damages, the judge not having certified that the title to the house came in question.

Doe v. Davies,
6 T. Rep. 593.

So, in trespass for mesne profits; for the action is founded wholly upon title.

Stead v.
Gamble,
7 East, 325.

So, where to trespass at *A.* and throwing down, burning, and destroying the plaintiff's hedge there then erected, &c., whereby, &c., the defendant pleaded the general issue, and justified as to throwing down the hedge, that it was erected on a common over which he prescribed for a right of common, and issue was taken on such right, which was found for him, and a verdict for the plaintiff, with 20s. damages, on the general issue; the facts stated in the special plea, and found, could not be taken into consideration to shew that the title to the freehold could not come in question; and as on the declaration the freehold might have come in question, and the judge did not certify, the plaintiff was entitled to no more costs than damages. ||

2 Vent. 180.
195. [Bunb.
208. Gilb. Eq.
Rep. 199.]

* In trying
such cases, it is
very necessary
attention, on
the part of the

Also, if there be a trespass upon the freehold, and likewise a count laid *de bonis asportat.*, in order to put in for costs merely, if there be no evidence of the carrying away of the goods, by which the defendant is acquitted as to that, though he is found guilty as to the trespass to the freehold, yet, if the damages be under 40s. the plaintiff shall recover no more costs than damages.*

defendant, should be given to the declaration, and to the evidence, and if an *asportavit* is not found, to see that the verdict be properly taken. Though if a verdict be taken generally, and no evidence given of an *asportavit*, and damages under 40s., the court, on motion, will amend the verdict by the judge's notes.

2 Mod. 141.

2 Freem. 214.
Where the de-
fendant justi-
fies for a way,
and issue is

It is further to be observed in the construction of the statute 22 & 23 Car. 2. that there is no need of a judge's certificate, where by the pleading it appears that the title or interest of the land is in question.

joined upon *extra viam*, and found for the plaintiff, he shall have full costs. Asser v. Finch, 2 Lev. 234. Higgins v. Jennings, 2 Ld. Raym. 1444. 2 Str. 726. Beale v. Moor, 2 Str. 1168. Martin v. Vallance, 1 East, 350. [But it is otherwise, if the way under which the defendant justifies be defined by metes and bounds in the plea, and the plaintiff reply *extra viam*; for here no doubt can arise concerning the extent and locality of the way, since these circumstances are admitted and agreed by the pleadings; and therefore a certificate from the judge, that the freehold or title was in question, is necessary to entitle the plaintiff to full costs, in case the jury find damages under forty shillings. Cockerill v. Allanson, B. R. Tr. 22 Geo. 3. Hullock, 86. Bull. Ni. Pr. 330.] || Gregory v. Ormerod, 4 Taunt. 98. ||

Hobson v.
Brown, Barnes,
124. 129.
Lloyd v. Day,
d. 149.

[If in trespass *quare clausum fregit*, the defendant plead a justification, and thereupon the plaintiff make a new assignment, to which there is a plea of not guilty; in such case, if the plaintiff do not recover damages to the amount of 40s., and there be no certificate, there shall be no more costs than damages; for a new assignment is equivalent to a new declaration; and where the

the defendant pleads only not guilty to it, there is in reality no special pleading in the case.

So, if in such action the defendant plead two pleas, not guilty and a justification, and a verdict be found for the plaintiff on the former, with damages under 40s., and a verdict for the defendant on the latter, there cannot be full costs without a certificate; because the issue joined on the special plea being found for the defendant, the case is exactly the same as if only the general issue had been pleaded.]

¶ Where the case is such that the judge, who tries the cause, cannot in any view of it grant a certificate, it is considered as a case out of the statute. Upon this principle it has been settled, after great deliberation, that where a defendant, in an action of trespass *quare clausum fregit*, pleads a special plea, the issue joined upon which is found against him, the plaintiff shall have full costs, although the damages may be under forty shillings, and the judge shall not have certified that the title came in question at the trial. And the plaintiff's right to costs in such a case will not be affected by or depend upon the nature or facts of the special plea; for although such plea should not make title to the land mentioned in the declaration; or though it should be even such as would preclude the possibility of bringing the title into question thereon; as, a disclaimer of title, that the trespasses were involuntary, and tender of amends, or a licence; still the plaintiff will be entitled to full costs, if he obtain a verdict on that plea.

So, where in an action on the case by a commoner against the defendant for turning his sheep upon the common, so that the plaintiff could not enjoy his right of common *in tam amplo modo*, &c. the plaintiff obtained a verdict with ten shillings damages; this was resolved not to be a case within this act, since by no possibility could the title to the land come in question, and the plaintiff was allowed full costs.

So, where the plaintiff declared in trespass for breaking and entering his free warren in *A.* and chasing, hunting, and killing divers foxes, hares, conies, partridges, and pheasants of the plaintiff, and taking away other his goods and chattels; not guilty was pleaded, and the defendant was found guilty of breaking and entering the free warren of the plaintiff, and chasing and hunting one hare, damages 6*d.*, and not guilty as to the residue; the plaintiff was holden entitled to full costs, the title to free warren being collateral to that of the land.¶

If an action be commenced in an inferior court, and removed by *habeas corpus* or *certiorari* into the courts of *Westminster*, the plaintiff shall have full costs, although the damages are under 40s. *terbury v. Fuller.* 1 *Ld. Raym.* 395.; but in *Gavel v. Scudamore*, 2 *Lev.* 124, where the cause is removed by the defendant.]

¶ On writs of inquiry, in cases within this act, the plaintiff shall have full costs, notwithstanding the damages be under 40s.

2 *Ventr.* 180.
195.

1 *Hullock*, 80.
Redridge v.
Palmer, 2 *H.*
Bl. 2. *Comer*
v. Baker, *id.*
341. *Peddle v.*
Kiddle, 7 *T.*
Rep. 659.

Styleman v.
Patrick, 2 *Mod.*
141. 1 *Freem.*
214. *S. C.*
Edmonson v.
Edmonson,
8 *East*, 294.
acc.

Lord Dacre
v. Tebb, 2 *Bl.*
Rep. 1151.

[*Roop v.*
Scritch, 4 *Mod.*
379. *Arch-*
bishop of Can-
terbury, this is doubted.]

Sheldon v.
Ludgate, *Bull.*
N. P. 329.

(a) As to what species of tradesmen are comprehended within the meaning of the words "inferior tradesmen," see *Ben-net v. Talbois*, 1 Ld. Raym. 149. Com. Rep. 26. S. C. 5 Mod. 307. S. C. Carth. 32. S. C. 1 Salk. 212. S. C. *Buxton v. Mingay*, 2 Wils. 79.

This statute is partially repealed by st. 4 & 5 W. & M. c. 23. § 10., which, reciting that great mischiefs ensue by *inferior tradesmen* (a), apprentices, and other dissolute persons neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours, for remedy thereof enacts, "that if any such person as aforesaid shall presume to hunt, hawk, fish, or fowl, (unless in company with the master of such apprentice, duly qualified by law,) such person or persons shall be subject to the penalties of this act, and shall and may be sued and prosecuted for their wilful trespass in such their coming on any person's land, and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his full costs of suit; any former law," &c.

Pallant v. Roll,
ubi supra.

If in trespass for hunting, &c. laid upon this statute, the plaintiff prove only the trespass, and not the circumstances under the statute, he shall nevertheless recover as in a common trespass *quare clausum fregit*, without any more costs than damages, should the damages be under forty shillings, and the judge should not certify.

Dickenson v. Pearson,
1 Hull. 93.

To entitle himself to full costs under this statute, the plaintiff must prove not merely that the defendant was an *inferior tradesman*, but he must also prove him to be that particular species of tradesman mentioned in the declaration, though alleged under a *videlicet*.

Also, by the 8 & 9 W. 3. c. 11. § 4., for preventing wilful and malicious trespasses, it is enacted, "That in all actions of trespass, to be commenced and prosecuted in any of his majesty's courts of record at *Westminster*, wherein at the trial of the cause it shall appear, and be certified by the judge, under his hand, on the back of the record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit; any former law to the contrary notwithstanding."

Millburne v. Read, 3 Wils. 325.

[Although this statute speaks generally of "*all actions of trespass*," and Lord C. J. *Willes* was of opinion that every wilful trespass was within it; yet there is no instance of a certificate upon it, except in actions of trespass *quare clausum fregit*.

3 Bl. Com. 214. 1 T. Rep. 636.

Every trespass is wilful within the meaning of this act, where the defendant has notice, and is forewarned not to come upon the land; as every trespass is malicious, where the intent of the defendant plainly appears to be to harass and distress the plaintiff.

6 Vin. Abr. tit. Costs, 332.

And it was holden by *Eyre J.* at *Essex* Lent assizes, 1719, that where a trespass was *wilful*, a judge would certify, though *no malice proved*; which was said to be the practice.]

Reynolds v. Edwards, 6 T. Rep. 11. *Swinerton v. Jarvis*, there cited.

¶ It has been considered that, *after notice*, it was compulsory on the judge to certify; but in a late case three of the judges held it to be discretionary, according as it appeared to him on the trial that the trespass was or was not wilful and malicious;

licious (a); but the notice in this case being insufficient, it was not necessary to decide the point, and the Chief Justice avoided it. ||

[A certificate under this act must be made by the judge in open court; if made out of court, it is void.]

273. *sed vide* 1 T. R. 636. 7 T. Rep. 449. *semb. contr.*

2. *Of Costs in Actions of Slander.*

By the 21 Jac. 1. c. 16. § 6. it is enacted, "That in all actions on the case for slanderous words to be sued or prosecuted by any person or persons in any the courts of record at Westminster, or in any courts whatsoever, that have power to hold plea of the same, || if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover (b) only so much costs as the damages so given or assessed amount unto, without any farther increase of the same; any law, statute, custom, or usage to the contrary in any wise notwithstanding." ||

this the power of the judges is taken away, as to giving costs *de incremento*, where the damage is under 40s.; but it is said to have been the resolution of the judges, that though the court cannot increase the costs, yet the jury are not bound by the statute, and therefore they may give 10l. costs where they give but 10d. damages. Salk. 207.

In the construction of this statute, it has been holden, that it extends not to actions for slander of title, for that is not properly slander, but a cause of damage; and the slander intended by the statute is to the person.

Jones, 196. S. C. adjudged.

So, if for calling thief, and causing him to be arrested, &c., and the defendant is found guilty of both, it is not within the act.

Topsall v. Edwards, Cro. Car. 163. [Blizard v. Barnes, *Id.* 307. S. P. Carter v. Fish, 1 Str. 645. S. P.]

So, where the plaintiff brought an action on the case for slanderous words spoken of his wife, *viz. that she was a whore per quod she lost such and such customers*; after verdict for the plaintiff, and damages under 40s. the court held, that the plaintiff should have full costs; for it is not the words, but the special damage which is the cause of action in this case; and it was incumbent on the plaintiff to prove the special damage, otherwise the action would not have lain for the words.

Salk. 206. Browne and Gibbons, adjudged, 2 Ld. Raym. 831. S. C. 7 Mod. 129. S. C. Andr. 375. S. P. Burry v. Perry, 2 Str. 936. 2 Barnard, 71. pl. 50. S. P.

[It is indeed now settled, beyond controversy, that where the words are actionable in themselves, without the special damage, the plaintiff can have no more costs than damages, where the latter are under 40s. But, where the words are not actionable in themselves, but the action is maintainable only with respect to

(a) Good v. Watkins, 3 East, 495. Ford v. Parr, 2 Wils. 21. Acc. 5. T. Rep. [This statute is a direct repeal of that of Gloucester quoad actions of slander; for in these if the damages do not amount to 40s. costs *de incremento* are taken away by express and positive words. Gilb. Eq. Rep. 196.] (b) By

Cro. Car. 141. Law and Horwood, adjudged, Ley, 82. Palm. 530. S. C. adjudged.

Topsall v. Edwards, Cro. Car. 163. [Blizard v. Barnes, *Id.* 307. S. P. Carter v. Fish, 1 Str. 645. S. P.]

Salk. 206. Browne and Gibbons, adjudged, 2 Ld. Raym. 831. S. C. 7 Mod. 129. S. C. Andr. 375. S. P. Burry v. Perry, 2 Str. 936. 2 Barnard, 71. pl. 50. S. P.

Turner v. Horton, Barnes, 132. Willes's Rep. 438. S. C. Surman v. Shelleto,

to

3 Burr. 1688.
Collier v. Gail-
lard, 2 Bl. Rep.
1062.

to the special damage, then it is a case at large, and without the statute; and, *if any* damages are recovered, the plaintiff will be entitled to full costs.]

Savile v. Jar-
dine, 2 H. Bl.
531.

|| But, if some of the counts in the declaration be for words that are actionable, and others for words not actionable, and special damage be laid referring to all the counts, and there be a general verdict for the plaintiff; he is entitled to full costs, though he recover less than 40s. damages.||

Littlewood v.
Smith, 1 Ld.
Raym. 181.
But, if in an ac-
tion for slan-
der, com-
menced origi-
nally in an in-
ferior court, and afterwards removed into one of the courts at *Westminster*, the plaintiff re-
cover under 40s. he shall have no more costs than damages. Anon. C. B. T. 12 Ann. 2 Com-
Dig. 546. *Vide* Latch 2. 58.

[It hath been holden, that this statute of 21 Ja. 1. c. 16., notwithstanding the comprehensive words which the legislature hath used in it, doth not extend to courts baron, and other inferior courts; for as damages cannot be given in those courts to the amount of 40s. it would be impossible to tax costs *de incremento* in any action of slander beyond that sum.]

2 Wils. 258.
per Clive J.
Dovor v. Ro-
binson, Barnes, 128.

A plea of justification will not take the case out of this statute.

Halford v. Smith, 4 East, 567.

Lampen v.
Hatch, 2 Str.
934.

If upon a writ of inquiry the damages be assessed under 40s. and the costs be taxed above that sum, and judgment be entered up accordingly, the judgment will be reversed *in toto*.]

2 Show, 506.
(a) B. R. H.
17 Geo. 3.

|| It was once thought, that in an action of *scandalum magnatum*, no costs are recoverable, however large the damages may be; but in Lord Bolingbroke v. Woodfall (a), which was *scandalum magnatum*, the court ordered costs to be taxed; and Lord Mansfield said, that the point had been so settled in his time.||

3. Of Costs in Actions of Assault and Battery.

(b) 1 Vent. 256.
2 Lev. 102.
|| (c) But it
would seem,

On this part of the statute of 22 & 23 Car. 2. c. 9. it has been (b) holden, that if an assault only be proved, the plaintiff shall have no more costs than damage. (c)

that the judge, in such a case, may certify under the statute of 8 & 9 W. 3. c. 11. that the assault was wilful and malicious, which will entitle the plaintiff to full costs. 3 Wils. 326.||

Salk. 206. pl. 5.
5 Mod. 74.
7 Mod. 129.
2 Ld. Raym.
831.

That if a man brings trespass for beating his servant, *per quod servitium amisit*, it is not an action of assault and battery within the statute, but is an action founded upon the special damage, in which there shall be full costs.

Batchelor v.
Bigg, 3 Wils.
319. 2 Bl. Rep.
854.

[Neither is an action for criminal conversation with the plaintiff's wife within this statute, for the criminal conversation is the gist of the action, and not the assault.]

Mich. 10.
Geo. 1. in C. B.
Beck and
Nicholls, Str.

In trespass of assault and battery, wounding and imprisonment; as also for entering and breaking plaintiff's house, and opening the doors of the said house, and breaking three locks and three bars

bars belonging to the said doors, the defendant pleaded not guilty to all except the imprisonment, and for that he justifies; and on the trial the justification was found for the defendant, and the not guilty for the plaintiff, and the damages 2s. 6d.; and held by the court, that the damages being under 40s. he could not have full costs for the battery, because the judge had not certified the battery to be well proved; neither could he have full costs for breaking the house, because this is a trespass relating to the freehold *

577. Gilb. Eq. Rep. 197.

* But if defendant had not justified the imprisonment, and he had been found guilty of that, plaintiff would have

been entitled to full costs.

[Again, in an action of trespass, the plaintiff declared for an assault and battery upon himself, and also for striking his horse, by which the horse was lessened in value; the defendant pleaded not guilty, and there was a general verdict for the plaintiff, with 20s. damages, but no certificate from the judge. The plaintiff moved for full costs, on account of the special matter stated relative to the horse, which, on consideration, were refused by the court.

Clarke v.

Othery, 1 Str.

624. Bannister

v. Fisher,

1 Taunt. 357.

S.P.

But, where the declaration charged the defendant with an assault, battery, and wounding, and with obstructing the plaintiff in getting his coals, taking them away, treading and trampling upon them, breaking and spoiling the standard and roller of the plaintiff, and taking away his goods and chattels, and a general verdict was found for the plaintiff upon the whole charge, except the taking away of the goods and chattels; it was holden, that he was entitled to full costs, notwithstanding the damages were under 40s., and the judge had not certified an assault and battery to have been proved: for there was a spoliation in this case distinctly stated, upon which the plaintiff might have brought his separate action, and have recovered full costs without a certificate.

Milburne v.

Read, cited in

3 Wils. 322.

It hath been resolved, that there shall be no more costs than damages, (should the latter be under 40s.) without a certificate, in an action for assault and battery, and for tearing or injuring the plaintiff's clothes, if the tearing or other injury be charged in the declaration, or found by the jury to have been in consequence of the beating.

Hampson v.

Adshead, Sav.

Rep. 91. Bull.

Ni. Pri. 329.

Cotterill v.

Tolly, 1 T. Rep.

655.

But it seems to have been once thought, that where in such an action the tearing or damaging of the clothes is laid in the declaration as a distinct and substantive fact, and not as a consequence of the beating, even though such charge should be contained in the same count with the injury to the plaintiff's person, a certificate is not necessary to entitle the plaintiff to full costs. However, it is now settled (a), that if the tearing of the clothes appear to have been at the same time with the injury to the person, the court will consider it as part of the same transaction, and allow the plaintiff no more costs than damages, notwithstanding the declaration may not allege the former injury as consequential to the latter.

Carruthers v.

Lamb, Barnes,

120. Cotterill

Tolly, 1 T. Rep.

655. (a) Mears

v. Greenaway,

1 H. Bl. 291.

Atkinson v.

Jackson, id.

295. Lock-

wood v. Stan-

nard, 5 T.

Rep. 482.

So Clarke v.

Othery, 1 Str.

624. Bannister v. Fisher, 1 Taunt. 357.

Richards v. Turner, Bull. Ni. Pri. 330. Smith v. Edge, 6 T. Rep. 562. *Vide* Wilson v. Kincard, 2 N. R. 471. Page v. Creed, 3 T. Rep. 391. Brennan v. Redmond, 1 Taunt. 16.

Where the defendant pleads a justification to the assault and battery, as *son assault demesne*, there is no need of a certificate to entitle the plaintiff to full costs, for the justification is an admission of the battery, and is tantamount to a certificate of its having been proved. But, if the defendant justify, and the plaintiff make a new assignment, to which the general issue is pleaded, he will have no more costs than damages without a certificate. Neither will he, if the defendant justify the assault only.

(C) Where the Costs shall be doubled or trebled.

10 Co. 116. a. **I**T seems agreed, that where damages were before recoverable, and a statute increases them to double or treble the value, the plaintiff shall recover his double or treble damages; and costs also, as parcel of the damages, shall be trebled.
2 Inst. 289. Hard. 152. Carth. 297. [1 Ld. Raym. 20. Gilb. Hist. C. P. 267. Cowp. 365.]

Vide ubi supr.

(a) As upon the statute

2 E. 6. c. 13.

for not setting out tithes, &c.

2 Inst. 651.

Cro. Ja. 70.

Cro. Car. 560.

Hard. 152.; but

now *vide* the 8 & 9 W. 3. c. 11.

But, where a new statute gives either single, double, or treble damages, where there were no damages recoverable (a) before, there no costs shall be allowed, because the party can have nothing more than such new statute has already given, and that is damages only; for the statute of Gloucester cannot operate to add costs to what is given by a subsequent statute, because the new statute must be construed from itself, which gives damages only.

(b) 2 Inst. 289.

10 Co. 116.

1 Vent. 22. S. P.

adjudged.

(c) So, in an assise upon the statute for a disseisin with force. 10 Co. 116. b. (d) And the costs *de incremento*, as well as those given by the jury, shall be trebled. Cro. Eliz. 582. Leon. 282. 2 Leon. 52. Co. Lit. 257. 2 Str. 1044.

(b) In an (c) action for a forcible entry upon 8 H. 6. c. 9. which gives treble damages, the plaintiff shall recover not only treble damages but (d) treble costs also.

2 Inst. 289.

Kelw. 209. N.

Bendl. 80. S. C.

Roll. Abr. 516.

But in an action of debt upon the statute of 1 & 2 Ph. & M. c. 12. of distresses, upon the branch of the statute by which the 5*l.* and triple damages are given to the party grieved, for driving a distress out of the hundred, no costs are to be given, because the statute, by intendment, gives triple damages in lieu of the whole.

2 Inst. 289.

Kelw. 26. a.

Godb. 210. S.

P. adjudged.

(e) But now

vide supra 8 &

9 W. 3. c. 11.

So, in an action of waste against tenant for life or years by the statute of Gloucester, c. 6. the place wasted and treble damages shall be recovered (e), but no costs, because no action lay against them at the common law; but the action and damages are merely given.

2 Inst. 289.

(f) A prohibition of waste

But in waste against tenant in dower, &c. treble damages and costs also shall be recovered, because (f) an action of waste lay against

against them at the common law; and for the waste, damages should have been recovered.

able, but only for waste, after the prohibition delivered. 10 Co. 116. a.

In an action upon the statute of 2 H. 4. c. 1. for suing before the admiral for a thing done upon the land, in which case the statute gives to the plaintiff double damages, without speaking of any costs, he shall recover as well double costs as double damages.

Roll. Abr. 517.
Dyer, 159.
10 Co. 116.
[Sandv. Child,
3 Lev. 355.
Smith v.

Dunce, 2 Str. 1048.]

So, on the statute 2 W. & M. c. 5. by which treble damages and costs are given against the rescouser of a distress for rent, in an action upon the case for a rescous upon the statute, the plaintiff shall recover treble costs as well as treble damages; for the damages are not given by the statute, but increased, and an action upon the case lay for a rescous at common law.

Lawson v.
Storie, Salk.
205. Skin. 555.
Carth. 321.
1 Ld. Raym.
19.

|| A defendant is entitled to double costs under the statute of 11 Geo. 2. c. 29. § 22. without either a certificate from the judge, or a suggestion on the roll.

Finlay v. Sea-
ton, 1 Taunt.
210.

Where in trespass against the owner of a house in the metropolis adjoining to the plaintiff's, for taking down his party-wall, and building on it, the defendant shews at the trial that he was authorized in doing the thing complained of, under the building act of 14 Geo. 3. c. 73. he is entitled upon a nonsuit to treble costs under the 100th section of that act. ||

Collins v. Po-
nez, 9 East,
322.

[The 28th § of 25 Geo. 3. c. 50. respecting duties upon game-certificates, directs, "that if any person shall at any time be sued, molested, or prosecuted, for any thing by him done or executed in pursuance of that act, or of any clause, matter, or thing therein contained, such person may plead the general issue, &c.; and if the plaintiff be nonsuited, or the defendant obtain a verdict, such defendant shall be awarded his treble costs." This clause, it hath been determined, only extends to give treble costs to those persons who are sued for something done in the execution of the act, not to those who are sued for penalties under it: and therefore a person prosecuted under the act for shooting without a certificate, is not entitled to treble costs upon obtaining a verdict.

Smith v. Wal-
lis, 1 T. Rep.
252.

|| Where a plaintiff is put to declare in prohibition, and is nonsuited at the assizes, the defendant is entitled only to single costs under the statute of 8 & 9 W. 3. c. 11. § 3., and not to double costs under the statute of 2 & 3 E. 6. c. 13. § 14.; for it would seem to be only where the party prohibited does not put the plaintiff to declare, and where the ground of the consultation is the want of proof in the court which granted the prohibition within six months, that double costs can be claimed under the last statute. ||

Trask v.
French,
15 East, 574.

Where treble costs are to be recovered against a prosecutor for matter not appearing upon the *postea*, the court will, upon motion, allow a suggestion of the special matter to be made on the record.

Rex v. Poland,
1 Str. 49. || Bar-
ton v. Miles,
Ca. temp.
Hardw. 125.

Bennet v. Hart, Sayer's Rep. 214. ||

Where

Sands v. Child, Where a person is entitled to double or treble costs, not only
 3 Lev. 355. those assessed by the jury, but also those adjudged *de incremento*
 Lawson v. by the court, shall be doubled or trebled.
 Story, Carth.
 321. Skinn. 555. S. C.

Smith v. But double or treble costs are not to be understood to mean,
 Dunc., 2 Str. according to their literal import, twice or thrice the amount of
 1048. 2 Tidd's single costs. Where a statute gives double costs, they are cal-
 Pr. 674, 5. culated thus: 1. The common costs, and then half the common
 costs. 2. If treble costs, 1. the common costs; 2. half of these;
 and then half of the latter.

(D) Of awarding the Defendant his Costs.

(a) Extends BY the 23 H. 8. c. 15. it is enacted, That in any suit in a
 not to an ac- court of record, or elsewhere, in any action, bill, or plaint
 tion for an of trespass, upon 5 Rich. 2., debt or covenant, upon any specialty
 escape; for or contract, detinue, account charging as bailiff or receiver,
 though within case, or (a) upon any statute for any offence or wrong (b) per-
 the equity of sonal, immediately done to the plaintiff, if the (c) plaintiff after
 Westm. 2. that (d) appearance of the defendant be (e) nonsuited, or (f) any
 gives it against (g) verdict (h) pass by lawful trial against the plaintiff, the de-
 the warden of fendant (i) shall have judgment to recover his costs, to be taxed
 the *Fleet*, yet by the judge of the court, and the defendant shall have such pro-
 it is not c- cess and execution for the same as the plaintiff should have had,
 properly an action in case the judgment had been for him.
 upon the sta-
 tute, because
 no mention is
 made of the
 statute in the declaration; and this was no personal wrong. 2 Leon. 9. 4 Leon. 182. but
qu.—Nor to an action upon 8 H. 6. c. 9. for a forcible entry, for that was no personal wrong;
 and the writ says *quod disseisivit*. 2 Leon. 9. 4 Leon. 182.—So, it extends not to an ac-
 tion upon 1 & 2 P. & M. c. 12. for unlawfully impounding a distress. 2 Leon. 52. 3 Leon. 92.
 And the rather, because this action is grounded upon a subsequent statute.—Nor to an ac-
 tion upon 5 Eliz. c. 9. for perjury. Hut. 22. Brownl. 66. Cro. Eliz. 177.—So, it extends
 not to an action upon 2 E. 6. c. 13. for not setting forth tithes, because a mere non-feasance,
 and no personal wrong. 2 Inst. 651. Noy, 32. (b) It extends not to an assise. Brownl. 28,
 29. (c) Otherwise, if he is an infant, for commencing his suit by guardian, there can be no
 malice supposed in him. Cro. Eliz. 33. & vide Bulst. 189.—Nor to persons who sue *in auter*
droit; for which vide *infra*, concerning executors and administrators. (d) For this vide 2 Lev.
 81. (e) *Secus*, if the original be discontinued. Leon. 105. Hut. 36. Cro. Car. 575.—
 The plaintiff, the day before the trial, came into court, and entered a *nolle prosequi*, and
 whether the defendant should have costs, Hard. 152. *dubitatur*. (f) Though special. Cro.
 Eliz. 465. Hard. 152. (g) In covenant against two for not building, judgment is given
 against one by default, and the other pleads performance, and it is found for him; the plaintiff
 can have no judgment, but the defendant shall have his costs. Lev. 63. (h) Not upon de-
 murrer that goes to the writ only; *secus*, if to the action. And. 117. vide Hard. 152, Cro.
 Car. 533., March, 30. and 8 & 9 W. c. 10. by which it is now certainly given. (i) Though
 judgment is not given upon the nonsuit, but upon the insufficiency of the pleading. Moor,
 625. Winch. 69. 2 Bulst. 248. Godb. 220. & vide Dyer, 32. Cro. Ja. 159. In attaint
 brought by plaintiff, and first verdict affirmed, the defendant shall not have costs, because,
 if the plaintiff had succeeded in the attaint, he should have had such costs only as in the
 first action, if found for him, but not more in respect of the attaint. Daly v. Bellamy, Cro.
 Car. 542. Sir Wm. Jones, 432. S. C. March, 24. S. C.

[By st. 24 H. 8. c. 8. plaintiffs suing to the use of the king in
 any action whatsoever, are exempted from the payment of costs,
 when they are nonsuited, or a verdict passeth against them.]

By st. 4 Ja. 1. c. 3. "if any person or persons shall commence or sue in any court of record, or in any other court, any action, bill, or plaint of trespass, or *ejectione firmæ*, or any other action whatsoever, wherein the plaintiff or demandant might have costs, (in case judgment should be given for him,) and the plaintiff or plaintiffs, demandant or demandants, in any such action, bill, or plaint, after appearance of the defendant or defendants, be nonsuited; or any verdict happen to pass by any lawful trial against the plaintiff or plaintiffs, demandant or demandants, in any such action, bill, or plaint, then the defendant or defendants in any such action, bill, or plaint, shall have judgment to recover his costs against every such plaintiff and plaintiffs, demandant and demandants, to be assessed, taxed, and levied in manner and form as costs in the actions therein recited are to be assessed, taxed, and levied in and by the said law of 23 H. 8."

If the plaintiff be nonsuited, he shall not be permitted, in order to deprive the defendant of costs, to allege the insufficiency of his own declaration to entitle him to costs, in case he had obtained a verdict.

Pritchard v. Williams, Godb. 329. Semb. Anon. *Id.* 345. S. P. unanimously adjudged. Drury v. Fitch, Hob. 219. Hutt. 16. S. C. Prichard v. Reynald, Palm. 365. Thomas v. Bligh, 3 Lev. 327. where the Reporter takes a distinction where the action is wholly mistaken. See also Blyth v. Topham, Cro. Ja. 158.

Ladd v. Wright, Moor, 625. Dove v. Knappe, 2 Ro. Rep. 213. Palm. 147. S. C.

¶ But, where at the trial of the cause, a verdict was found for the plaintiff, and two points were reserved for the opinion of the court; one of which was a ground for arresting the judgment, and the other for entering a nonsuit, and both of them, on argument, were determined against the plaintiff; the court refused to order a nonsuit to be entered, but arrested the judgment, and thereby fixed each party with his own costs, as the defendant might have demurred to the declaration. Besides, his conduct in the transaction, in which the action originated, appeared to be somewhat reprehensible.

The defendant shall have his costs, where the plaintiff is nonsuited in a *homine repleviando*.

Cameron v. Reynolds, Cowp. 403. 1 Hullock, 124.

Or, in an action by the party grieved against the hundred, upon the statute 9 Geo. 1. c. 22. § 7.

So, in general, where a penalty is given by a statute, though subsequent to that of Gloucester, to the party grieved, if the plaintiff be nonsuited, or a verdict pass against him; because the plaintiff in such a case would have had costs if he had succeeded.

Hatt. v. Lissett, Ca. Pr. C. P. 39.

Greetham v. Hundred of Theale, 3 Burr. 1723.

The Mayor of Plymouth v. Werring, Willes's Rep. 440.

If the plaintiff be nonsuited, the defendant shall have costs, although he may have pleaded an insufficient plea in bar.¶

Laiston's case, Godb. 220.

Though the nonsuit be upon a variance of the *nisi prius* roll from the plea roll, and so immaterial, yet the defendant, it seems, shall have costs at the discretion of the court.

Read v. Grappler, Sir Thos. Raym. 38.

But

1 Brownl. 28.

But the defendant shall not have costs, if the plaintiff be nonsuited in an assise, because it is not within the words of the statute.

Laiston's case,
Godb. 220.

Nor, when there is a default in the original writ, and the plaintiff is afterwards nonsuited: because when the original is abased, it is as if no suit had been.

Greenhill, v.
Shepherd,
12 Mod. 145.
Allen v.
Maxey,
Barnes, 120.

[Nor, where there is a plea in abatement, which the plaintiff confesses to be true, and enters a *nil capiat per breve*. *Secus*, it would seem, if the plaintiff move to quash the writ before plea pleaded. (a)]

Pocklington v. Peck, 1 Str. 638. (a) *Id. ibid.* Huet v. Whitebread, Ca. Pr. C. P. 74. Pr. Reg. 78. Poole v. Bradfield, Barnes, 431.

Aplin v. Con-
stable, 1 Ca.
Pr. C. P. 35.

But, if issue be taken on a plea in abatement, and the plaintiff be nonsuited at the trial of it, the defendant shall have his costs; for if the issue were found for the plaintiff, it would be peremptory, and he would have costs.]

Bell v. Potts,
5 East, 49.

¶ Where in an action on the case the plaintiff recovered a verdict, and had judgment in C. B., which judgment, upon a bill of exceptions returned into B. R., was reversed, and the plaintiff took nothing by his bill; the defendant could not have costs.¶

Davies' v.
James, 1 T.
Rep. 371.

[If a defendant remove proceedings from a county-court by *Recordari facias loquelam* into one of the superior courts, and sign judgment of *non-pros* for the non-appearance of the plaintiff, he is entitled to costs.

Geale v. Chap-
man, Ca. Pr.
C. P. 65.

In the case of a *set-off*, the indorsement on the *postea* of the sum due to the defendant on the balance of the accounts is equivalent to a verdict, so as to entitle him to costs.

Rex v. Mid-
lam, 3 Burr.
1720. Davila
v. Herring,
1 Str. 300.

It seems, that upon a nonsuit, the defendant ought to be allowed all such costs as have been incurred by taking the necessary measures for his defence in the action.]

Jordan v.
Harper, 1 Str.
516. Duthy v.
Tito, 2 Str. 1203. acc.

¶ If the plaintiff be nonsuited in an action against several defendants, he may pay the costs to any one of them at his election.

2 Com. Dig.
350.

If the plaintiff be nonsuited for a fault in his declaration, though divers defendants appear severally, yet they shall have only the costs of one nonsuit.

By st. 43 Geo. 3. c. 46. § 3. "In all actions to be brought in England or Ireland, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such action shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought; provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion

"motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount as aforesaid; and provided such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant or defendants; and the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed the amount of the taxed costs of the defendant or defendants in such action; and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant or defendants to be taxed as aforesaid, then the defendant or defendants shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action from the amount of his or their costs to be taxed as aforesaid, to take out execution for such costs, in like manner as a defendant or defendants may now by law have execution for costs in other cases."

The mere circumstance of a defendant having been arrested and holden to special bail for a larger sum than that which the plaintiff recovered, is not of itself sufficient to warrant an application by the defendant for costs under this act; but, it would seem, that the want of a reasonable or probable cause for so arresting and holding him to bail ought to be made out by circumstances similar to those which would be required to enable a defendant to maintain an action for a malicious arrest.

The act seems to relate only to cases where the plaintiff does not recover by the verdict of a jury the amount of the sum for which he has arrested and holden the defendant to bail. Therefore where the plaintiff having arrested and holden the defendant to bail for 50*l.* took out of court 20*l.* which the defendant had paid in and proceeded no further, the court of K. B. did not think the defendant entitled to costs. (a)

Rep. 667. *Cammack v. Gregory*, 10 East, 525. (a) In the case of *Laidlaw v. Cockburn*, 2 N R. 76. *Rooke and Chambre*, Justices, were clearly of opinion in a similar case in C. P. that this was within the act: but they ultimately discharged the rule on the merits.

1 HUllock, 131.
See Fountain
v. Young,
1 Taunt. 60.
Younie v.
Mullison,
1 Smith's Rep.
521.

Rouvieroy v.
Alefon,
13 East, 90.
Clarke v.
Fisher,
1 Smith's Rep.
428. Linth-
waite v. Bel-
lings, 2 Smith's

Where a verdict was taken at the trial for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs were directed to abide the event of the award, and the arbitrator found a less sum to be due to the plaintiff than that for which the defendant had been arrested; the court held that the sum so found, and for which judgment was afterwards given, was to be considered as a sum recovered within the meaning of this act, so as to entitle the defendant to apply for costs.

1 HUllock, 134.
Neale v. Por-
ter, 2 Tidd's
Pr. 4th ed.
887. n. Burns
v. Palmer,
in Seac. M.
44 Geo. 3.
S. P. *ibid.*

Anon.
2 Smith's Rep.
261.

Where the defendant had been arrested for the price of coals, considered as full measure, and the plaintiff recovered less than the sum sworn to, the defendant was allowed his costs upon this statute; the plaintiff having previously to the arrest compounded a penal action for delivering the same coals, as being short of measure.

The statute of 8 Eliz. c. 2. recites, that "where divers persons of their malicious minds and without any just cause do many times cause and procure others of the queen's subjects to be very much molested and troubled by attachments and arrests made of their bodies, as well by process of *latitat*, *alias*, & *pluries capias*, sued out of the court commonly called the King's Bench, as also by plaint, bill, or other suit in the court commonly called the Marshalsea, and within the city of London, and other cities, towns corporate, and places where any liberty or privilege is to hold pleas of debt, trespass, and other personal actions and suits; and when the parties that be arrested or attached are brought forth to answer to such actions and suits as shall be objected against them, then many times there is no declaration or matter laid against the parties so arrested or attached, whereunto they may make any answer; and so the party arrested is very maliciously put to great charges and expences without any just or reasonable cause; and yet nevertheless hitherto, by order of the law, the party so grieved and vexed could never have any costs or damages to him to be judged or awarded for the said unjust vexation and trouble: for remedy whereof, be it enacted, that when and as often as any person and persons shall sue forth, or by any means cause or procure to be sued forth of the said court commonly called the King's Bench, any of the writs or process before mentioned against any person or persons which upon the same writ or writs shall happen to be arrested, or which shall appear upon the return of any of the said writs or process, and shall put in his or their bail or bails to answer such suit as shall be objected against him, according to the common order of the court; that then in every such case if the party or parties at whose suit, means, or procurement, the same writ, writs, or process was obtained or sued forth, do not, within three days next after such bail had and taken, put into the same court his or their declaration against the same party or parties against whom such writ or process shall be sued; or, if after declaration had and put into the same court, the plaintiff in such case shall not prosecute the same with effect, but shall willingly and apparently to the court suffer his or their said suit to be delayed, or shall, after declaration so had, suffer the same suit to be discontinued, or otherwise shall be non-suit in the same; that then, in every such case, the judges of the same court for the time being shall by their discretions, from time to time as they shall see or perceive any such default

“ default to be in the party or parties at whose suit, means, or
 “ procurement such writs or process was sued forth, award and
 “ adjudge to every person and persons so arrested, vexed,
 “ molested, or troubled by such writs or suits his and their
 “ costs, damages, and charges by any means sustained by
 “ occasion of any such writs, process, arrests, or suits taken,
 “ sued, or had against him, to be paid by such person or per-
 “ sons that so doth or shall cause or procure any such writ or
 “ process to be sued forth as is aforesaid.”

The third section of the act gives, in like manner, costs to a defendant attached or arrested to answer any suit in the Marshalsea or any other of the inferior courts therein mentioned, in case the plaintiff do not declare in due time, or, afterwards, delay or discontinue his suit, or be nonsuited.

By st. 13 Car. 2. st. 2. c. 2. § 3. unless the plaintiff who has sued a writ, bill, or process out of the Court of King's Bench or Common Pleas shall put into the court from which it issued his bill or declaration against the person thereupon arrested in some personal action or *ejectione firmæ* of lands or tenements before the end of the term next following after appearance, a nonsuit may be entered in the said courts respectively; and the defendant shall have judgment to recover costs against such plaintiff, to be assessed, taxed, and levied in such manner and according as it is provided by the statute for costs made in the twenty-third year of King Henry the Eighth.

express leave of the Court, which would not be granted but upon payment of costs, so that a statutable provision for costs would have been unnecessary in that case. Say. Costs, 83. 1 Leon. 103.

In every case of a discontinuance by the plaintiff, *by leave of the court*, the defendant is entitled to costs.

Comb. 299.
323. Bull.
N. P. 322.
Burt. Pr. Exch. 155.

Upon a rule to discontinue, it is incumbent upon the plaintiff to get an appointment from the master to tax the costs, and serve a copy of it on the defendant's attorney; for the service of a rule to discontinue does not, of itself, without an appointment to tax the costs, operate as a discontinuance of the action. The plaintiff is not, however, liable to an attachment for non-payment of the costs taxed upon the common rule for a discontinuance; but, as this rule is conditional, and no stay of proceedings unless the costs be paid, the action will not be discontinued, and the plaintiff may be compelled to proceed therein.

Whitmore v. Williams,
6 T. Rep. 765.

Stokes v. Woodeson,
7 T. Rep. 6.

No costs are payable upon a discontinuance in law, or on a demurrer.

Comb. 325.
1 Sid. 142.

Where a plaintiff discontinues, by leave of the court, in a species of action wherein the defendant, in case he obtained a verdict, would be entitled to double costs, it must be upon payment of double costs.

Devenish v. Martin, Bull.
N. P. 332.
2 Str. 974. S. C.
2 Barnardist.

373. 432. 449. S. C.

Styl. 366.

1 Salk. 178.

Carth. 86.

1 Show. 63.

1 Str. 76.

1 Saund. 39.

Pym v. Warren, Barnes, 169.

Cooper v. Tiffin, 3 T. Rep. 511.

Milliken v. Fox, 1 Bos. & Pull. 157.

Dibben v. Cooke, 2 Str. 1005. Poole v. Boulton, Barnes, 139. Ingle v. Wordsworth, 3 Burr. 1284.

Duke of Norfolk v. Anthony, 2 Tidd's Pr. 890. 4 ed.

Thrustout v. Woodyear, Barnes, 131.

The Court, on motion, gave the plaintiff leave in one case to discontinue, where he was under a peremptory rule to try the next term, on condition of paying *good* costs to the defendant. And the plaintiff may, by leave of the Court, discontinue after a *special* verdict, but such leave is never given after a *general* verdict, or a writ of inquiry executed and returned, or after a peremptory rule for judgment on demurrer. But after demurrer argued and allowed, a discontinuance has been permitted, where there was a mistake in pleading.

The Court refused to permit a plaintiff to discontinue upon payment of costs after judgment given on demurrer for him, but not entered on record, and a writ of error brought, and bail put in thereon, without payment of costs on the writ of error.

The entry of a *noli prosecute* by the plaintiff is a discontinuance within this act, and the defendant is consequently entitled to costs.

But, if a *noli prosecute* be entered upon one of the counts of the declaration, after it has been demurred to, the Court will not in that stage of the proceedings determine a question of costs respecting such a count, the right to costs being a matter for future consideration.

By st. 8 & 9 W. 3. c. 11. "where several persons shall be made defendants to any action or plaint of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit, in like manner as if a verdict had been given against the plaintiff or plaintiffs, and acquitted all the defendants; unless the judge, before whom such cause shall be tried, shall immediately after the trial thereof, in open court, certify upon the record under his hand, that there was a reasonable cause for making such person or persons a defendant or defendants to such action or plaint."

This act, like every other act relating to costs, is to be construed strictly and according to the letter: for costs are considered (perhaps, not very correctly,) as in the nature of a penalty. Hence it hath been adjudged, that neither case for a tort, trover, replevin, nor informations are within it.

1 Bl. 355. Regina v. Danvers, 1 Salk. 194.

Neither doth it extend to an action of debt upon bond against executors, one of whom was acquitted on the plea of *plene administravit præter*.

Upon the trial of an ejectment all the defendants were found guilty except one, who was found not guilty, and his costs were taxed on the *postea*, the judge not having certified that there was a reasonable cause for joining him in the action. He afterwards applied to the Court that he might be allowed a third part of defendant's common costs, and all his extraordinary

costs.

costs. But it appearing to be nothing more than a contrivance to fix the plaintiff with the extraordinary costs, which had been incurred on account of all the defendants, to one of whom this defendant was tenant, and indemnified by him, the Court discharged the rule with costs.

So, where on a joint plea of not guilty to trespass and assault one of the defendants was found guilty with 1s. damages and 1s. costs, and the other was acquitted, the latter was allowed only 40s. costs. The Court observed, that if they had pleaded separately, it might have been different; but, as they had pleaded jointly, it would be making the plaintiff pay the costs of the other defendant to allow increased costs to this defendant.

Hughes v. Chitty, 2 Maule & Selw. 172.

If one of several defendants let judgment go by default, and the other plead a plea, which goes to the whole declaration, and shews that the plaintiff had no cause of action, and such plea be found for him, he shall have costs; and the plea being an absolute bar to the action, the other defendant shall have the advantage of it, and shall not pay costs to the plaintiff upon the judgment by default.

Tilly and Wody's case, 7 E. 4. 31. Parker v. Lawrence, Hob. 70. Porter v. Harris, 1 Lev. 63. 1 Sid. 76. and

1 Keb. 284. *Semb.* S. C. by the name of Boulter v. Ford. Biggs v. Benger, 2 Ld. Raym. 1372. 8 Mod. 217. S. C. 1 Str. 610. S. C. Langdon v. Vinicombe, Ca. Pr. C. P. 107. Shrubbs v. Barret, 2 H. Bl. 28.

1 Hullock, 143. Noke v. Ing-ham, 1 Wils. 89.

But, if the plea pleaded by one of several defendants be merely a personal discharge as to him, and do not constitute an answer to the action, the plaintiff will not be precluded by a verdict on such a plea for the party pleading it from recovering his damages and costs against the other.

By § 2. of st. 8 & 9 W. 3. c. 11. if upon any demurrer by a plaintiff or defendant in any action in any court of record, judgment shall be given against him, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendam, fieri facias, or elegit*.

1 Hullock, 145. Thomas v. Lloyd, 1 Salk. 194. 1 Ld. Raym. 337. S. C. Garland v. Extend, 1 Salk. 194. 2 Ld. Raym. 992. S. C. Miller v. Seagrave, 1 Ca. Pr. C. P. 25.

The demurrer meant by this statute is a demurrer to the *merits*, upon which the Court may decide the right of action, and give final judgment. Upon a judgment on a demurrer to a plea in abatement a defendant is not entitled to his costs, because the judgment in that case is not final, nor is the right of action thereby determined. Besides, it was the intention of the act to give costs to the defendant only where the plaintiff would have been entitled to them in case judgment had been given for him, and upon a judgment in his favour upon a demurrer to a plea in abatement the plaintiff has no costs.

Thrall v. Bp. of London, 1 H. Bl. 530.

In an action of trespass and assault for criminal conversation with the plaintiff's wife, the defendant pleaded two pleas, *viz.* not guilty, and not guilty *infra sex annos*. On the former plea issue was joined, and to the latter the plaintiff demurred. Before the arguing of the demurrer the issue joined on the first plea was tried, and a verdict was found thereon for the plaintiff with

Cooke v. Sayer, 2 Burr. 753. 2 Wils. 85. S. C.

5*ol.* damages. Afterwards the demurrer was argued and adjudged for the defendant. Under these circumstances it was holden, that the defendant should have judgment, and also the costs of the demurrer, but that, upon the trial, there should be no costs on either side.

By st. 3 Ja. 1. c. 15. § 4. "If in any action of debt, or action upon the case on an *assumpsit* for the recovery of any debt, to be sued or prosecuted against any the person or persons" (therein described) "in any of the king's courts at *Westminster*, or elsewhere out of the court of Requests in the city of *London*, commonly called the court of Conscience, it shall appear to the judge or judges of the court, where such action shall be sued or prosecuted, that the debt to be recovered by such plaintiff doth not amount to the sum of forty shillings, and the defendant in such action shall duly prove, either by sufficient testimony, or by his own oath, to be allowed by any the judge or judges of the said court, where such action shall depend, that at the time of the commencing such action, such defendant was inhabiting and resiant within the city of *London*, or the liberties thereof, that in such case the said judge or judges shall not allow to the said plaintiff any costs of suit, but shall award that the plaintiff shall pay so much ordinary costs to the defendant, as the defendant shall prove before the said judge or judges it hath truly cost him in the defence of the said suit."

The right of suing in this court is by the statute of 14 G. 2. c. 10. (by which the above statute is explained and confirmed) extended to every citizen and freeman of *London*, and every other person inhabiting within the city or its liberties, and every person renting or keeping any shop, shed, stall, or stand, or seeking a livelihood in the city or its liberties, against any person whatsoever inhabiting or seeking a livelihood within the same limits, whilst so inhabiting or seeking a livelihood.

By § 12. of statute 39 & 40 G. 3. c. 104. which recites the above acts, and extends the jurisdiction of this court to the recovery of debts not exceeding five pounds, it is enacted, that "if any action or suit shall be commenced in any other court than the said court of Requests, for any debt not exceeding the sum of five pounds, and recoverable by virtue of the said recited acts, or of this act, or any of them, in the said court of Requests, then and in every such case, the plaintiff or plaintiffs in such action or suit, shall not, by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the judge or judges before whom the same shall be tried or heard, shall think fit to certify that such debt ought to have been recovered in the said court of Requests, then and so often such defendant or defendants shall have double costs, and shall have such remedy for recovering the same as any defendant

“ defendant or defendants may have for his, her, or their costs
“ in any cases by law.”

By statute 23 G. 2. c. 33. it is enacted, that a special county court shall be holden at least once a month in every hundred of the county of *Middlesex* by the county clerk: that in all causes not exceeding the value of forty shillings, the county clerk and twelve suitors of the said county court shall proceed in a summary way, and from time to time make such order or decree therein, as they shall adjudge agreeable to equity and good conscience. § 19. “ That in case any action of debt, or action upon “ *assumpsit* shall be commenced and prosecuted in any of his “ majesty’s courts of record at *Westminster*, and the defendant, “ at the time of such action brought, shall live or reside in the “ said county of *Middlesex*, and be liable to be summoned to the “ said county court, and the jury, upon the trial of such cause, “ shall find the damages for the plaintiff under forty shillings, “ unless the judge shall in open court certify upon the back of “ the record, that the freehold, or title to the plaintiff’s land “ principally came in question at such trial, no costs shall be “ awarded to the plaintiff in such action, but the defendant shall “ be entitled to and recover double costs of suit.”

If a man be sued in one of the superior courts for a matter arising within the jurisdiction of the court of Conscience of *London*, he may plead the statute of 3 Ja. 1. in bar of the action; or should he omit to plead it, and suffer a verdict to go against him, if the damages thereby given are under forty shillings, he may afterwards take the benefit of the statute by entering a suggestion on the roll.

After a judgment (*a*) by default, and a writ of inquiry executed, and damages assessed at 4*l.* 7*s.* 6*d.* the court upon application of the defendant, before final (*b*) judgment, granted a rule for staying the proceedings upon payment of the damages assessed without costs, upon an affidavit of the defendant’s residence at the time of the commencement of the suit within the jurisdiction of the *London* court of Requests.

Pennel v. Wallis, cited in
1 Str. 47.

Dunster v. Day, 8 East, 239. *Footte v. Coare*, 2 Bos. & Pull. 588. (*a*) *Brampton v. Crabb*, 1 Str. 46. *contr.* over-ruled.

(*b*) *Barney v. Tubb*, 2 H. Bl. 351.

Where the plaintiff declared for more than forty shillings, and obtained a verdict for only thirty shillings, the court granted a rule for entering a suggestion on the record, in order to entitle the defendant to his costs, under the statute of 22 G. 2. c. 47. for erecting a court of Requests in the borough of *Southwark*, the provisions in which act as to costs are similar to those in 3 Ja. 1. c. 15.

Weston v. Donnelly, Say. Costs, 64.

But, where the balance is reduced by a set-off, or upon an issue on a plea of tender, to a sum under forty shillings, the defendant, though within the jurisdiction of a court of Conscience, will not be entitled to costs: for the debt at the commencement of the suit exceeded forty shillings, and the plaintiff could not know that the defendant would avail himself of the set-off, or plead a tender.

Pitts v. Carpenter, 2 Str. 1191. 1 Wils. 19. *S. C.* *Gross v. Fisher*, 3 Wils. 48. Say. Costs, 65. *S. C.* *Heaward v.*

Hopkins, Dougl. 448.

But,

Horn v.
Hughes,
8 East, 347.
Clark v. As-
kew, Id. 28.

But, where the original debt had been reduced below the sum of five pounds by part payments on account, *before* the commencement of the action; the defendant was allowed his costs. The decision in *McCollam v. Carr*, 1 Bos. & Pull. 28. *contr.* over-ruled.

Bateman v.
Smith, 14 East,
301.

So, where it was cut down at the trial to a sum under forty shillings by the plea of infancy.

Fountain v.
Young,
1 Taunt. 60.

But the twelfth section of the act for the court of Requests held for the borough of *Southwark* of 46 G. 3. c. 87. containing an exception "of any debt for any sum, being the balance of" an account on demand, originally exceeding five pounds;" a debt originally above five pounds, but reduced by partial payments below that sum, is within the terms of that exception.

Porter v. Phil-
pot, 14 East,
344.

But, where a demand for plumber's work and new materials found, amounting in value to eight pounds, was reduced below five pounds by the plaintiff's taking the old lead, and allowing for it, instead of using it as far as it would go, in which case the original demand would have been under five pounds; this was holden not to be a demand reduced below that sum by balancing an account within the exception of this act, and that therefore the plaintiff was deprived of his costs.

Fomin v. Os-
well, Maule &
Selw. 393.

Where the plaintiff in *assumpsit* failed to prove his special counts, but upon the common counts recovered less than five pounds upon the balance of an account rendered to him by the defendant, which contained items both on the debit and credit side, it was holden that he was deprived of costs by 39 & 40 Geo. 3.

Fitzpatrick v.
Pickering,
2 Wils. 68.
Barnes, 470.
S. C. differ-
ently reported.
(a) *Jefferies v. Watts*, 1 N.R. 153.

If the verdict gives less than forty shillings damages in an action which ought to have been prosecuted in a court of Conscience, the court are bound to allow the defendant to enter a suggestion upon the record, unless (a) he has done any thing that may amount to a waiver of his right.

Keay and
another v.
Rigg, 1 Bos.
& Pull. 11.

Where a general jurisdiction is given, the court of Conscience has the trial of bankruptcy as incidental to it; and therefore if assignees of a bankrupt recover a sum under forty shillings, the defendant shall have leave to enter a suggestion.

Wase v.
Wyburd,
Doug. 246.

If a personal representative bring *assumpsit* in the court of King's Bench, and recover less than forty shillings, the defendant, if resident within the county of *Middlesex*, and liable to be summoned to the County court, is entitled to enter a suggestion of these facts on the roll under 23 G. 2. c. 33. in the same manner as if the plaintiff had sued in his own right.

Butler v.
Grubb, cited
in 3 T. Rep.
139.

If a cause is referred to arbitration, and the costs are directed to abide the event of the suit; the defendant will be entitled to them, if it appear by the award that the original debt was recoverable in a court of Conscience.

Lees v. Rogers,
4 Taunt. 150.

No person to whom any debt of certain descriptions, not exceeding five pounds, is owing from any person resident within the jurisdiction of the *Birmingham* court of Requests, can re-
cover

cover any costs, if he sue elsewhere than in that court; where-soever the plaintiff may reside, or the cause may accrue.

But a citizen of *London*, not resident in *London*, having a demand under forty shillings against another citizen who is resident, is not bound to sue in the court of Requests pursuant to the 14 G. 2. c. 10., that act applying only to cases where both plaintiff and defendant reside within the jurisdiction.

The mode of proceeding to take advantage of these statutes is either by plea or suggestion. If the statute erecting the court contain a prohibitory clause that *no action for any debt not amounting to so much, and recoverable in that court, shall be brought by any person residing within the jurisdiction in any other court*, the defendant can only take advantage of it by *plea in bar* to the action; or, at the latest, by making the objection at the trial. But, if there be no such clause, he may apply before, or in the same term in which, final judgment is signed, upon an affidavit stating the proper facts, for leave to enter a suggestion of such facts on the roll. This suggestion is traversable, if any of the facts in it be untruly alleged: or, it may be demurred to, if the facts set forth are not sufficient to bring the case within the act. And, where the plaintiff demurred to the suggestion, which was adjudged against him, the costs of the application were allowed, as well as the costs of the trial and former proceedings, although not, strictly speaking, costs of the defence.

If the defendant pay into court a sum under forty shillings, which the plaintiff accepts; the plaintiff is not therefore liable to costs, as suing for a sum under forty shillings.

If an action on the case for an injury to a house for which the plaintiff has delivered a bill of 1*l.* 10*s.* be commenced in one of the superior courts, the proceedings therein may be stayed, the county court being the proper tribunal for such a case.

By the *Welch* judicature act of 13 G. 3. c. 51. it is enacted, that in *personal* (a) actions tried in any *English* county, where the cause of action arose, and the defendant resides in *Wales*, if the plaintiff shall not recover a verdict for ten pounds, he shall be nonsuited and pay the defendant's costs, unless it be certified by the judge that the freehold or title was chiefly in question, or that the cause was proper to be tried in an *English* county. And by § 2. in all transitory actions wherein it shall appear at the trial, that the cause of action arose, and the defendant was resident in *Wales*, and the plaintiff shall not recover a verdict for ten pounds, and it shall be so certified by the judge; on such facts being suggested on the record, a judgment of nonsuit shall be entered, and the plaintiff shall pay to the defendant his costs, deducting thereout the sum recovered by the verdict.¶

By 8 & 9 W. 3. § 3. in all actions of waste, debt upon the statute for not setting forth tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles; and in suits upon a *scire facias*, and suits upon prohibitions,

Webb v. Brown, 5 T. Rep. 535.

1 Hull. 177.
Taylor v. Blair, 3 T. Rep. 452.
Parker v. Eldring, 1 East, 352.

Barney v. Tubbs, 2 H. Bl. 351. Andr. 380.
Watchorn v. Cook, 2 Maule & Selw. 348.

Hickman v. Colley, 2 Str. 1120. Andr. 377. S. C. but not S.P.

Cadwallader v. Barley, Anstr. 627.

Melton v. Garment, 2 N. R. 84.

(a) An action of covenant to levy a fine is a personal action within the meaning of this act.
Davis v. Jones, 1 N. R. 267.

bitions, the plaintiff obtaining judgment or any award of execution after plea pleaded, or demurrer joined therein, shall recover his costs; and if the plaintiff shall become nonsuit or discontinue, or a verdict pass against him, the *defendant shall* recover his costs.

(E) What Persons are entitled to, or exempted from paying Costs: And herein,

1. Of Executors and Administrators.

Vide tit. Executors. (a) AN executor defendant pays costs in all cases, and the judgment is *de bonis testatoris si &c. & si non tunc de bonis propriis*: also, (b) when he is defendant, and there is judgment for him, he shall have his costs.

[Yet it is said to have been determined in a late case, by the Court of Common Pleas, that no costs shall be allowed on a judgment of assets *in futuro*, on a plea of *plenè administravit*. Imp. Pr. C. P. 2 Ed. 374. Imp. Pr. K. B. 3 Ed. 275. Marg. If a bankrupt executor plead a false plea in an action commenced against him, between the issuing of the commission, and the obtaining of his certificate, by a creditor of his testator, he is liable to be taken in execution for the costs. *Howard v. Jemmett*, 3 Burr. 1368. 1 Bl. Rep. 400. Where an executor pleads *non assumpsit*, and a specialty debt sufficient to cover the assets, the court will permit him to withdraw the former plea, upon payment of the costs occasioned by that plea only. *Dearne v. Grimp*, 2 Bl. Rep. 1275.] (b) Cro. Eliz. 503. Hut. 69. 79.

N. Bendl. 19. But an executor or administrator is not within the 23 H. 8. Cro. Eliz. c. 15. or 4 Ja. 1. c. 3. which give costs to the defendant after a verdict or nonsuit; nor within the 8 & 9 W. & M. c. 11. which give costs upon a demurrer, being made upon the same platform; so that when they are plaintiffs they pay no costs, for they sue *in auter droit*, and are but trustees for the creditors, and are not presumed to be sufficiently conusant in the personal contracts of those they represent: (c) and this by an equitable construction of the statutes, for there are no express words to exempt them.

Brownl. 107. 6 Mod. 93. (c) || Attending to the language of the act of 23 H. 8. c. 15. perhaps, we may be authorized to say, that the sound principle on which the exemption of executors and administrators rests, is not the degree of ignorance under which they may be supposed to lie, but that the exemption founds itself on the description of the actions contained in the statute in which costs are to be paid. The words are, "any action, bill, or "plaint of debt or covenant upon any especialty made to the plaintiff or plaintiffs, or upon "any contract supposed to be made between the plaintiff or plaintiffs, and any other person or "persons." The statute of 4 Ja. 1. c. 3. does not carry the matter further. The exposition of the early cases seems to be, that if the contract be not made with the executor or administrator, but with the testator or intestate whom they represent, then it is not an action "on a contract supposed to be made with the plaintiff and any other person or persons" in the language of the act. By Lord Eldon in *Tattersall v. Groote*, 2 Bos. & Pull. 255.]

11 Mod. 135. But, if executors or administrators bring an action in their own right, as for a conversion or trespass in their own time, they shall pay costs.

pl. 17. 174. v. Spencer, 7 T. Rep. 358.] 2 H. 7. 15. Sav. 134. Hut. 79. Although they name themselves executors, for it is but surplusage. Dals. 96. Latch. 220. 1 Vent. 92. — *Vide* Mason and Jackson, 3 Lev. 60. adjudged *cont. per totam curiam*; because in the right of the testator, though a thing done in their own time. — So, in a ravishment of ward brought by executors, for a ravishment in their time. *Peacock and Steer*. Cro. Car. 29. By three judges *cont.* Yelv. But

But *Hut.* 78. S. C. by two judges against two; and in 6 *Mod.* 94. S. C. cited *per Holt*, and the reason of the resolution was, because the ward never came to the defendant's possession.

So, in an *indebitatus assumpsit* by husband and wife, who declared, that the defendant was indebted to them in 20*l.* as executors of the last will and testament of *J. S.* for money had and received to their use as executors, which he promised to pay, &c. on the trial the plaintiffs were nonsuited; and it was held, that the plaintiffs should pay costs, for the cause of action arose in their time; for the receipt being since the death of the testator, if it was by the consent of the executor it is the receipt of the executor; or if without his consent, yet the bringing of the action is a consent, and the naming themselves executors is only to deduce their right and set it forth *ab origine*.

But, if an executor brings an *indebitatus* upon an account made in his time, it is in the right of his executorship, and he (a) shall pay no costs.

(a) If he brings an *insimul computasset*, and is nonsuited, he shall pay no costs; because there was no new cause of action, but a new action upon ascertaining an ancient right, notwithstanding which, it still remains the testator's debt. *Eaves v. Mocato*, 6 *Mod.* 93. Said to have been adjudged, 2 *Ann.* Salk. 207. 314. [This case of *Eaves v. Mocato* is denied to be law in *Andr.* 359. and 5 *T. Rep.* 234. In the case of *Goldthwayte v. Petrie*, reported in this last book, the action was by husband and wife, as executrix for money had and received after the testator's death to the use of the wife, as executrix, and there being a verdict for the defendant, the court held him entitled to costs.]

So, if the goods of the testator be taken and converted before they come to the hands of the executor, he shall not pay costs upon a nonsuit in an action brought for these, for they were never assets.

So, where an action was brought by an administratrix for money lent by the intestate, the defendant pleaded payment to the plaintiff after the death of the intestate, and issue joined upon it, and verdict for the defendant; it was insisted upon, that the defendant should have costs upon 4 *Ja.* 1. c. 3. this being a falsity in her own conscience; but it was denied, the action being as administratrix; so that upon bringing the action, that which is pleaded to be in her own conscience does not appear.

If an administrator brings an action on the case in *C. B.* and there is a verdict and judgment against him, and thereupon he brings a writ of error in *B. R.* where the judgment is affirmed; yet he shall not pay costs; for he is not a person within the intent of the statute which gives costs in this case, although it was objected, that it was his own act, and lay in his own knowledge, and was brought *in dilacione executionis*.

[The question, in what cases a person suing as executor or administrator shall be exempt from costs, is embarrassed with a variety of decisions so contradictory, that it is impossible to reconcile them: its solution, however, seems now to turn upon this distinction, namely, whether it be necessary, or not, for him to sue in his representative character: if it be necessary, he shall not be liable to the payment of costs: if it be not necessary, he stands

Salk. 207.
Jenkins & Ux.
v. Plume.
6 *Mod.* 92. 181.
S. C. adjudged.

2 *Lev.* 165.
2 *Jones*, 47.
adjudged.
4 *T. Rep.* 280.

Salk. 208. *per Holt C. J.*

Pasch. 27 *Car.*
2. in *B. R.*
Anne Taylor
v. *Barebone*.

Carth. 281.
Gale and Till.
4 *Mod.* 244.
and 3 *Lev.* 375.
S. C.

Cockerill and
Wife Execu-
trix v. Kyn-
aston, 4 *T. Rep.*
277. *Gold-*
thwayte and
Wife Execu-
trix v. Petrie,
5 *T. Rep.* 234.

|| Bolland v. stands precisely in the situation of any other plaintiff, without
Spencer, 7 T. any claim to exemption from the character he has assumed.
Rep. 359. Tat-
tersall v. Groote, 2 Bos. & Pull. 253. Cooke v. Lucas, 2 East, 395. Wilson v. Hamilton,
1 Bos. & Pull. 445. Hollis v. Smith, 10 East, 293. Grimstead v. Shirley, 2 Taunt. 116.||

Knight v. Although an executor proceed to trial, after the payment of
Duchess money into court, and recover a verdict for a less sum, yet he is
Hamilton, not liable to pay any costs.
Bunb. 44.

Gregg's case, It was formerly holden, that money could not be paid into
2 Salk. 596. court in an action by an executor or administrator, because the
Bryan v. Hol- executor or administrator is not liable to costs. But it is now
loway, Barnes, settled, (a) that money may be paid into court in such case, for
279. the effect of it is not to make the executor *pay*, but only *lose* his
(a) Crutchfield subsequent costs.
v. Scott. 2 Str. 796.

Martin v. Nor- Where the plaintiff is executor or administrator, he is not
folk, 1 H. Bl. liable to costs under 5 Geo. 2. c. 30. § 7. though the defendant
528. plead the general plea of bankruptcy, and obtain a verdict.

Howard v. Neither does he pay costs under the 14 Geo. 2. c. 17. upon a
Radburn, judgment against him, as in the case of a nonsuit, for not pro-
Barnes, 130. ceeding to trial according to the course of the court in which the
Per Curr. acc. cause is instituted.]
4 Burr. 1928.
|| Booth v. Holt, 2 H. Bl. 277.||

Bellew v. Ayl- || Nor can costs be awarded against him on a *scire facias* or
mer, 1 Str. 188. *prohibition*; for the act of 8 & 9 W. 3. c. 11. which gives costs
Scammell v. in those proceedings, provides in § 5. that it shall not vary the
Wilkinson, law as to executors and administrators.||
3 East, 202.

7 Mod. 98. 118. [But an executor or administrator shall pay costs for not pro-
1 Salk. 314. ceeding to trial pursuant to his notice, if it be through his own
2 Ld. Raym. default.
806. 1 Str. 33.
3 Burr. 1305. 1585. Ogle v. Moffat, Barnes 133.

Nunez v. So, he hath been made to pay costs for withdrawing his record
Modigliani, before trial.
1 H. Bl. 217.

Hullock on It does not appear to be established, whether or not an exe-
Costs, 193. cutor or administrator is liable to pay costs upon discontinuing
Eccleston v. his suit; but though no general rule can be extracted from the
Clipsam, cases upon this subject, which are contradictory, yet upon princi-
2 Keb. 385. ple and the reasoning of the court in the cases referred to in the
Baynham v. margin, it seems, that where the necessity of discontinuing is oc-
Matthews, casioned by the laches or default of the executor himself, the
2 Str. 871. condition of paying costs will, generally, be annexed to the rule
Fitzg. 130. to discontinue.
Bird v. Smith, 2 Kel. 70.
2 Barnard. 154. Haydon v. Norton, Cas. Pr. C. P. 79. Harris v. Jones, 3 Burr. 1451. 1 Bl.
Rep. 451. Bull. Ni. Pri. 332. Bennet v. Coker, 4 Burr. 1927. Say. Costs, 96. Hugh v. Lloyd,
Burt. Pr. Excheq. 156.

Lumley v. An executor shall pay costs upon being nonprossed for want
Nicholls, Cas. of a replication, or for not declaring in due time, because guilty
Pr. C. P. 14. of a default.]
Hawes v.

Saunders, 3 Burr. 1584. || Higgs v. Warry, 6 T. Rep. 654.||

|| Where

¶ Where executors or administrators lend their names improperly to other persons, and bring actions *malâ fide*, the court will visit them with costs.

The executor having pleaded *non assumpsit*, as well as *plenè administravit* and *plenè administravit præter*; &c. and thereby forced the plaintiff to go to trial; the plaintiff, obtaining a verdict on the *non assumpsit*, and being entitled to judgment of assets *quando acciderint*, was allowed the general costs of the trial, although the issue of *plenè administravit* was found for the defendant.

But, where upon the pleas of *non assumpsit* and *plenè administravit*, the plaintiff joined issue, and omitted to pray judgment of assets *quando acciderint*, and the first issue was found for the plaintiff, and the last for the defendant; the defendant was holden entitled to the *postea* and general costs.¶

Comber v. Hardcastle, 3 Bos. & Pull. 115.

Hindsley v. Russell, 12 East, 232.

Hogg v. Graham, 4 Taunt. 135.

2. *Of Officers and Ministers of Justice.*

[By 43 Eliz. c. 2. § 19. (entitled *an act for the relief of the poor*), if in any action of trespass or other suit to be brought against any person for making any distress or sale, or doing any other thing under the authority of that act, there shall be a verdict for the defendant, or a nonsuit of the plaintiff after appearance, the defendant shall recover treble damages with his costs also, and that to be assessed by the same jury, or writ to inquire of the damages, as the same shall require.]

only the damages. Noy, 137. S. C. If the jury who try the issue assess only single damages, or if they omit to assess any damages at all, the court will, on a verdict for the defendant, or nonsuit of the plaintiff, supply the omission by awarding a writ of inquiry of damages. As a ground, however, for this, a suggestion must be entered on the *postea* that the defendant was an overseer of the poor, &c., and that the injury complained of was an act done in the execution of his office. Such a suggestion indeed is not necessary, where the defendant's title to treble damages appears on the record; as, where in replevin, he avows as overseer of the poor, &c. Carth. 362. 1 Salk. 205. 5 Mod. 76. 118. Skin. 595. 1 Ld. Raym. 59. 2 Str. 1021. Ca. temp. Hardw. 138. Say. Rep. 214. 2 Bl. Rep. 921. 3 Wils. 442.

This act extends to other actions against overseers besides trespass. Okely v. Salter, Yelv. 176. But the costs shall not be trebled,

By the statute 7 Ja. 1. c. 5. it is enacted, "That if any action upon the case, trespass, battery, or false imprisonment, shall be brought in the courts of *Westminster*, or elsewhere, against any justice of peace, mayor, bailiff of city or town corporate, headborough, portreeve, mayor, bailiff, (a) constable, tithing-men, collectors of fifteenths and subsidies, concerning any thing by them done by virtue of their office, they, and all others, doing any thing in their assistance, or by their command concerning their office, may plead the general issue, &c. and (b) if the verdict shall pass with the defendant in any (c) such action, or the plaintiff become nonsuit, or suffer a discontinuance, the justices, or (d) such judge before whom the matter shall be tried, shall allow the (e) defendant his double costs."

[See further with respect to justices of the peace and constables, 24 G. 2. c. 44., and with respect to officers of the excise or customs, 20 G. 3. c. 70. § 34. and 24 G. 3. Sess. 2. c. 47. § 35.] (a) Extends to a deputy constable. 3 Bulst. 77. Roll. Rep.

274. Moor, 845. (b) Though judgment is after given upon the insufficiency of the declaration. Helyer's case, Cro. Car. 175. [Willett v. Tidey, Carth. 188. 1 Show. 214. 12 Mod. 6. S. C.] (c) But this extends not to an action upon the case against a constable, for presenting that the plaintiff

plaintiff was an inhabitant of *A.*, by reason of which he was compelled to pay, &c. unjustly, because no trespass or false imprisonment, wherein liberty is given to plead not guilty. *Cro. Car. 467.*—Nor to an action by a freeman against a Mayor, for refusing his vote in the election of a mayor, because a non-feasance. *2 Lev. 251.* And said *per curiam*, that the intent of the statute was to give double costs in false imprisonment, &c. where it enabled to plead the general issue. (d) They cannot be allowed, unless the judge of assise marks the *postea*. *2 Vent. 45. 2 Lev. 251. Winch. 16.* [*Grindley v. Holloway, Dougl. 307.* They may upon a special verdict, where it appears by the facts found, that the defendant was acting by virtue of his office. *Rann v. Pickens, B. R. M. 23 Geo. 3. Dougl. 308. n.* If the plaintiff discontinues, the court will, upon an affidavit, that the act for which the defendant was sued, was done by virtue of his office, make a rule upon the master for the taxation of double costs. *Devenish v. Mertins, 2 Str. 974.* If judgment goes by default, the defendant may enter a suggestion on the roll. *Ca. temp. Hardw. 138-9.*] (e) All the defendants. *Vaugh. 117.*

(a) Not where an action is brought against churchwardens, for falsely and maliciously presenting the plaintiff for incontinency; because merely ecclesiastical, and the statute is intended only where troubled concerning temporal matters. *Cro. Car. 286. Jones, 305.* ||Nor where the action is for a non-feasance. *Atkins v. Eanwell, 3 East, 92. Blanchard v. Bramble, 3 Maule & Selw. 131.* ||

By the statute *21 Ja. 1. c. 12. § 3.* the above statute is made perpetual, and it is thereby further enacted, “That churchwardens, and all persons called sworn men, executing the office of churchwardens, overseers of the poor, and others, which shall do (a) any thing by their assistance or command, concerning their office, shall have benefit of 7 Ja.”

3. Of Costs for and against Informers, and where the Prosecution may be said to be carried on at the Suit of the King.

2 Keb. 781. Roll. Abr. 544. Lutw. 200. Vent. 133. Salk. 206. Moor, 65. 3 Lev. 374. 2 Inst. 288. It seems agreed, that a common informer, upon a popular statute, can in no case recover costs, unless they be expressly given by such statute; for it is certain, that he cannot recover them at common law, for that doth not give costs in any case; neither can he recover them by force of the statute of Gloucester, which gives the plaintiff his costs only in cases in which he shall recover his damages.

[But on a *bonâ fide* composition of a penal action by leave of the Court, the plaintiff may be allowed a reasonable sum for his costs. And, on motion, the defendant may pay the penalty into court with costs. *Wood qui tam v. Johnson, 2 Bl. Rep. 1157. Walker v. King, Bull. Nî. Pri. 197.*]

Jones, 447. Cro. Car. 559. 2 Inst. 289. Roll. Abr. 516, 517. 574. March, 56. 1 H. Bl. 13. But in an action on a statute by the party grieved, for a certain penalty given by such statute, the plaintiff within the statute of Gloucester shall recover costs, because such penalty is intended him by way of recompence for his particular damage by the offence prohibited; and if he could recover that only, and no more, it would be in most cases in vain for him to sue for it, since the costs of suit would exceed it.

3 Lev. 374. 3 Keb. 781. Lutw. 200. Carth. 230, 231. The Corporation of Plymouth v. Collings, adjudged. And the like So, in debt for a penalty of *20l.* by a corporation *qui tam*, &c. upon a private act of parliament concerning the *New River Water* brought to *Plymouth*, where the action was brought for diverting the water-course, contrary to the statute; after verdict for the plaintiffs it was holden, that though this was on a new and penal law, yet being brought by the parties injured, and for a certain penalty, they should have their costs; otherwise, where the action is brought by a common informer.

point said to have been adjudged, *Mich. 5 W. 3. between the Corporation of Cutlers and Buslin. 12 Mod. 46. Comb. 224. Skin. 363. 367. Holt. 172.*

But

But no costs shall be recovered in an action on a statute, which gives no certain penalty to the party grieved, but only his damages in general, &c. if such a statute be introductive of a new law, and give a remedy in a point not remediable at the common law. But there is not that inconvenience in this case as in the former, because no certain sum being specified, the jury may give the plaintiff full satisfaction by way of damages.

§ 10. In an action by the party grieved against the sheriff on the 29 Eliz. c. 9. for not taking bail, the plaintiff shall have costs.

§ 11. In an action against the sheriff under the statute of 29 Eliz. c. 4. for extortion, the party grieved shall have his costs.]

§ 12. Where a prisoner sues, as the party grieved, for the penalty under the *habeas corpus* act, 31 Car. 2. c. 2. § 5. for refusing a copy of his warrant of commitment, he is entitled to costs.

As to costs against *informers*, by the 18 Eliz. c. 5. which is made perpetual by 27 Eliz. c. 10. it is enacted, "That if any informer or plaintiff, on a penal statute, shall willingly delay his suit, or shall discontinue, or be nonsuit in the same, or shall have the trial or matter passed against him therein by verdict or judgment of law; that then in every such case, the same informer or plaintiff shall yield, satisfy, and pay unto the party defendant, his costs, charges, and damages, to be assigned by the Court, in which the same suit shall be attempted, &c."

In the construction of this statute it hath been holden, that it extends only to common informers, who are to have the whole benefit of the penalty, and not where the penalty is given to the party grieved, or where part is given to the king, and part to him who will sue for it. (a)

(a) [But prosecutors *qui tam* are looked upon as common informers; and shall pay costs. Salk. 30. Cowp. 366. And where the defendant obtains a verdict in a *qui tam* information, he shall have costs, although he himself removed the information from the sessions into the court of King's Bench. *Qui tam* by the Town of Dover v. Hodgson, 1 Wils. 139.]

Also, it hath been holden, that where judgment is given against an informer, because the Court in which he sues has no jurisdiction of the cause, or because the statute on which he grounds his information is discontinued, yet he shall pay costs within the intent of the statute, which shall have a liberal construction, and was intended to prevent all vexatious informations.

It is said, that the entry of a *noli prosequi* by the plaintiff, in a popular action, comes within this statute. 2 Cr. Pr. 469. n.]

By the 18 Eliz. there is a *proviso*, that it shall not extend to any officers that have used to exhibit informations, &c.

else they will be taken as common informers, and affidavits to the contrary will not be admitted. 2 Ld. Raym. 1333. Bull. Nt. Fri. 334. 4 Ed.]

Roll. Abr. 574.
Lutw. 200.
10 Co. 116.
Cro. Car. 560.
Salk. 206.

Creswell v.
Hoghton,
6 T. Rep. 355.

Tyte v. Glode.
7 T. Rep. 267.

Ward v. Snell.
1 H. Bl. 10.

[This statute extends to all actions by common informers, whether such actions may be grounded on statutes made prior, or subsequent, to it. Law 9. t. v.

Worrall, 1 Wils. 177.

And. 116.
Sav. 50, 51.
Cro. Eliz. 177.
2 Leon. 116.
Salk. 30.
2 Salk. 543.
Ld. Raym. 27.

Sid. 311.
2 Keb. 106.
581. [Garland
q. t. v. Burton,
2 Str. 1103.]
Vide Hut. 35,
36. || 3 T. Rep.
364. 1 H. Bl.
546. || [And it

[But this must appear upon the record,

Rex v. Inhabitants of Chederton, 5 T. Rep. 272. Rex v. Inhabitants of Clifton, 6 T. Rep. 344.

[It is provided by stat. 13 G. 3. c. 78. § 64. that " it shall and may be lawful for the Court, before whom any indictment shall be tried for not repairing highways, to award costs to the prosecutor to be paid by the persons so indicted or presented; if it appear to the Court that the defence made to such indictment or presentment was frivolous." Under this statute the judge at *nisi prius* only hath power to award costs: if he omit to do it, the Court of King's Bench cannot supply the defect. But a certificate from the judge that the defence was frivolous is sufficient to entitle the prosecutor to his costs, though it do not expressly award costs.]

4. Of Paupers.

Vide tit. PAUPER.

(F) Of Costs in Replevin.

Jones, 434.
|| Gilb. H. C. P.
273. ||

IN replevin the plaintiff had damages at common law, and costs by the statute of Gloucester, as a consequence of such damage, but the avowant or defendant in replevin being entitled to no damages had no costs, although in many cases where an avowry or conusance was made, and a return prayed, the defendant was an actor.

By st. 7 H. 8. c. 4. " Every avowant, and every other person and persons that make avowry, conisance, or knowledge, or justify, as bailly to any other person or persons in any *replegiari*, or second deliverance, for any rent, custom, or service, if their avowry, conisance, or justification be found for them, or the plaintiffs in the said action otherwise barred, shall recover their damages and costs that they have sustained, as the plaintiffs should have done, if they had recovered in the said replevins."

Dent v. Parso, Cro. Ja. 473.
2 Ro. Rep. 37.
but no judgment given.
Brownl. 173.
Semb. S. C.
contr. But the judgment actually entered up corresponds with the report in Cro. Ja. *Vide* a transcript of it in 2 Lutw. 1195.

Where the defendant avowed for 36*l.* a year and half's rent, and the plaintiff pleaded payment of 12*l.*, and there was another issue for the 24*l.*, and the first issue was found for the plaintiff, and the last for the defendant; the plaintiff was allowed neither costs nor damages, but the avowant had a return, damages, and costs.

Winnard v. Foster, 2 Lutw. 1190.

But, where the defendants justified the taking under an attachment from a county court against the goods of one *D.* whose property the distress was, and, on issue joined on the property being in *D.* a verdict was found as to part for the plaintiff, and as to the residue for the defendants, (*viz.* that the property of part of the goods was in the plaintiff, and that of the residue in *D.* the defendant in the county court,) and damages and costs were assessed for both parties; it was adjudged that the plaintiff should have both costs and damages, but the defendant only costs.

This

This act does not extend to a nonsuit.

Sir W. Jones,
423.

This act extends to executors making avowry under the 32 H. 8. c. 37. *Farnell or Farvell v. Kebley*, 2 Ro. Rep. 457. but not to a defendant claiming property, for this is *casus omisus*. *Hardr.* 153. Nor is an avowant entitled to

By the st. 21 H. 8. c. 19. by which the lord may avow, as in lands within his fee, without naming any tenant in certain, it is further enacted, § 3. that "every avowant, and every other person or persons that make any such avowry, justification, or conisance, as bailor or servant to any person or persons, in any *replegiare*, or second deliverance for rents (*a*), customs (*b*), services, or (*c*) for damage-feasant, or other rent (*d*) or rents, upon any distress taken in any lands or tenements, if the same avowry, conisance, or justification be found for them, or the plaintiffs in the same be nonsuit (*e*), or otherwise barred, that then they shall recover their damages and costs against the said plaintiffs, as the same plaintiffs should have done or had, if they had recovered in the *replegiare*, or second deliverance found against the said defendants."

costs under either of the acts, where the writ only abates. *Smith v. Walgrave*, Com. Rep. 122. 2 Ld. Raym. 788. S. C. (*a*) The defendant avowed the taking as a stray within his manor; and whether he should have costs *dubitatur*; but judgment reversed for another cause. *Hasclop v. Chaplin*. Cro. Eliz. 257. 329. Owen, 13. but cited in Jones, 435. and said, the judgment was reversed because damages and costs were given; and that this reason is entered upon the roll. — Not if an avowry for an amercement in a leet, &c. *Porter v. Grey*. Cro. Eliz. 300. Moor, 893. Cro. Ja. 520. 2 Roll. Rep. 75. But releasing his damages, he had costs by 4 Ja. 1. and *vide* Jones, 424. 435. But Cro. Eliz. 257. 329. it has been the constant practice since this act to give costs and damages. [See too stat. 8 & 9 W. 3. c. 11.] — Where the avowry was for a penalty upon breach of a bye-law. Cro. Ja. 497. 532. Jones, 421. 435. March, 29. (*b*) Where the avowry is for relief *dubitatur*, because no service, but a flower thereof only, and it goes to executors. Cro. Ja. 28. Cro. Car. 422. 533. Jones, 422. 2 Roll. Rep. 75. — But upon a distress for a heriot, no question but costs shall be paid. Cro. Ja. 28. Yet *vide* Cro. Eliz. 257. 329. (*c*) But he shall recover damages for the trespass at the time of the taking only, and not for the mean time. Dals. 52. (*d*) Extends not to an avowry for a *nomine pænæ*. (*e*) Therefore 2 Sid. 155., where the defendant avowed for a rent-charge, and the plaintiff, after evidence, was nonsuited, the Court took the verdict of the jurors, who found for the defendant, and assessed damages and costs.

A plaintiff or avowant, if the avowry be for damage-feasant or for rent, is entitled to damages and costs upon a judgment in his favour, as well on a special as a general verdict. 1 Lill. Pr. Reg. 472.

A plaintiff in replevin may under the statute of 4 Ann. c. 16. § 4. plead, with leave of the Court, several matters; provided by § 5. that "if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court; or, if a verdict shall be found upon any issue in the said cause for the plaintiff, costs shall be also given in like manner, unless the judge, who tried the said issue, shall certify (*f*), that the said defendant or tenant, or plaintiff in replevin had a probable cause to plead such matter, which upon the said issue shall be found against him."

(*f*) The certificate need not be made in court at the

trial; but will be good if made afterwards; even after an application by the plaintiff for the costs of a special plea for want of it. *Cremer v. Deat, Barnes*, 11.

Although the word "avowant" does not occur in this clause of the statute, yet it is obvious from the penning of the latter part that it must have been omitted by accident, and that the

1 Hull. 108.
Bright v. Jackson, Barnes, 144. *Dodd v. Jodrell*, 2 T. Rep. 235

legislature must have intended to comprehend avowants therein. It hath therefore been holden, that although some issues in replevin may be found for the plaintiff, which entitle him to judgment, and some for the defendant, the latter has a right to the costs of the issues found for him, unless the judge certify, that there was a probable cause for pleading the matters on which those issues are found. And the general rule is, that where several matters are pleaded by the plaintiff, some of which are found for him, and others for the defendant, so that the plaintiff is entitled to judgment; if the judge, who tried the cause, certify that there was a probable cause for pleading those pleas, the master is not to deduct the costs of the issues so found for the defendant: but, if there be no certificate, the defendant is entitled to have those costs deducted for him.

Stone v. Forsyth, Dougl. 709. n. (2).

An avowant having been determined to be a defendant within the meaning of this act, it follows, that, if there are several avowries, some of which are found for the plaintiff, and the others for the defendant, the plaintiff is entitled to the costs of the issues found for him, unless the judge certify, even though, on the whole, it should appear that he had no cause of action.

Brooke v. Willett, 2 H. Bl. 435. Vol-
lum v. Simpson, 2 H. Bl. 368. Cook
v. Green, 5 Taunt. 594.

The party pleading several matters is liable, in case there be a verdict against him upon any of the issues, and no certificate from the judge, not only to the costs of the unnecessary pleadings, but also to such costs of the trial, as related to that part of the record.

Da Costa v. Clarke, 2 Bos. & Pull. 376.

Where the avowant after trial and verdict for the plaintiff, obtained judgment *non obstante veredicto*, in consequence of the plaintiff's pleas being adjudged bad, it was holden, that the avowant was not entitled to any costs upon the pleadings subsequent to the pleas in bar, inasmuch as he ought to have demurred to such of them as were insufficient in point of law.

By st. 17 Car. 2. c. 7. § 2. and 3. (which is set out at length under tit. "Replevin and Avowry" (L),) if the plaintiff, in case of rent arrears, be nonsuit before issue joined, then upon suggestion made on the record in the nature of an avowry or cognisance; or, if judgment be given against him on demurrer, then without any suggestion, the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or, if more, then so much as shall be equal to such arrear, with full costs; or, if the nonsuit be after issue joined, or, if a verdict be against the plaintiff, the jury impanelled to try the issue shall assess such arrears, and the defendant shall have judgment, together with full costs.

By st. 11 Geo. 2. c. 19. § 22. (which see under tit. "Replevin and Avowry" (L),) if the defendant avow or make cognisance according to that statute, upon distress for rent, relief, heriot, or other services, and the plaintiff become nonsuit, discontinue his action, or have judgment against him, the defendant shall recover double costs of suit.

If a plaintiff in replevin on an avowry for a seizure for a heriot-custom be nonsuited, the avowant is not entitled to double costs; because the avowry not being for a distress, the case is not within this statute. Lloyd v. Winton, 2 W. 28. Barnes, 148. S. C.

Neither is an avowant for a rent-charge entitled to double costs under it, upon a nonsuit; for though the statute is in some clauses remedial, in others it is penal; and this clause, which is a substantive clause, does not in terms include rent-charges; and as it is a penal clause, it ought not to be extended by construction. Lindon v. Collins, Willb.'s Rep. 429 Bulpit v. Clarke, 2 N.R. 56. acc.

Where, by a canal act, the company were authorized to take certain lands for the purposes of the act on making certain payments either by annual rents or sums in gross; and the persons from whom the lands might be taken, were empowered to distrain the goods of the company, even off the premises. in case of non-payment of such sums; an avowant stating a distress under this act, was holden not to be entitled, on obtaining a verdict, to double costs under the statute of 11 Geo. 2. c. 19. || Leominster Canal Company v. Morris, 7 T. Rep. 500. So, Leominster Canal Company v. Cowell, 1 Bos. & Pull. 217. S. P. For by Eyre C. J. the

distress intended to be protected by the 11 Geo. 2. is a distress for a certain rent directly reserved by a landlord on his grant or demise of land theretofore made. But this is a distress for rent by the canal act charged on the rate; it is a mere rent-charge, with a power of distress given; and not at all like the case of rent reserved by tenure. A rent-charge is not within the 11 Geo. 2.

(G) Of Costs in a Writ of Error.

AS there were no damages given in a writ of error, but only a reversal or affirmance of the former judgment, there could be no costs, either at common law or by the statute of *Gloucester*: hence it was thought necessary to make a statute to redress the mischiefs that arose from writs of error, in order to delay execution. Therefore, Cro. Eliz. 583.

By the st. 3 H. 7. c. 10. "Where oftentimes plaintiff or defendant, plaintiffs or defendants, that have judgment to recover, be delayed of execution, for that the defendant or tenant, defendants or tenants, against whom judgment is given or other that been bound by the said judgment, sueth a writ of error to annul and reverse the said judgment, to the intent only to delay execution of the said judgment; It is enacted, that if any such defendant or tenant, defendants or tenants, or if any other that shall be bound by the said judgment, sue, afore execution had, any writ of error to reverse any such judgment, in delaying of execution, that then, if the said judgment be affirmed good in the said writ of error, and not erroneous, or that the said writ of error be discontinued in the default of the party, or that any person or persons, that sueth writ or writs of error, be nonsued in the same, that then the said person or persons, against whom the said writ of error is sued, shall recover his costs and damage, for his delay and wrongful vexation in the same, by discretion of the (a) justice afore whom the said writ of error is sued." By the statute of 19 H. 7. c. 20, this act is confirmed; and it is enacted, that the same shall from thenceforth be put in execution. (a) || This word "justice" is no doubt made use of here instead of "court," there being no court of error consisting of only one judge. Dougl. 561. n. (5). 7 East, 111.

Sid. 357.

(a) Where a judgment in C. B. in *Ireland*, was affirmed in B. R., as to the costs.

there, as also

on a writ of error in B. R. here, and likewise on a writ of error in the House of Lords here, and a *capias ad satisfaciend.* in B. R. here, as well for the costs given by the courts in *Ireland*, as for those given by the Court here, was superseded as irregular. Carth. 460. Ld. Raym. 427. 5 Mod. 421. Salk. 321.

(b) Vent. 166.

Mod. 77.

(c) 3 Lev. 375.

Carth. 281.

4 Mod. 244.

[But, where

executors and administrators would be liable to pay costs in the original action, they will also be liable in error. Williams v. Riley, 1 H. Bl. 567. Caswell v. Norman. *Ibid.* n. 2 Barnard. 450. 2 Str. 977.]

Cro. Ja. 636.

Cro. Car. 401.

2 Str. 1199.

Vent. 88.

(d) || And if execution be executed only in part, costs shall be proportionally diminished. Earl of Pembroke v. Bostock, Cro. Car. 173. ||

There are no costs by this act where execution is executed, for then there can be no delay of execution.

Hence, there can be no costs in a writ of error upon a judgment in ejectment, where execution was executed as to the costs and damages, though not as to the term. (d)

Smith v. Smith,

Cro. Car. 425.

Winne v.

Lloyd, 1 Lev.

146. Raym.

134. || It seems

to be now settled, notwithstanding these cases, that costs are recoverable under this statute in every writ of error for the delay of execution, where the judgment is affirmed, although *none were recoverable in the original action.* Henslow v. Bp. of Sarum, Dy. 766. Anon. Cro. Car. 145. Earl of Pembroke v. Bostock, Id. 173. Penruddock v. Clerk, Cro. Eliz. 659. Graves v. Short, Id. 616. Ferguson v. Rawlinson, 2 Str. 1084. Andr. 113. S. C. ||

Salt, one, &c.

v. Richards,

7 East, 111.

2 And. 123.

Cro. Eliz. 588.

|| Nor are costs allowed under this statute where a writ of error upon a judgment in B. R. is non-prossed before the transcript of the record by the clerk of the errors of B. R. ||

This statute extends to a writ of error in the Exchequer-chamber, though given by a subsequent statute.

Also, the more effectually to prevent defendants from bringing frivolous writs of error, by the 13 Car. 2. st. 2. c. 2. it is enacted, that if any prosecute a writ of error for reversal of any judgment *after verdict* in the courts of *Westminster*, counties palatine of *Chester*, *Lancaster*, or *Durham*, or of the great sessions in *Wales*, and the judgment is affirmed, they shall pay double costs for the delaying of execution, popular actions and actions upon penal laws, (except debt for tithes,) indictments, informations, &c. excepted.

But,

But, as these statutes do not extend to cases where judgment is given for the (a) defendant, and the plaintiff brings a writ of error, it was thought necessary to remedy this inconvenience: And therefore, defendant in replevin, though he is considered in some cases as a plaintiff, shall not have costs within these statutes which are to be construed strictly, because costs are in nature of a penalty. *Golding v. Dias*, 10 East, 2. *Cone v. Bowles*, Carth. 179. 4 Mod. 7. *Show*, 13. 165. 12 Mod. 1. 2 Ld. Raym. 788. *Salk*. 205. S.C.

By the 8 & 9 W. 3. c. 11. "If in any action, &c. upon demurrer by plaintiff or defendant, judgment shall be given for the defendant; or if after judgment for the defendant in such action, &c. the plaintiff shall bring error, and the judgment shall be affirmed, the writ of error discontinued, or the plaintiff nonsuited, the defendant shall have judgment for his (b) costs, and execution for the same by *capis ad satisfaciend*." for this shall not be presumed merely for delay, since the plaintiff keeps possession of nothing by his writ of error.

[By 4 Ann. c. 16. § 25. for preventing vexation from suing out defective writs of error, it is enacted, "That upon the quashing of any writ of error, for variance from the original record, or other defect (c), the defendant shall recover against the plaintiff in error his costs, as he should have had, if the judgment had been affirmed, and to be recovered in the same manner."] *Ratcliffe v. Burton*, Ca. temp. Hardw. 135. *McNamara v. Fisher*, 8 T. Rep. 302. Though no costs are recoverable in the original action, yet they are payable on quashing a writ of error. *Archbishop of Dublin v. Dean of Dublin*, 1 Str. 262. But, where the defendant in error enters continuances to defeat the writ of error, the plaintiff in error is not liable to costs on quashing it. *Gould v. Coulthurst*, 1 Str. 139. *Rejindoz v. Randolph*, 2 Str. 834. But, though the act of a defendant may occasion the quashing of a writ of error, yet if it be not reprehensible, he shall not pay the costs. *Cooper v. Robbins*, Say. Costs, 207. And none of the statutes give costs on the reversal of a judgment. *Wyvil v. Stapleton*, 1 Str. 617. 8 Mod. 315. || *Bell v. Potts*, 5 East, 49. A judgment for the plaintiff was reversed on a writ of error in fact brought by the defendant: and the Court held that the plaintiff in error was entitled to the costs of the original action, though not to the costs in error. 2 Tidd's Pr. 4th ed. 1101. n. (f) B. R. H. 40 Geo. 3. ||

|| The House of Lords, upon a writ of error returnable in parliament, exercise a discretionary power with respect to the allowance of costs. To these discretionary costs, however, custom seems to have prescribed a maximum; for as they are generally, indeed invariably, comprized in one gross sum, they are in no case, by the usage and practice of the House, awarded at a higher amount than 200*l*.

House was called by Lord *Eldon* in 1806, in order that some measure might be taken with respect to it, the smallness of the sum being an inducement to the lodging of groundless appeals, and operating as a grievance to the other party.

In the court of the Committee of Privy Council for the hearing of appeals from the judgments of the courts in our colonies and settlements abroad, the same discretionary power with respect to costs is exercised, and subject to the same limitation as in the House of Lords.

In the court holden before the Lord Chancellour, Lord Treasurer, and Judges (under 31 E. 3. c. 12.) for examining erroneous

Burt. Pr. Exch.
331.

2 Burr. *ubi*
supra.

neous judgments in the Exchequer, costs are given by the Lord Chancellor, or Lord Keeper, personally. Upon the affirmance of a judgment in this Court, the attorney of the prevailing party draws out a bill of costs occasioned by the writ of error and the subsequent proceedings; upon which bill the Lord Chancellor signs his *allocatur*. And the practice is to give interest from the day of signing the judgment to the day of affirming it there, computed according to the current, not according to the strictly legal rate of interest.

(a) Interest allowed by this Court in trover for bills of exchange from the date of the final judgment

In the Court of Exchequer-chamber, upon the affirmance of a judgment, the Court are bound to allow double costs to the defendant in error: but the allowance of interest, by way of damages, upon such affirmance, is entirely matter within their discretion. (a)

upon all such bills as had been received before the judgment, and upon all such as had been received afterwards from the time of the receipt of them. *Atkins v. Wheeler*, 2 N. R. 205. Interest allowed on a judgment of *non-pros.* as well as a judgment of affirmance in an action of covenant for liquidated damages. *Sykes v. Harrison*, 1 Bos. & Pull. 29. Interest allowed on the affirmance of a judgment on a contract to make good to the acceptor of a bill so much money as the dividends of a bankrupt's estate should fall short of the amount of the bill, *Furlonge v. Rucker*, 4 Taunt. 250.; on a judgment for the balance of a merchant's account, and for the interest on that balance, *Hammel v. Abel*, *Id.* 298.; for goods sold and delivered, which were to have been paid for by a bill, no bill having been given, *Middleton v. Gill*, *Id.* *ibid.*; for the balance of an account for money lent, and for interest on the advances, the plaintiffs, as bankers, having been in the practice of charging it, *Gwyn v. Godby*, *Id.* 346.; and on a promise to give a mortgage, *Anon.* *Id.* 876.; but not, it should seem, in an action for unliquidated damages, *Bristow v. Waddington*, 2 N. R. 300. *Saxelby v. Moor*, 3 Taunt. 51. *Gwyn v. Godby*, 4 Taunt. 346.; nor for rent, *Anon.* *Id.* 30.; nor on a judgment on a recognisance of bail in B. R. it being confined to the amount of the debt, *Anon.* *Id.* 722.; nor in an action for an attorney's bill, *Walker v. Bayley*, 2 Bos. & Pull. 219. Allowed in *Shepherd v. Mackreth*, 2 H. Bl. 284., but said to have been from inadvertency.

2 Burr. 1097.

In the Court of King's Bench, upon writs of error from the Common Pleas, and other inferior courts of record, the officer taxes the costs of affirmance in the same manner as he taxes other costs, though somewhat more liberally. But he has never any regard to interest, nor does he allow it as of course. But the Court, on motion, will order interest to be computed, by way of damages, on the sum liquidated by the judgment below, down to the time of affirmance; and that the same be added to the costs taxed for the plaintiff in the original action.]]

1 Hullock, 299.
2 Burr. *ubi*
supra 1 Bl.
Rep. 268. 2 Str.
931. 2 T. Rep.
79.

[(H) Of Costs in a feigned Issue.]

Still v. Rogers,
1 Lill. Pr. Reg.
344. Palmer v.
Williams,
Barnes, 130.
Rex v. Phillips,
1 Wil. 261.
Herbert v.

WHEN a feigned issue is directed by a court of law, whether in a civil or criminal proceeding, the costs always abide the event of the verdict. But, when a feigned issue is ordered by a court of equity, the costs do not follow the verdict as a matter of course; but the finding of the jury is returned to the court that ordered it, where the costs are discretionary.

Wilkinson, *Id.* 324. *Say. Rep.* 24. S. C.; but in the case of *Hoskins v. Lord Berkeley*, 4 T. Rep. 402. the Court of King's Bench strongly intimated an opinion, that as feigned issues were only granted with leave of the Court, it would be prudent in future, when they permitted such issues to be tried, to compel the parties to consent that the costs should be in the discretion of the Court.

Where

Where the issue is ordered by a court of law, on a rule for an information (a), or motion for an attachment (b), the costs of the original rule, or motion, do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned from the time when the feigned issue was first ordered and agreed to (c). Yet when it was ordered, by the consent rule, that the costs should abide the event of the issue, the court directed the whole costs to be paid under it (d).

(c) Thomas v. Powell, 1 Burr. 603. (d) Oldknow v. Wainwright, 2 Burr. 1017. Tidd's Pr. 672-3.

If any one of several issues be found for the plaintiff, he must have his costs.

Where the crown is party, the plaintiff shall not pay costs, though he submit to a *non pros*.]

(a) Rex. v. Nicholls, Say Rep. 229. Thomas v. Powell, 1 Burr. 603. Say. Costs, 144. S. C. (b) Rex v. Griffith, Say. Rep. 253.

Tidd's Pr.

Tempest v. Metcalf, 1 Wils. 331.

Williams v. Attorney-General, Burton's Pr. Exch. 248.

|| But, where the king is not a party, the plaintiff, on a non-suit in a feigned issue, is liable to costs, though the point in controversy turn on a grant from the crown. ||

[If an issue be directed out of Chancery to be tried, and the plaintiff give notice of trial, and do not countermand it in time; upon motion, the Court of Chancery will give costs, and not put the defendant to move the court of law where the issue is to be tried.]

|| The party for whom the material issue is found, where two or more issues are directed by the Court of Chancery, must have the costs at law. ||

Bagshaw v. Bp. of Bangor, Bur. Pr. Exch. 248.

Anon. 2 P. Wms. 68.

Blackburn v. Gregson, 1 Br. Ch. Rep. 425.

|| (1) Of Costs in Actions upon Judgments.

BY st. 43 G. 3. c. 46. § 4. In all actions brought in *England* or *Ireland* upon any judgment recovered in any court in *England* or *Ireland*, the plaintiff shall not recover or be entitled to any costs of suit, unless the court in which such action shall be brought, or some judge of the same court shall otherwise order.

An action of debt upon bond, wherein the plaintiff has a verdict for nominal damages only, and takes his judgment for the penalty, is not within this act.

Nor is a judgment of nonsuit; the judgments intended by the act being judgments recovered by plaintiffs.

Where a defendant, against whom judgment had been obtained, sued out a writ of error, and to an action on the judgment pleaded *nul tiel record*; the Court, under the discretion given to them by this act, allowed the plaintiff his costs of the action on the judgment; for the defendant should have moved to stay proceedings; the inference from the plea of *nul tiel record* was, that the writ of error was brought for delay. ||

Cammack v. Gregory, 10 East. 525.

Bennett v. Neale, 14 East, 343.

Garnwell v. Barker, 5 Taunt. 264.

(K) Of Costs in the several Steps and Proceedings of a Cause.

AS the courts exercise a discretionary power in awarding costs, before there is a final judgment in the cause, it seems difficult to ascertain the several cases in which they will make use of this power; however, it may be observed in general, that the delays or contempts, which either party is guilty of, can only be remitted or purged on payment of costs.

12 Mod. 560. As, for not going on to trial, inquiry (*a*), &c. so, if the plaintiff
[It is laid down in the case here referred to in 12 Mod. that, if upon notice of trial, the defendant draws briefs, retains counsel, and makes ready his witnesses, before that notice is countermanded, upon affidavit thereof, and motion, he shall have such costs as the master shall tax. But it hath been since holden, that if a notice of trial be regularly countermanded, the defendant is not entitled to receive the costs of a witness who resided in London, and, before the countermand was delivered, set out to attend the assizes in the country. *Hester v. Hall*, Barnes, 307. *Goodright v. Hoblyn*, *Id.* 298. *Pr. Reg. C. P.* 393. *S. C.*—A plaintiff is not liable to costs for not proceeding to trial according to notice, if the delay was the result of inevitable accident, *Ogle v. Moffit*, Barnes, 133., or occasioned by the neglect of the defendant's attorney. *Strong v. Harwood*, Say. Costs, 174. || If a defendant do not proceed to trial by proviso, pursuant to his notice, or countermand the same in due time, he shall pay costs. *Wilkinson v. Poole*, 2 Str. 797. 1 T. Rep. 696. || (*a*) [*Shadford v. Houston*, 1 Str. 317. *Sutton v. Bryan*, 2 Str. 728.] || In some cases there may be amendments without the payment of costs, 1 East, 372. 10 East, 237. 3 Mod. 112. 1 Ld. Raym. 94. 116. Say. Costs, 157. 1 Salk. 50. || *Vide* title *Amendment*, letter (G).

10 Mod. 88. There are no costs in abatement upon demurrer, because there are no damages given, but only a *respondeas ouster* awarded.

6 Mod. 2. 1 Lill. [No costs are allowed to either party on a repleader, because it
Pr. Reg. 472. is a judgment of the court upon the pleading; and both parties
2 Salk. 579. were in fault to allow an immaterial or insufficient issue to be
3 Burr. 504. joined, and therefore neither of them can have any claim to
2 Ventr. 196. receive costs from the other.]
Barnes, 125.
6 T. Rep. 131. 2 Bos. & Pull. 379.

Leon. 105. But the statutes give costs on a *non pros.*, and this even before
Hutt. 36. Cro. declaring, and then the plaintiff is demandable, for he is not in
Car. 575. Hard. court by attorney until he has declared; but since he has put in
152. his appearance by attorney, the court will vacate his appearance,
if he does not do as he ought to do in declaring; and this sort of
nonsuit is as well within the statutes, as when he is demandable
at the *nisi prius*; but because the King's Bench suffered them
to lie three terms without awarding a *non pros.*, therefore,

Enlarged to By the 8 Eliz. c. 2. if upon a *latitat*, *alias*, or *pluries capias*
the end of the issuing out of the King's Bench, the plaintiff does not declare
2d term, by an within three days after bail put in, or after declaration shall de-
order of K. B. lay or suffer his suit to be discontinued, or be nonsuit, the court
made Mich. shall award the defendant his costs and damage.
term, 10 G. 2. Reg. 2. Note (b).

[This statute doth not extend to actions brought by executors or administrators, in their representative character. Cro. El. 69. Cro. Ja. 361. If the plaintiff enter a *noli prosequi*, the defendant is entitled to costs upon this statute. *Cooper v. Tiffin*, 3 T. Rep. 511.]

After a declaration put in by the plaintiff, if the defendant puts

puts in a bar or demurrer, and the plaintiff does not reply, &c. there is a judgment against him on the bar, &c. and costs awarded, because he does not prosecute his writ with effect.

After issue joined or a verdict given, the plaintiff cannot discontinue without leave of the court, which is never granted but upon payment of costs.*

* *Qu.* if he can discontinue at

any time, after suit commenced, without paying costs?

The plaintiff cannot bring a new ejectment without paying the costs of the first.

4 Mod. 379.
Vide tit. Ejectment, (B) 3.

That if a new trial, or second issue be directed out of Chancery, it must be on payment of costs. 2 Vern. 75. 8 Mod. 225. *Vide tit. Trial, (L).*

[It was formerly not usual (a) in any actions, but ejectments, to stay the proceedings in a second action, until the costs were paid in a prior one for the same cause; and, particularly, if the merits did not come in question on the former trial (b). But of late years it hath been done, in several instances, on the ground of vexation (c); and || that, whether the former action were in the same or a different court (d). In the King's Bench, the practice is not confined to cases where a trial was had in a former action, but applies equally where the cause is put an end to by judgment of *non pros.*, or as in case of a nonsuit. But it is otherwise in the Common Pleas; for that court never interferes, unless the merits of the case have been tried in the former action (e). || And in one case (f), where the action was brought by husband and wife, the Court stayed the proceedings until the payment of costs in the former action, at the suit of the husband only, it being for the same demand.

(a) Tidd's Pr. 5 Ed. 534.
Real v. Macky, 2 Str. 1206.
English v. Cox, Cowp. 322.
Say. Costs, 251.
S. C. Lazarus v. Pritchard, Barnes, 125.
Doe v. Alston, 1 T. Rep. 491.; but see Lord Biron's case, 1 Ventr. 100. (b) Bass v. Firmen, 1 Ld. Raym. 697.
(c) Weston v. Withers, 2 T. Rep. 511.

Gravenor v. Cape, Say. Costs, 245. Melchar v. the Executors of Halsey, Rep. 741. S. C. 3 Wils. 149. (d) Nevitt v. Lade, E. 24 G. 3. B. R. 1 Tidd, *ubi supra*. (e) 3 Bos. & Pull. 23. Cox v. Chubb, 2 Bl. Rep. 309. Cooke v. Dobree, 1 H. Bl. 10. (f) Lampley and wife v. Sands, H. 25 Geo. 3. B. R. Tidd's Pr. 285. || This rule has been followed in equity where the former suit was in the same court, or even in another court of equity, for the same matter; Pickett v. Loggon, 5 Ves. 706. Holbrooke v. Cracraft, *ibid.* (note); but not where the first proceeding was at law, or in the ecclesiastical court. Wild v. Hobson, 2 Ves. & Beames, 105. ||

So, it was formerly not usual (g), in any actions but ejectments, or actions *qui tam*, to require security for costs, where the plaintiff resided abroad; for it was considered, that such a proceeding might affect trade, by excluding foreigners from our courts, and would be a means of clogging the course of justice. But now, although a plaintiff be not compellable to give security for costs, merely as a foreigner, if he reside in this country; yet, whether he be a foreigner or native, if he reside abroad out of the reach of the process of the Court, the proceedings will be stayed till he return, or security be given for the payment of costs.] (h)

(g) Real v. Macky, 2 Str. 1206. Lanu v. Sewell, 1 Wils. 266. Maxwell v. Mayer, Say. Costs, 156.
2 Burr. 1026.
S. C. Boswell v. Irish, 4 Burr. 2105. Golding v. Barlow, Cowp. 24.
Nuncomar v. Fitzgerald v.

Burdett, *Id.* 158. English v. Cox, *Id.* 322. (h) Pray v. Edie, 1 T. Rep. 267. Whitmore, *Id.* 362. Doe v. Alston, *Id.* 491. || But see Parquot v. Eling, 1 H. Bl. 106. *contr.* but Ganesford v. Levy, 2 H. Bl. 118. acc. and laid down as a settled point; since relaxed, however, in favour of foreign seamen serving on board *English* ships, Henschen v. Garves, *Id.* 383. Jacobs v. Stevenson, 1 Bos. & Pull. 96.; or being in the habit of navigating them to and from the ports of this country. Nelson v. Ogle, 2 Taunt. 253. And where the plaintiff

plaintiff was a prisoner in France, the court refused to grant a rule compelling him to give security for costs. *Tullock v. Crowley*, 1 Taunt. 18. So, where a prisoner of war in this country sued for wages earned on board an *English* ship. *Maria v. Hall*, 2 Bos. & Pull. 236.]

(a) *Golding v. Barlow*, Cowp. 24. *Shindler v. Roberts*, Barnes, 126. *Field v. Carron*, 2 H. Bl. 27. (b) *Davies v. Solomon*, T. 25 Geo. 3. K. B. 1 Tidd, 532. 5 Ed. (c) *Doe v. Alston*, 1 T. Rep. 491. (d) *McCulloch v. Robinson*, 2 N. R. 352. || But proceedings shall not be stayed, even in a *qui tam* action, merely on account of the defendant's poverty (a); or because he is protected as servant to a foreign (b) minister; or in ejectment, where the lessor of the plaintiff is known, of full age, and resident in the country (c). And where (d) a commission of bankrupt had issued against the plaintiff, who was gone with his family to *New York*, upon the petition of the defendant, who was the only creditor, and had chosen himself assignee, and the plaintiff brought an action against the defendant, to try the validity of the commission, the Court of Common Pleas refused to stay the proceedings till he should give security for costs; for in this case the defendant having possessed himself as assignee of all the plaintiff's property, had thereby put it out of his power to give any pledge or counter security to those who might be bound for him.

Where the defendant is entitled to demand security, he should apply for it to the plaintiff's attorney (e); and if the motion be delayed till after notice of trial, the Court of King's Bench will require an affidavit that such application has been (f) made, though, before notice of trial, an affidavit is unnecessary (g). The motion however should, in all cases, be made as soon as the defendant can reasonably do it, after knowledge of the fact of the plaintiff's residence abroad; and therefore if it might have been made earlier, it comes too late after issue joined and notice of trial given. (h)

1 Tidd, *ubi supra*.
(e) 2 Smith's Rep. (f) *Per Cur. E.* 47 G. 3.
(g) *Id.*
(h) *Walters v. Frythall*.
5 East, 338.
— v. *Cazenove*, T. 44 G. 3.
K. B. acc.
Barker v. Hargreaves, 6 T. Rep. 597. *contr.*

De la Preuve v. Duc de Biron, 4 T. Rep. 697. The defendant must put in bail previously to the application.

Carr v. Shaw, 6 T. Rep. 496. But, if a foreigner sue two defendants, and only one of them put in bail, that one may require the plaintiff to give security for costs, without putting in bail for the other defendant.

Michel v. Parski, 2 H. Bl. 593. The agreeing to take short notice of trial is a waiver of the defendant's opportunity to apply for such security.

Muller v. Gernon, 3 Taunt. 272. *Steel v. Lacy*, *Id.* 273. note.

Duthy v. Tito, 2 Str. 1206. It was formerly not allowed in cross actions between the same parties, to deduct the costs of one action from those of the other; because, it was said, it required the authority of an act of parliament to enable a defendant in an action to set off a mutual debt, and that act did not extend to the case of costs. But this is now become a common practice (i), and it depends not on the statutes of set-off, but on the general jurisdiction of the Courts over their suitors. And it has been done even where the parties have not been precisely the same in the two actions (k), and also where the actions have been brought in different courts. (l)

Barnes, 145. *Roberts v. Biggs*, *Id.* 146. Bull. N. P. 336. S. C. *Wills v. Crabb*, *Id. ibid.* *Thrustout v. Crafter*, 2 Bl. Rep. 826. (k) *Nunez v. Modigliani*, 1 H. Bl. 217. (l) *Hall v. Ody*, 2 Bos. & Pull. 28. *Emden v. Darley*, 1 N. Rep. 22.

Where

Where an action was brought for the recovery of costs directed to be paid to the plaintiff by an interlocutory order of the Mayor's Court of *London*, and a verdict was found for the plaintiff; though the verdict was set aside, on the ground that no action could be sustained for such costs, and judgment was given for the defendant; yet the Court directed those costs to be deducted from the costs allowed to the defendant in this action.

Emerson v. Lashley, 2 H. Bl. 248. 253.

So, where *A.* was equitably entitled to the costs of a nonsuit in an action by *B.* against *C.* and liable to pay the costs of a nonsuit in an action by himself against *B.*, he was allowed to set-off the costs of the nonsuit in the former action against those in the action by himself against *B.*

O'Connor v. Murphy, 1 H. Bl. 657.

Where, in assault and battery against two defendants, one of whom suffered judgment to go by default, and the other pleaded not guilty, and on the trial there was a verdict for the latter; and as to the former, the jury assessed damages at 1s., the Court allowed the plaintiff to set off the costs which he was to receive from the defendant, who had let judgment go by default, against those which he was liable to pay to the other defendant, upon an affidavit that the defendants had agreed to consolidate the costs. So, in trespass against three, two of whom had let judgment go by default, and the third had obtained a verdict, upon an affidavit that the two first had acted under the authority of the third, who had undertaken to pay the damages and costs.

Cawthorne v. Thompson, Hullock, 471.

The Court of King's Bench has permitted defendants to set off a judgment recovered by them against the plaintiff, against the judgment obtained by the plaintiff against them, though it appeared that the plaintiff had also a separate demand upon one of the defendants.

Schoole v. Noble, 1 H. Bl. 23.

Glaister v. Hewer, 8 T. Rep. 69.

But that Court has refused to permit a judgment recovered by *A.* against *B.* and *C.* to be set off against a judgment recovered against *A.* by the assignees of *B.* under an insolvent debtors' act, the interests of third persons intervening, who have claims by the statute. And Lord *Ellenborough*, in this case, expressed a strong disinclination to extend the power of setting off debts upon general grounds of equity beyond the line which the legislature had thought proper to mark out.

Doe v. Darn-ton, 3 East, 149.

Where the plaintiff sued out execution against the defendant, an uncertificated bankrupt, notwithstanding the allowance of a writ of error, and the execution was set aside for irregularity, with costs, the Court would not permit the amount of those costs to be set off against the costs of the action, but compelled the plaintiff to pay them forthwith.||

Hill v. Tebb, 1 N. Rep. 311.

The defendant shall not pay the costs of reversing an out-lawry until the plaintiff declares against him; and if the plaintiff be nonsuit, the defendant shall have them again in his costs; and if there be more defendants than one, and they be all outlawed, they shall all be contributory for the costs, and not every one pay the whole costs.

Vide title Outlawry.

(L) Costs, how assessed or taxed.

Roll. Abr. 517. **A****T****E****R** the making of the statutes that introduced costs, it (a) [Formerly, if these words were omitted, or even misplaced, in the judgment, it was error. But this is now helped by 16 & 17 Car. 2. c. 8. § 1., and 4 Ann. c. 16. § 2. And in an action of debt, if there be no writ of inquiry to ascertain the damages sustained by the detention of the debt, the damages assessed by the court, as well as the costs of the suit, should, in the judgment, be stated to be given *with the assent* of the plaintiff; but the omission of such statement, it seemeth, is aided by 16 & 17 Car. 2. or, at least, may be supplied at any time. *Tully v. Sparkes*, 2 Str. 868. 2 Ld. Raym. 1570. 1 Barnard. 325. 335. S. C. So, if a manifest miscomputation, or any plain mistake in figures, should appear on the face of the record with regard to costs, it may be amended. 4 Burr. 1989. 1 Roll. Abr. 205. pl. 5.]

7 Mod. 129. [It is said, that if a judgment be entered up with a blank for
Hullock, 622. the costs, they cannot be afterwards inserted.

Green v. Cole, If the jury assess costs in a case wherein none are recoverable
2 Saund. 257. by law, the judgment should be entered *nullo habito respectu* to such costs.

Stores v. Tong, The jury ought *ex officio* to give costs in an action in which
Ca. Pr. C. P. 7. costs are recoverable by law; but, if they omit or refuse to do so,
Ward v. Snell, the court will, on motion, order costs to be taxed, and indorsed
1 H. Bl. 10. on the *postea*.]
Vide 1 Lill.
Abr. 472.

Hullock, 649. ¶ A gross sum may be assessed by the jury in their verdict for
Cro. Ja. 420. damages and costs; because the word *damna*, in its largest sense,
Co. Litt. 257. a. includes costs; or damages and costs may be assessed separately.
9 East, 298. In the former case the plaintiff cannot have judgment beyond the
13 H. 7. 16. amount of the damages laid in his declaration, because the da-
10 Co. 117. b. mages and costs being entirely assessed, *non constat* how much
Cro. El. 568. is given for the one, and how much for the other, and the jury
may, possibly, have given greater damages than the plaintiff de-
clared for, and he can have judgment only to that amount. But,
by assessing them in distinct sums, the jury may give damages to
Pillfold's case, of the extent of what the plaintiff has declared for, and also costs
10 Co. 116. of suit, though together they may exceed the damages laid in
Cro. Ja. 297. the declaration.
Jenk. 288. Cro.
El. 544. Yelv.
70.

Heines v. Guie, If the costs assessed by the jury be omitted in the entry of the
Yelv. 107. judgment, it will be error. And where the costs *de incremento*
Bishop's case, were, in the entry of the judgment, said to be assessed *per jura-*
1 Ro. Abr. 205. *tores*, instead of *per curiam*, it was holden to be error. (b) But,
p. 2. and see if judgment be given for the damages and costs assessed by the
Anger v. jury, the want of judgment for costs *de incremento* is not error.]]
Brookhen,
2 Show. 56. 89.
(b) Goose v. Penton, 3 Keb. 394.

If there are several issues found for the plaintiff, or against several defendants; entire costs are given upon the whole pleadings, for that is the whole charge the plaintiff is at.

10 Co. 117.

So, if in debt the defendant pleads several pleas, upon which they are at issue, and the jury find one issue for the plaintiff, and damages 12*d.*, another issue for the plaintiff, and damages 10*d.*, and another issue for the plaintiff, and damages 6*d.*, and one issue against the plaintiff; they must assess the costs entirely, and not according to the damage severally, for every issue found for the plaintiff.

Keilw. 48.
2 Leon. 177.
Brownl. 3.

[In an action of *assumpsit*, the plaintiff declared upon two several promises, to which there was the general issue, and at the trial a verdict was found for the plaintiff, and several damages were assessed with entire costs. A writ of error being brought, the judgment was reversed as to the one promise, and affirmed as to the other, and the *entire* costs.]

Grymston, v.
Reyner, Cro.
Eliz. 527. Mo.
708. S. C.
Jacob v. Miles,
Cro. Ja. 343.
S. P.

¶ Where there are several counts in a declaration, and the plaintiff has obtained a verdict upon one only, it has been uniformly holden, that in such case the costs shall not be taxed for the defendant on such counts as may have been found for him; and that, not only where the substantial cause of action is the same in all the counts, only varied by the manner of stating it; but also, where to different counts of a declaration there have been different pleas, and issues on those pleas, and one or more found for the plaintiff, and the others for the defendant.

1 Hullock,
2 Ed. 367.
Henderson v.
Rumbold, Say.
Costs, 212.
Lloyd v. Day,
Barnes, 149.
Bull. N. P. 335.
Butcher v.
Green, Dougl.
677. Postan

v. Stanway, 5 East, 261.

So, where a defendant has succeeded on a demurrer as to part of the plaintiff's demand.

Astley v.
Young, 2 Burr.
1232. Say.

Costs, 211. S. C. but differently reported. Note, in these cases it is the course of practice in the King's Bench to tax costs for the plaintiff upon such counts only as have been found for him, and no costs for either party on the other counts which have been found for the defendant. But it was the practice of the Common Pleas, where there were different counts in the declaration, and the plaintiff succeeded in any one; whether the cause of action was the same in all the counts, only varied by the mode of laying it; or whether there were different and distinct causes of action in the different counts; to allow the plaintiff his entire costs on the whole declaration, notwithstanding the defendant had succeeded on the other counts. *Tempest v. Medcalf*, 1 Wils. 331. *Bridges v. Raymond*, 2 Bl. Rep. 800. *Norris v. Waldron*, *Id.* 1199. *Spicer v. Teasdale*, 2 Bos. & Pull. 48. But the practice of that court in this respect hath been lately altered in conformity with that of the King's Bench. *Penson v. Lee*, 2 Bos. & Pull. 330.

But, if there be two distinct causes of action in two different counts, as to one of which the defendant lets judgment go by default, and as to the other takes issue, and at the trial obtains a verdict; it has been determined, that the defendant is entitled to judgment and costs on the count upon which he obtained a verdict, notwithstanding the plaintiff is entitled to judgment and costs on the other counts, whereon there was judgment by default.

Day v. Hanks,
3 T. Rep. 654.

So, where the declaration in an action of trespass consisted only of one count, to which there were several pleas of justification, on which issues were taken, and a new assignment, as to which the defendant let judgment go by default; and a *venire*

Griffiths v.
Davies, 8 T.
Rep. 466.
Wright v.
Smithies,

was

15 East, 123. n. was awarded as well to assess the damages on the judgment by default, as to try the issues; and all the issues were found for the defendant; it was holden that he was entitled to the costs of them.

In these cases, as Lord *Ellenborough* observed, the only issue joined was found for the defendant, and there was no issue or trial on which the plaintiff succeeded, which distinguishes them from the preceding cases. And on this distinction the courts seem to have founded themselves in relieving the defendant from what appeared to them a hardship to which he was subject by the practice of both courts in cases falling within the former description. 5 East, 265.

Thornton v.
Williamson,
13 East, 191.

In trespass for breaking and entering the plaintiff's messuage and yard, and passing and repassing therein, &c. the defendant pleaded not guilty as to the force and arms, &c.; and 2dly, as to the residue, justified for a right of way over the *locus in quo at all times*; and 3dly, the like *in the day-time*. The plaintiff took issues on the two rights of way, and new assigned *extra viam*, to which there was judgment by default. After verdict for the plaintiff on the first special issue for 1s. and damages also assessed on the new assignment, and a verdict for the defendant on the not guilty, except, &c. and on the second special issue; it was holden, that the defendant was entitled to the general costs of the trial; because the plaintiff was not obliged to go to trial, but should have let judgment go by default, on the issue of the limited right of way, which was found against him.||

Braithwaite
v. Bradford,
6 T. Rep. 599.

[An inclosure act having directed that the parties, who were dissatisfied with the determination of the commissioners, might bring actions to try their rights, and "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff, but, if against such determination, then by the proprietors at large;" a proprietor, who had brought an action for nine distinct rights, and recovered for three only, was allowed costs only on those issues which were found for him, and the costs of the other issues were given to the defendant.]

Yates v. Gun,
Barnes, 141.
In a similar
case the Court
of King's
Bench allowed
the costs of the

After issue and demurrer joined, plaintiff tried the issue, and had a verdict; but afterwards, upon argument, judgment was given for the defendant upon the demurrer; and it was holden, that the plaintiff should have the costs of the trial, and the defendant those of the demurrer.

demurrer to the defendant, but gave no costs on either side on the trial. *Cooke v. Sayer*, 2 Burr. 753. 2 Wils. 85. S. C. Say. Costs, 221. S. C.

Vivian v.
Blake, 11 East,
263.

If, besides the general issue, there be a special plea, which goes to an issue, to the whole declaration, and on the trial there be a verdict for the defendant, and upon the other for the plaintiff, with 1s. damages; the plaintiff is not entitled to costs.||

Salk 208.
2 Salk. 520.
Fanshaw and
Morrison,
6 Mod. 157.
S. C. 2 Ld.
Raym. 1138.
10 Mod. 306.

Upon a *scire facias* on a recognisance in *C. B.* against bail, the plaintiff had judgment for execution upon the recognisance, *§ quod recuperet damna sua occasione dilationis executionis*. Upon a writ of error in *B. R.* this was reversed, for the bail are only liable to costs of suit by the statute; and damages, by reason of the delay of execution, are not costs, nor costs of suit, but damage sustained by being so long kept out of his money, which used to be assessed by allowing the party what lawful interest would

would have come to him in the mean time; so that costs and damages are different in this case, given for different ends, and assessed by different measures.

If baron and feme join in an action, and a verdict is given for the plaintiffs, and the jury assess damages *ultra misas & custagia per ipsum* (the baron) *circa sectam suam exposita*, to so much, & *pro misis & custagiis illis*, to so much; and thereupon judgment is given, that the baron and feme shall recover the costs and damages; though it is found that the baron only expended and disbursed the money for the costs of the suit, in as much as the feme had nothing, yet the judgment is good, that the baron and feme shall recover the costs; for there cannot be one judgment for the costs, and another for the damages.

[The husband cannot have execution for the costs on a plea of coverture found for the wife defendant, without a *scire facias*.]

A demand of costs must be made at the time of serving the rule of court under which they are taxed; and upon an affidavit that the costs were so demanded either by the party entitled to receive them, or by some person by him duly authorized, and that payment was refused; an attachment will be granted in the first instance, and may be moved for the last day of term.

The costs allowed to the plaintiff after obtaining judgment in an action on a simple contract, or for a debt certain, only extend to the time of signing final judgment. In such case, the expences of levying, together with all other incidental charges of the execution, must be paid by the plaintiff, and not by the defendant; for the sheriff can levy on the defendant only the sum given by the judgment. || And it was holden in one case where the defendant let judgment go by default in an action of debt on simple contract, that the plaintiff was not entitled to levy the expences of the execution, notwithstanding those expences, together with the debt and costs of the action, did not exceed the sum confessed on the record. || But, if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent on the expences of the execution, which, in that case, must be sustained by the defendant (a). A defendant, if he prevail, can only levy the amount of his costs, and that at his own expence.

“action, in which the plaintiff shall be entitled to levy under an execution against the goods of any defendant, such plaintiff may also levy the poundage, fees, and expences of the execution, over and above the sum recovered by the judgment.” But this act does not seem to extend to cases where the defendant is taken in execution on a *capias ad satisfaciendum*; nor to entitle a defendant, in any case, to poundage and the expences of the execution, where, after a judgment of *non-pros*, &c. he takes out execution for costs. Hullock, 654. ||

It was anciently the practice for the court, or one of the judges, to tax the costs, and make a special rule for their payment; upon service of which, and refusal of payment, an attachment issued. But, at this day, costs are taxed in the King's Bench by the master, and in the Common Pleas by one of the prothonotaries, upon the attornies or agents of the parties attending them at their respective offices for that purpose. After the taxation,

Roll. Abr. 516.
Cruce and
Berry, ad-
judged upon a
writ of error.

Wortley v.
Rayner,
Doug. 637.

Barnes, 120.
Say. Rep. 48.
1 Burr. 651.
5 Burr. 2686.

Hullock, 624.
2 T. Rep. 157.

Thornton v.
Merredew,
3 Bos. & Pull.
362.

|| (a) And now,
by a late act
43 Geo. 3. c. 46.
§ 5. “in every

Hullock, 625.
Gilb. H. C. P.
261. 266.

tion, the master, or the prothonotary, marks the amount of the costs on the *postea*, inquisition, or demurrer-roll, as the case may be, when final judgment is said to be signed, and execution may be immediately taken out.

Hullock, 625.

1 Lill. Abr.
470. I.

Where any extraordinary expences have been incurred in a cause, and generally in country causes, an affidavit (in which it is customary for the party entitled to the costs and his attorney to join) stating the particulars of such extra expences, is requisite to enable the proper officer to make an adequate taxation. And it is said, that more than ordinary costs ought not to be taxed, until the attornies on both sides have been heard for their clients, and an affidavit of the costs produced, except where one of the attornies, having had notice of the intended taxation, neglects to attend. It is usual to give such notice to the attorney or agent of the party liable to the costs; but, as this is a matter of courtesy, and not of right, it may be prudent, in some cases, to take out a rule from the office of the clerk of the rules in the King's Bench, or of the secondary in the Common Pleas, to be present at the taxation, which, when served on the opposite party, renders it incumbent upon him to give notice.

Thellusson v.
Staples, Dougl.
438.

In the taxation of costs, no allowance can be made for the contingent losses, which the witnesses may have suffered by obeying the *subpœna*.]

Cotton v.
Witt, 4 Taunt.
55. Schimmel
v. Leusada, *Id.*
695. Sturdy v.
Andrews, *Id.*
697.

|| The costs of bringing a foreign witness to this country are allowed both in the King's Bench and Common Pleas; and so are the costs of detaining him here, computed from the day of the writ sued out to the day of trial. The costs of his return are allowed by the King's Bench, but not by the Common Pleas. ||

COVENANT.

|| THE word "Covenant" seems to be borrowed from the Latin *convenire*, or *conventus*, which signifies a mutual agreement and accord, upon conditions propounded and accepted by the parties concerned. A covenant then is a mutual consent and agreement entered into between persons, whereby they stand bound each to the other to perform the conditions contracted and indented for. So that a covenant in this larger sense is the very same thing with a contract or bargain.

But the word is generally taken in the law of *England*, and indeed is here considered, in a more restrained sense, and applied

applied only to an agreement in writing under seal. By cove- 2 Bl. Comm.
nants therefore are meant those clauses of agreement contained 304.
in a deed, whereby either party stipulates for the truth of cer-
tain facts, or binds himself to perform, or forbear doing, some
thing to the other. For the breach of these covenants the party
injured is entitled to relief by (a) an action, or writ of covenant
against the covenantor, founded on the deed.

(a) It is said,
that an action
may be main-

tained by special custom, as in *London*, or *Bristol*, upon a mere verbal agreement, though
such custom shall be taken strictly. F. N. B. 146. A. Touchst. 162. 1 Leon. 2. But by a
note in the Register, 165. b. *Non debet fi-ri breve de conventione per legem mercatoriam quia
placitum de conventione non valeat sine facto, et quilibet debet judicari secundum factum suum, et
non per aliam legem.* Qu. the custom.

But the word "covenant" is not a word of art, and essential 1 Leon. 324.
to the constitution of a covenant; for any words in the deed, in Sty. 406.
what part soever found, from which the intent of the parties to
enter into the engagement can be collected, are effectual for that
purpose.

Covenants are distinguished into express and implied cove- Touchst. 160.
nants — express, when they are expressed in the deed; implied,
when the deed doth not express them, but the law doth make and
supply them.

They are distinguished also into real and personal: real,
when they pass land, or are annexed to and run with land; per-
sonal (b), when they attach upon or run in the personalty, and (b) Collateral
charge or benefit some person in particular. Personal again covenants fall
may be distinguished into such as are transitive or intransitive: under this
intransitive, when the duty of performing them is limited to the branch of the
covenantor himself; transitive, when it passes to his represen- division.
tatives.

Covenants again are distinguished into affirmative and nega-
tive, as they may be in the one or the other; and into cove-
nants executed and executory: the former referring to a thing
as done already; the latter providing that it shall be done here-
after.

A covenant is not a duty, nor cause of action, till it be Aleyn. 39.
broken; so that it is not discharged by a release of all actions:
and when it is broken, the action is not founded merely on the
specialty, as if it were a duty, but savours of trespass, and sounds
in damages, and therefore an accord is a good plea to it. ||

For the better understanding of the action of covenant, I
shall consider,

- (A) The Manner, and by what Words an express
Covenant is created.
- (B) Covenants created by Implication of Law.
- (C) Where an Action of Covenant is the proper
Remedy.
- (D) Where there are several Parties: And herein of
joint Covenants.

(E) Covenants Real and Personal: And herein to whom they shall extend:

1. *Covenants which shall extend to the Heir or Executor, so as to bind them, though not expressly named.*
2. *Covenants which the Heir or Executor may take Advantage of.*
3. *Where an Assignee shall be bound by the Covenant of the Assignor.*
4. *Where the Assignor continues still liable.*
5. *Where an Assignee shall take advantage of a Covenant.*
6. *Covenants which bind by force of the Statute 32 H. 8. c. 34.*

(F) How Covenants are to be construed.

(G) Where the principal, and all auxiliary Covenants, shall be said to be void and extinguished.

(H) What shall be deemed a Breach, or construed a good Performance.

(I) Where the Breach shall be said to be well assigned.

(K) Where the Performance shall be said to be well set forth and pleaded.

(L) What may be pleaded in Bar to the Action.

(A) The Manner, and by what Words an express Covenant is created.

(a) 1 Chan. Ca. 294. Leon. 324.

[1 Burr. 290. Dougl. 766.

(b) A party may also covenant in respect of past transactions. Plowd. 308. So, he may covenant as to time *present*, for it is

the constant language of deeds of alienation, that the grantor has lawful power to convey. 3 Wooddes. 86.] (c) Roll. Abr. 518. Brownl. 23. S.C. (d) But it is said, that without the word *agreed*, it would have been only a qualification of the covenant of the lessee. Roll. Abr. 518. 2 Co. 72.

(a) THE law does not seem to have appropriated any set form of words, which are absolutely necessary to be made use of in creating a covenant; and therefore it seems that any words will be effectual for that purpose, which shew the parties concurrence to the performance of a future act (b); as, (c) if lessee for years covenants to repairs, &c. *Provided always, and it is agreed, that the lessor shall find great timber, &c.* this makes a covenant on the part of the lessor to find great timber, by the word (d) *agreed*, and it shall not be a qualification of the covenant of the lessee.

So, if *A.* leases to *B.* for years, upon condition that he shall acquit the lessor of ordinary and extraordinary charges, and shall keep and leave the houses at the end of the term in as good plight as he found them; if he does not leave them well repaired at the end of the term, an action of covenant lies.

So, these words in a lease of a mill, *and the lessee shall repair the mills as often as need shall require, and shall leave them sufficiently repaired at the end of the term*, make a covenant, (a) because it is the clear agreement of the parties; for otherwise the words, *shall leave, &c.* would have no effect.

2 Roll. Rep. 63. S. C. adjudged. (a) As if *A.* by indenture agrees to give *B.* 70*l.* for an house, if *B.* executes one part of the indenture to *A.*, *A.* may bring covenant for the house. Pordage and Cole. Lev. 274. *per cur.* Raym. 183. *per cur.* Saund. 319. for on the part of *B.* it amounted to a covenant to convey.

If *A.* leases to *B.* for life, with a *proviso*, that if the lessee dies within the term of forty years, that then the executors of the lessee shall have it for so many of the years as amount to the number of forty years, to be accounted from the date of the indenture of lease; this *proviso* shall not be a lease, but only a covenant.

If there are articles of agreement between *A.* and *B.* by which it is agreed, upon a marriage intended between *A.* and *C.* that all the stock of *C.* shall remain in the hands of *B.* till *A.* shall make a certain jointure to *C.* *ipso B. annuatim solvendo to A. interesse proinde secundum ratam 8*l.* per centum, &c.* if *B.* does not pay the said interest, an action of covenant lies against him upon these words, because (b) every (c) agreement by deed is a covenant, otherwise *A.* could not have any remedy for the money.

words were only by way of recital, that it was intended that a fine should be levied, &c. [yet held to be a covenant, coupled with other parts of the deed, to which they related: for whatever doth amount to a collective intent to do an act under hand and seal will make a covenant. Hollis v. Carr. 2 Mod. 89. 91. 2 Freem. 3. S. C. || And where a man by deed-poll recited that *whereas he was* possessed of certain lands for a certain term of years, by good and lawful conveyance he assigned the same to *J. S.*; the court said, Recital of itself is nothing, but being joined and considered with the rest of the deed it is material, as here, for against the recital the party cannot say that he hath not any thing in the term. And they clearly resolved, that if he had not that interest by a good and lawful conveyance, the obligation was forfeited. Severn and Clerke's case. Leon. 122. (c) Where a man assigns and transfers a chose in action, though nothing passes, yet it amounts to a covenant that the other shall have the thing. Mod. 113. 3 Keb. 304. Freem. 268. Ld. Raym. 683. [2 Ld. Raym. 1242. 1419. 2 Bl. Rep. 820.]

If *A.* makes a deed to *B.* in these words, *I have in my custody one writing obligatory, in which writing obligatory, one William now standeth bound to the said B. for the payment of 400*l.* upon such a day, being the proper money of B. and (d) I will be ready at all times, when I shall be required, to re-deliver the same writing obligatory to the same B.*; if *B.* after demands the said obligation of *A.* and he refuses to deliver it, *B.* may have an action of covenant upon this deed by force of the words, *and I will be ready at all times, when I shall be required, to re-deliver the same, &c.*

40 E. 3. 5. b.
Roll. Abr. 518.
S. C.

Roll. Abr. 518.
Bret and Cumberland, adjudged. Cro. Ja. 399. 521.
3 Bulst. 163.
Roll. Rep. 359.

for an house,
Pordage
and Cole. Lev. 274.
per cur. Raym. 183.
per cur. Saund. 319.
for on the part of B. it
amounted to a covenant to convey.

Co. 155. Roll.
Abr. 518.
Moor, 478.

Roll. Abr. 518,
519. (b) So,
where a man
acknowledges
himself to be
accountable to
another for all
money by him
charged upon
A. to be paid
to B. Lev. 47.
— Where the

Roll. Abr. 519.
(d) So, where
the words of a
deed are, I
oblige myself
to pay so much
money at such
a day, and so
much at an-
other. Hard.
178. adjudged;
but

but the chief baron doubted, if the words had been *teneri & firmiter obligari*; for that these words sound in debt, and not in covenant.

Raym. 25. Robinson and Ampton, adjudged. Keb. 103. 118. S. C. Sid. 48. S. C.

If *A.* enters into a statute to *B.* and afterwards *B.* by his deed covenants, that upon payment of such a sum at a day to come, the statute shall be void, and that he will deliver it in, and cause it to be vacated; if *B.* before the day sues execution upon the statute, *A.* may bring an action of covenant; for though it be true, that a covenant that is to take effect presently is to stand or fall by the operation of law, and no action of covenant will lie; as, if a man covenants that a bond shall be void upon doing such an act, or to stand seised, no action of covenant will lie upon these; yet here the last words bind the party to the performance of a future act, *viz. to deliver in the said statute, and cause it to be vacated*, which, without all question, sound in covenant.

Carth. 64. Comb. 123. 124.

If *A.* enters into an obligation to *B.* and afterwards *B.* covenants not to sue *A.* without any limitation of time, this amounts to a release, and may be pleaded as such.

Carth. 64.

But, if the covenant be temporary, and limited to a certain time; as, if it be, that *B.* will not sue for ninety-nine years, &c. this still remains a covenant; and for the violation thereof an action of covenant is the proper remedy, but it cannot be pleaded in bar. So, if there be two obligors, and the obligee covenant that he will not sue one of them, this is no release, but only a covenant.

Carth. 64.

A letter of licence containing the words following, *viz. that if the creditor sue within such a time, his debt shall be forfeited*, works a forfeiture by the commencement of the suit, and therefore may be pleaded in bar to the action.

Roll. Abr. 518. Geary and Read. Cro. Car. 128. S. C. adjudged. || A proviso shall be sometimes taken for a condition, and sometimes for an explanation, and sometimes for a covenant, and sometimes for an exception,

and sometimes for a reservation. It is taken for a condition, as, if a man lease land, *provided* that the lessee shall not alien without the assent of the lessor, *sub pena foris facture*, here it is a condition. If I have two manors, both of them named *Dale*, and I lease to you my manor of *Dale*, *provided* that you shall have my manor of *Dale* in the occupation of *J. S.*; here the proviso is an *explanation* what manor you shall have. If a man lease a house, and the lessee covenant that he will maintain it, *provided* always that the lessor is contented to find great timber, here it is a *covenant*. If I lease to you my messuage in *Dale*, *provided* that I will have a chamber myself, here it is an *exception* of the chamber. And if I make a lease rendering rent at such a feast as *J. S.* shall name, *provided* that the feast of *St. Michael* shall be one, here this proviso is taken for a *reservation*. *Per Popham C. J. Gouldsb. 131.* in the case of the Earl of Pembroke v. Barkley. It may sometimes operate as a qualification of the covenant of the other party: as, if a lessee covenant to repair, *provided always that the lessor shall find great timber*, omitting the word *agreed*, this proviso shall not be any covenant on the part of the lessor, but shall be merely a qualification of the lessee's covenant. Ro. Abr. tit.

tit. Covenant (C) pl. 3. Holder v. Taylor. The very clause too of the proviso itself may operate both as a condition and as a covenant: as a condition, by force of the proviso; as a covenant, by force of the other words; purporting a condition, as it contains the words of the grantor (for no condition can be reserved or made but on the part of the donor, lessor, or feoffor, Dyer. 6.) purporting a covenant as comprehending the words of the grantee. Nor is it material in what part of the deed the word *proviso* stands; it is the sense, and not the place, which is to determine its import. If it be substantive and independent, and relate only to the estate passed, it is a condition; if it be qualified, it may amount to a covenant only; if there be a proviso and covenant in the deed, it may enure to both. Jenk. 252. Cromwell's case, 2 Co. 71. Simpson v. Titterel, Cro. Eliz. 242. Earl of Pembroke v. Barkley, *Id.* 384. Co. Litt. 203. b. 146.||

If *A.* by deed enfeoffs *B.* provided that, if *A.* pays money to *B.* by a day, the feoffment shall be void, and covenants to save harmless from incumbrances and arrears of rent, and to make further assurance; and after *A.* enters into an obligation conditioned for the performance of all (*a*) covenants, payments, articles, and agreements comprised in the deed; if *A.* pays not the money, yet the bond is not forfeited; for there being no covenant to pay the money, it is a *proviso* in advantage of the feoffor, that, if he paid the money, he should have the land again; so that it is in his election to pay the money or lose the land, which is a sufficient loss to him, and the word *payment*, in the bond, hath reference to the covenant to save harmless from arrears of rent.

the deed are compulsory, not such as are voluntary; for otherwise the obligation would be repugnant and contrary to the deed. 1 Brownl. 113. S. C. and Bulst. 156. S. C. adjudged. 2 Mod. 37. S. P. 10 Mod. 227. Gilb. Eq. Rep. 43. (*a*) Otherwise, if the condition of the bond had been for the performance of all covenants and conditions in the deed. Tooms v. Chandler, 2 Lev. 116. 3 Keb. 454. adjudged, and in 3 Keb. 460., judgment is given for the defendant unless the plaintiff discontinue.

An action of covenant may be brought as (*b*) well on a deed poll, as on a deed indented.

lies upon the king's patent, though there is no counterpart sealed by the lessee, who is to be charged. Cro. Ja. 240. 399. 521. 3 Bulst. 163. Roll. Rep. 359. Poph. 136.

But, though covenant lies as well on a deed poll as upon a deed indented, yet the parties must be named therein; and, therefore, where in covenant the plaintiff declared, that *J. S.* being arrested at his suit, and in the custody of the bailiff, the defendant promised and engaged to bring in the body of *J. S.* into the custody of the bailiff such a day; on demurrer it was holden, that the action would not lie, the plaintiff not being named in the agreement, and no averment *dehors* could avail him.

Cro. Ja. 281. Brisco and King, adjudged; Yelv. 206. S. C. adjudged; the *proviso* being, that if *A.* paid for *B.* 40*l.* to *C.* &c. for the word *payment*, in the obligation, shall have reference to such payments only as by the deed and condition would be repugnant and contrary to the deed. 1 Brownl. 113. S. C. and Bulst. 156. S. C. adjudged. 2 Mod. 37. S. P. 10 Mod. 227. Gilb. Eq. Rep. 43. (*a*) Otherwise, if the condition of the bond had been for the performance of all covenants and conditions in the deed. Tooms v. Chandler, 2 Lev. 116. 3 Keb. 454. adjudged, and in 3 Keb. 460., judgment is given for the defendant unless the plaintiff discontinue.

Roll. Ab. 517. (*b*) So, a writ of covenant.

Salk. 197. Green and Horn, adjudged.

(B) Covenants created by Implication of Law.

THERE are some words which, of themselves, import no express covenant, yet being made use of in certain contracts, they amount to such, and are therefore called covenants in law, and will as effectually bind the parties, as if expressed in the most explicit terms.

48 E. 3. 2. b. 7. Roll. Abr. 519.

5 Co. 17. a. resolved.
(a) So, if an assignment thereof be

As, if a man (a) makes a lease for years of land, by the words (b) *concessi* or *demisi*, these import a covenant, and if the lessee or his assignee are (c) evicted, they may bring an action thereupon.

made by the word grant. 2 Roll. Rep. 399. Palm. 388. (b) Carth. 98. S. P. admitted.—Where a man *assignavit* & *transposuit* all the money that should be allowed by any order of a foreign state, to come to him in lieu of his share in a ship; Mod. 113. said by *Hale*, though it cannot be assigned, yet this amounts to a covenant that he shall have all the money. ||So, if the cattle of the lessee are distrained by the lord paramount, the lessee may have covenant against his lessor. Sir T. Raym. 257. || (c) [But, in such case, the eviction must be by one who hath a title, though it is otherwise, it hath been said, where there is an express covenant; 2 Leon. 104. Cro. El. 214. 2 Brownl. 161.; and yet it seems now to be settled, that an express covenant in the most general terms shall be restrained to lawful interruptions, 3 T. Rep. 584. Vaugh. 118.] ||The distinction between implied covenants by operation of law, and express covenants, is, that the latter are taken more strictly, and are obligatory upon the covenantor in every event, and in every state and condition of the thing which is the subject of the covenant. For when the law creates a duty, and the party is disabled to perform it without any default in him, and hath no remedy over, he will be excused; but, when by his own express contract he creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident even by inevitable necessity, because he might have provided against it by his contract. If, therefore, a lessee covenant to repair a house, though it be burnt by lightning, or by accident, or thrown down by the king's enemies, yet he is bound to repair it. Br. Covenant, 4. Dyer, 33. a. *Paradine v. Jane*, All. 27. *Earl of Chesterfield v. Duke of Bolton*, Com. Rep. 627. *Bullock v. Dommitt*, 6 T. Rep. 650. *Walton v. Waterhouse*, 2 Saund. 420. *Compton v. Allen*, Sty. 162. So, on a covenant to keep a bridge in repair for a certain time, the party is bound to rebuild it, though broken down by a great and extraordinary flood. *Company of Brecknock Navigation, v. Pritchard*, 6 T. Rep. 750. So, if there be an express covenant for the payment of rent, the lessee is liable to the rent, though the premises were burnt down, and his covenant was to keep them in repair during the term, except they should happen to be demolished or damaged by fire. *Monk v. Cooper*, 2 Ld. Raym. 1477. 2 Str. 763. S. C. *Belfour v. Weston*, 1 T. Rep. 310. *Doe v. Sandham*, 1 T. Rep. 704. *Shubrick v. Salmond*, 3 Burr. 1638. And it seems the lessor is not bound to rebuild, though he insist upon the payment of the rent during the term. *Pindar v. Ainsley*, cited in 1 T. Rep. 312. *Weigall v. Waters*, 6 T. Rep. 488. Nor will equity relieve in this case, unless there be some special circumstances (as where the lessor had recovered the value of the house from the insurers, *Brown v. Quilter*, Ambl. 619.); for the equity of the parties being equal, the rule of law must prevail, *Hare v. Groves*, Anstr. 687. See too 1 Fonbl. Eq. Tr. 374 to 379. ||

Roll. Abr. 519.
Style, 387.

Carth. 135.
(d) So, the words yielding

and paying make a covenant

Style, 406. 431.

2 Brownl. 215.

Sid. 266. 401.

2 Mod. 92.

Vent. 10.

2 Jones, 102.

3 Lev. 155.

So, if a man leases for years, reserving rent, an action of covenant lies for non-payment of the rent, for the (d) *reddendo* of the rent is an agreement for payment of the rent, which will make a covenant.

4 Co. 80. b.
Nokes and James, adjudged. 9 Ves. 330. S. P. by Lord Eldon.

Also, if a man leases for years by the words *demise*, *grant*, &c. and in the deed there are several covenants on the part of the lessor, and he enters into a bond conditioned for the performance of all the covenants, &c. in the deed; this extends as well to the covenants in law, as express covenants.

4 Co. 80. Cro. Eliz. 674. Yelv. 175. 4 Taunt. 329.

But, if a man leases for years by the words *demisi*, &c. and the lessor covenants that the lessee shall enjoy during the term, without eviction by the lessor, or any claiming under him; this express covenant qualifies the generality of the covenant in law, and restrains it by the mutual consent of both parties, that it shall not extend farther than the express covenant.

If a man leases to me by indenture the land of (a) *J. S.* of which *J. S.* is seised at the time, upon which I enter, and he re-enters, I shall have a writ of covenant upon this indenture, though I was not in the land by the lease, but by estoppel, for the lessor is estopped to say that I was not in of his lease.

Roll. Abr. 520.
Cro. Ja. 73.
S. C. adjudged.
(a) So, if by indenture he leases to me my own land,

and I am ousted by a stranger. Cro. Ja. 73. Roll. Abr. 520. 871.

So, if a man leases to me land of *J. S.* of which *J. S.* is seised at the time, I shall have a writ of covenant before entry upon *J. S.* and re-entry by him; for I need not allege an eviction, for this is a covenant in law, which is broken when he is not seised of the land at the time of the demise; for the word *demise* imports a power of letting, and it is not reasonable to enforce the lessee to enter into the land, and so to commit a trespass.

Roll. Abr. 520.
Holder and Taylor.
2 Brown. 22.
S. P. Hob. 12.
S. C. But *vide* in Roll. the case immediately follow-

ing; which seems *cont.*, and that if a man leases land for years, and a stranger enters before the lessee enters, he shall not have an action of covenant upon this ouster, because he was never a lessee in privity to have the action. Roll. Abr. 520. Owen, 105. S. P. *per* Fenner.*
—* *Sed. qu.* If this is law? and if he may not maintain an action on the covenant, express, or implied, that he shall hold and enjoy for the term?

But, if a man leases certain goods for years by indenture, which are evicted within the term, yet he shall not have a writ of covenant; for the law does (b) not create any covenant upon such personal thing.

Owen, 104.
Roll. Abr. 519.
(b) And therefore, in case of a lease of a

house, together with the goods, it is usual to make a schedule thereof, and affix it to the lease, and to have a covenant from the lessee to re-deliver them at the end of the term; for without such covenant the lessor can have no remedy but trover or detinue for them after the lease ended.

So, in the case of a grant of an (c) inheritance, by the words *enfeoff, grant, &c.* the law does not create a covenant.

(c) || Whether the word "reddendum"

will maintain an action of covenant upon a lease for life, *dubatur.* Sir T. Jones, 102. ||

Also, if two or more join in making a lease by the words *concessimus, &c.* this creates a covenant in law, for the breach of which, all of them shall be jointly sued; but, if the breach be the personal tort of one of them, as, if one of them enter and oust the lessee, the action may be brought against him alone; for it is unreasonable that the others should suffer for the personal wrong of their companion.

Carth. 97.
Coleman and Sherwin, adjudged. Salk. 137. Show. 79. S. C.

A. by indenture granted and demised to *B.* certain lands, except a little piece upon which a pump was standing, together with the use and occupation of the pump, in common with other the tenants of *A.* for thirty-one years; and after, the pump became useless for want of repairs, and *B.* brought covenant against *A.* and assigned the breach in *A.*'s permitting the pump to run to decay; it was holden by *Kelynge*, Chief Justice, *Rainsford* and *Moreton*, Justices, that the action lay; for that when the use of a thing is (d) demised, and it runs to decay, so that the lessee cannot have the use and benefit thereof, he may have covenant upon the word *demisi*; and here the lessee himself could not repair, having no interest in the pump, or land where it stood.

Comb. 163.
Vent. 26. 44.
Pomfret and Ricroft, adjudged, *cont.*
Twisden in B. R. Sid. 429. S. C. adjudged; *cont.* Twisden in B. R. But Saund. 321. S. C. reversed for Twisden's reasons in *Cam. Scacc.*; and

Hale said, that if I lend one a piece of plate, and covenant he shall have the use thereof, yet if the plate be worn out by ordinary use, without any default, no action of covenant lies against me.—

But Twisden totis viribus cont. 1. Because a covenant created by law, as this is, never lies but on an (*e*) actual ouster. 2. This covenant created by law, is not (*f*) properly to recover damages, but the term itself, and the damages that are recovered are for the whole term, whereas the pump may be repaired the next day. 3. The lessee may repair the pump himself, and may come on the ground without being a trespasser; as where I grant that you may fish in my pond, you have liberty to come upon my ground; so, if you have a grant to lay pipes in my ground, you may dig up the ground for that purpose; and for these reasons of *Twisden's*, the judgment was *unâ voce* reversed in *Cam. Scacc.*

But, if one by deed grants a water-course, and after stops it, an action of covenant lies against him. *Saund.* 322. For by *Twisden* this is a voluntary misfeasance.—So, if I lease a house, and therewith grant estovers out of such a wood, if I cut down the wood, so that no estovers can be had, the lessee may bring covenant against me. (*d*) But, if *A.*, in consideration that *B.* will build a mill upon the land, and a water-course through the land, demises to *B.* by the words *dedi & concessi*; and after *A.* stops the water-course, yet no action of covenant lies; for the covenant extends not to a thing which was not *in esse* at the making of the lease. 1 *Leon.* 278. (*e*) *Vide* Roll. Abr. 519. & *Q.* (*f*) *Vide* F. N. B. 145.

Carth. 232.
Bush and Cole,
adjudged. *Salk.*
196. Show.
388. S. C.
(*a*) Acc. in
Moor, 553.
Cro. Eliz. 657.

If *A.* leases a house to *B.* excepting two rooms, and free passage to them, and the lessee assigns to *J. S.* who disturbs the lessor in the passage; this, though a covenant in law, shall bind the lessee; for where the lessee agrees to let the lessor have a thing out of the demised premises, as a way, common, &c. covenant lies for a disturbance; (*a*) but, if the disturbance had been in the rooms excepted, covenant would not have lain.

Duke of St.
Albans v.
Ellis, 16 East,
352.

|| If a lessee covenant, that he will at all times during the term, plough, sow, manure, and cultivate the demised premises (*except the rabbit-warren and sheep-walk*) in a due course of husbandry; this exception is as much a covenant or agreement as the rest of the stipulation in which it is placed, and if the lessee plough the rabbit-warren or sheep-walk, covenant lies against him.

Seddon v.
Senate,
13 East, 63.

If the proprietor of a medicine assign to another all his right, title, and interest in the medicine, and all the future profits arising from the sale thereof; such assignment raises an implied covenant that he will not prepare or sell the medicine, for his own profit, or engage with others in so doing; such preparation and sale being a retention and exercise of that right which he has conveyed by his deed.||

(C) Where an Action of Covenant is the proper Remedy.

Roll. Abr. 11.
Cro. Ja. 505.

IF *A.* for valuable consideration, promise by his *deed* not to do a certain thing, no action upon the case lies upon this promise, but a writ of covenant.

Roll. Abr. 517.
Bemish and

So, if *A.* recovers a debt against *B.* and *B.* pays him the condemnation, upon which *A.* releases all actions, executions, &c. to *B.* by

B. by deed, and by the same deed promises that he will withdraw and discharge all writs of execution against *B.* upon the said judgment, yet no action upon the case lies upon this promise; because it is made by deed, and so he ought to have a writ of covenant.

Hildersly, adjudged. Cro. Ja. 503. S. C. [But, if articles of partnership under seal be dissolved, and

a balance struck, and an express promise be made to pay it, an *assumpsit* may be brought. Foster v. Allanson, 2 T. Rep. 479. So, if there be an express promise to pay a balance struck, though the articles, containing a covenant to account, are subsisting. Moravia v. Levy, Id. 483. n.]

|| If a contract of freight and demurrage be entered into by deed, the plaintiff cannot declare in debt generally, and give the deed in evidence; but must declare upon the deed.

Atty v. Parish, 1 N. R. 104.

Where a ship was let to freight by charter party from the plaintiff to the defendant, and in the deed "it was covenanted and agreed between the parties that forty days should be allowed for unloading, loading, &c." the owner's remedy for a detention beyond that time, was holden to be on the covenant; such detention being a breach of the freighter's implied covenant that he would not detain it longer than the stipulated time.||

Randall v. Lynch, 12 East, 179. Stevenson's case, 1 Leon. 324.

If a man leases for years, reserving rent, he may have an action of covenant, as well as debt, for the rent arrear: so, if *A.* grants a rent to *B.* payable at a certain feast yearly, and covenants to pay the rent at the feast; an action of covenant lies for non-payment, though he might have an action of debt for it.

2 Stra. 1089. 12 Mod. 371. Vide title Debt and Actions in general. Roll. Abr. 517, 518.

It seems by the better opinion, that upon the eviction of a freehold, no action of covenant will lie upon a warranty, either in deed or in law, for the party might have had his *warrantia chartæ*, or voucher; but in case of a lease for years upon an eviction, there can be no other remedy.*

Brownl. 19. Keb. 821. Vide Hob. 4. Yelv. 139. Noy, 131. * The course now is, to introduce an

express covenant for quiet enjoyment, against all persons claiming, and that the estate is free from incumbrances.

(D) Where there are several Parties: And herein of joint Covenants.

IF *A.* covenants to do an act for the benefit of two or more, and *A.* breaks his covenant, one of them alone (*a*) cannot maintain covenant against him, for then might he be doubly or trebly charged for the same breach.

5 Co. 12. b. Slingsby's case. But, where a covenant may be joint or several,

ral, vide 2 Roll. Abr. 149. Skin. 401. pl. 35. (*a*) In an indenture between *A.* and *B.* of the one part, and *C.* of the other part; among other covenants, there is one thus, viz. It is agreed between the parties, that *C.* shall enter into a bond to *B.* to pay him 100*l.* at a day, in an action for non-performance, *A.* and *B.* must join. Yelv. 177.

So, if *A.* covenants to do an act for the benefit of *B.* and *C.* and enters into a bond to them & *cui libet eorum* for performance; yet this being a joint interest, each cannot bring a separate action. But two may bind themselves severally to pay money, or

5 Co. 19. a. Show. 8. Comb. 155.

or if jointly and severally bound, the obligee may sue which he pleases.

Neele v.
Reeve, 2 Sid.
107.

If *A.* covenants with *B.* that *A.* or his son, or either of them, shall work with *B.* at, &c. *B.* paying to each of them so much, &c. and *B.* requests the son to work with him, &c., if he does not, the covenant is broken; for *B.* had the election to require both, or either of them, to work with him.

Comb. 115.
Spencer and
Durant.

If an agreement be entered into between several fidlers, that they will not play, &c. asunder, unless on my *Lord Mayor's Day*, &c., and they bind themselves in 20*l.* each to the other jointly and severally, and one only brings covenant, and assigns the breach, that the defendant played *ad quandam tabernam*, &c. this is naught, for they ought all to have joined, the interest being joint; and it is repugnant and contradictory for four persons to bind themselves one to the other jointly and severally.

Saunders v.
Johnson,
Skin. 401.

¶ An action of covenant was brought by the herald painters, *et pro quolibet et singulis eorum*, that they should bring their work to such a place, and that there such work should be done, &c.; and because one of the covenantors did not bring his work to the place aforesaid, the others brought this action, which was adjudged to be well brought; for it is founded upon the work not being brought to the place appointed for it, and in this part the covenant is joint, for they have all an interest and right jointly, that the work shall be brought there in order to be done; and though the words of the covenant are several, yet the subsequent matter and interest being joint, the covenant shall be joint.

Mansell v.
Burrledge,
7 T. Rep. 352.

Where two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award, and the arbitrator awarded each of the two to pay a certain sum to the third; it was holden that they were jointly responsible for the sum awarded to be paid by each.

Anderson v.
Martindale,
1 East, 497.

If *A.* covenant to and with *B.* his executors, administrators, and assigns, and to and with *C.* and her assigns, to pay an annuity to *B.* his executors, administrators, and assigns during *C.*'s life; this is a joint covenant to *B.* and *C.* in which they have a joint legal interest, although the benefit be for *B.* only; and therefore on the death of *B.* the right of action survives to *C.* only, and *B.*'s administrator cannot sue upon the covenant.

Southcote
v. Hoare,
3 Taunt. 87.

If by indenture tripartite between *A.* tenant for life of the first part, *B.* of the second part, and *C.* of the third part, *A.* demise to *C.*; and *C.* covenant with *B.* (a receiver appointed by the Court of Chancery) and other the receiver or receivers for the time being, and to and with such other person as, for the time being, shall be entitled to the freehold, and to and with every of them; this covenant is joint, and upon the death of *A.* for a breach in his lifetime the action survives to *B.* and cannot be maintained by *A.*'s representative. The covenant with two and every of them is joint, though the two are several parties to the deed. There is a great deal of difference, as observed by *Law-*

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rence J. between covenants where the parties covenant jointly and separately, and where they covenant with them, and every of them: in the former case the covenantees clearly have separate actions.

If conversely, a man covenant with two or more jointly, yet, if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint.

Hawley, 3 Mod. 263. Johnson v. Wilson, Willes's Rep. 248.

Where part-owners of a ship agreed "each and every of them, with the others, and each and every of the others," that the ship should proceed on a certain voyage, under the exclusive management and controul of one of them as ship's husband, and that after her return, "a full account should be made of the said ship and her concerns," and the neat profits be divided in proportion, after deducting all charges; this covenant is several, and for not making out the account, and dividing the neat profits, an action lies against the ship's husband by each of the part-owners. ||

[Where a covenant is joint and several, in an action against one only, the breach may be assigned in the neglect of both.

Owston v. Ogle, 13 East, 538.
Lillyv. Hedges, 1 Str. 553.
8 Mod. 166.
S. C.

If two joint lessees covenant jointly and severally, and one of them die, such covenant will be binding upon his executors, notwithstanding he should die before the commencement of the term, and the whole interest must necessarily survive to his co-lessee.

Enys v. Don-
nithorne,
2 Burr. 1197.

If lessees covenant jointly and severally at the beginning of their covenants, these words extend to all their subsequent covenants, notwithstanding the intervention of covenants on the part of the lessor.]

Duke of Northumberland
v. Errington,
5 T. Rep. 522.

(E) *Covenants Real and Personal: And herein to whom they shall extend.*

1. *Covenants which shall extend to the Heir or Executor, so as to bind them, though not expressly named.*

IN every case where the testator is bound by a covenant, the executor shall be bound by it, (a) if it be not determined by his death.

48 E. 3. 2.
Bro. Covenant,
12 S. C. Cro.
Eliz. 553.

Same rule *per Curiam*; and so Dyer, 14. pl. 69. (a) *Viz.* where it was to be performed by the person of the testator, the executor cannot perform it. Cro. Eliz. 553. || A testator had covenanted for himself and his executors to pay to B. the amount of his proportion, so as B. gave him notice in writing, and dies. It was holden, that notice must be given to the executor, though not expressly required by the terms of the covenant, because the covenant runs in interest and charge, and the executor is therefore bound to pay. Harwood v. Hilliard, ||

2 Mod. 268. — [But an executor, it is said, is not chargeable upon a covenant implied.

Swan

Swan v. Searles, Moor, 74. *Sed qu. & vide* Porter v. Swetnam, Styl. 407. Gilb. Covenants, 327.] || That an executor may dispose of a lease, notwithstanding testator's covenant not to alien, *vide* Seers v. Hind, 1 Ves. Jun. 295. ||

And. 12. If *A.* be (a) tenant for life, the remainder to *B.* in fee, and *A.* adjudged. by indenture demise, &c. to *C.* for fifteen years, and after *A.* Moor, 74. die, and *B.* enter upon *C.*, yet *C.* shall have no action of covenant against the executors of *A.*; for the covenant was but (b) Bendl. 150. S. C. Dyer, 257. S. P. by three judges during the term, which determined by the death of the tenant against one, for life. who differed from the others, because the lease was by indenture, which is a matter of conclusion; but if it had been by deed poll, he agreed with the rest. Brownl. 22. S. P. adjudged. (a) So, if tenant in tail demise, and die without issue. And. 12. 1 Leon. 179. Cro. Eliz. 257. & vide Lit. Rep. 334. (b) So, if the lessee had granted, bargained, and sold all his estate to another (admitting there was, by these words, a warranty implied,) yet it determines with the estate. Cro. Eliz. 157. Leon. 179.

48 E. 3. 2. Bro. If a man covenant that *A.* shall serve *B.* as an apprentice for Covenant, seven years, and die, if *A.* depart within the term, a writ of 12 S. C. covenant lies against the executor of the covenantor, without naming.

Sid. 216. If a man be bound to instruct an apprentice in a trade for Keb. 761. 820. seven years, and the master die, the condition is dispensed with, Lev. 177. for it is personal; but, if he were likewise bound to find him with meat, drink, clothes, and lodging, this the executors are obliged to perform.

Touchst. 178. [In general, the heir shall not be charged, unless expressly Dy. 257. named. If indeed the lessee be ousted by the heir himself, it seems an action of covenant will lie against him; though not if he be ousted by an elder title from the lessor.

Barber v. Fox, Hence, it is necessary in an *assumpsit* against the heir upon a 2 Saund. 136. promise to pay money due upon the ancestor's bond, to aver that the heir of the obligor was bound.]

Dykev. Sweat- || But, if bound, it is not necessary, whether it be in debt or ing, Willes's covenant against him, to allege in the declaration that he hath Rep. 585. lands by descent, for if he hath none, he may insist upon it by way of defence. ||

2. Covenants which the Heir or Executor may take Advantage of.

42 E. 3. 4. Covenants real, or such as are (c) annexed to estates, shall And. 55. descend to the heir of the covenantee, and he alone shall take (c) *Secus*, of advantage of them. gross. Palm. 558. — Also, for a breach in the time of the covenantee, the action shall be brought by his executor, though the covenant was with him, his heirs and assigns only. Lucy v. Levington. Vent. 175. 2 Lev. 26. S. C. || In this case of Lucy v. Levington, there was an eviction in the testator's lifetime, and therefore the damages in respect of such eviction, for which the action was brought, were properly the subject of suit and recovery by the executor, the covenant, which ran with the land, not descending to the heir. But, where the ultimate damage has not accrued in the testator's lifetime, the executor cannot recover for the breach of such a covenant, Kingdon v. Nottle, 1 Maule & Selw. 355. but the action remains to the heir. King v. Jones, 5 Taunt. 418. ||

As, if an abbot and convent covenant to sing for the covenantee and his heirs in such a chapel, his heirs at all times shall have a writ of covenant for the not doing thereof. 2 H. 4. 6. b. 5 Co. 18.

If a man leases for years, and the lessee covenants with the lessor, his executors and administrators, to repair, and leave it in good repair at the end of the term, and the lessor dies, &c. his heir may have an action upon this covenant; for this is a covenant that runs with the land, and shall go to the heir though he is not named; and it appears that it was intended to continue after the death of the lessor, in as much as his executors, &c. are named. 2 Lev. 92. Lougher and Williams, Skin. 305. S. C. cited.

3. Where the Assignee shall be bound by the Covenant of the Assignor.

The assignee of a term is bound to perform all the covenants annexed to the estate; as, if *A.* leases lands to *B.*, and *B.* covenants to (*a*) pay the rent, repair houses, &c. during the said term, and *B.* assigns to *J. S.* the assignee is (*b*) bound to (*c*) perform the covenants (*d*) during the life of the first lessee, though the assignee be not named, because the covenant runs with the land being made for the maintenance of a thing *in* (*e*) *esse* at the time of the lease made. Roll. Abr. 521. Cro. Eliz. 457. Moor, 399. 5 Co. 24. S. C.

(*a*) Where the assignee shall be chargeable with a *nomine pænæ* incurred after assignment, *vide* Cro. Eliz. 383. Moor, 357. Goldsb. 129. (*b*) By the common law, but without question by the statute of 32 H. 8. c. 37., Cro. Eliz. 457. (*c*) Lev. 109. Sid. 157. Raym. 80. S. P. (*d*) During the term. Moor, 399., & *vide* Cro. Eliz. 457. S. P. by two judges against two. (*e*) When the covenant extends to a thing *in esse*, parcel of the demise, it is *quasi* annexed to the thing demised, and runs with the land, and shall bind the assignee, though not expressly named. 5 Co. 16. b. Godb. 270.

But, if *A.* leases for years to *B.*, and *B.* for himself, his executors and administrators, covenants with *A.* to build a wall upon part of the land demised, and after *B.* assigns; the assignee is not bound by this covenant, for the law will not annex the covenant to a thing not *in esse*. 5 Co. 15. Spencer's case.

But, if *B.* had covenanted for him and his assigns to build the wall, &c. this would have bound the assignee, because it is to be done upon the land, and the assignee is to have the benefit thereof. 5 Co. 15. *per Cur.*

[If a lessee of tithes covenants for himself and his assigns, that he will not let any of the farmers in the parish have any part of the tithes, this covenant runs with the tithes, and binds the assignee.] Bally v. Wells, 3 Wils. 25. Wilmot's Rep. 341.

|| But, if a lessee of tithes covenant for himself and his assigns with an owner of lands in the parish, not to take tithes in kind from him or his tenants, but to accept a reasonable composition not exceeding 3s. 6d. per acre; this covenant, not being made with the lessor, does not run with the tithes, but is merely personal. Brewer v. Hill, Anstr. 413.

Where a lessee covenanted that he, his executors and administrators should constantly reside upon the demised premises during the demise, the covenant was holden to bind the assignee though Tatem v. Chaplin, 2 H. Bl. 133.

though not named, for it is *quodam modo* annexed and appurtenant to the land. ||

Grescot v.
Green, Salk.
199. St. Sa-
viour's church-
wardens v.
Smith, 3 Burr.
1271. 1 Bl. Rep.
351. S. C.

If lessee for years covenants for himself and his assigns to rebuild and finish a house within such a time, and after the time expired the lessee assigns over the premises, the house not being built and finished according to the covenant; this covenant shall not bind the assignee, because it was broken before the assignment; *aliter*, if broken after; as, if the lessee had assigned before the time expired.

5 Co. 15. *per*
Cur. (a) Cro.
Ja. 438. S. P.
adjudged.

Also, though the covenant be for himself and his assigns, yet, if the thing to be done be *merely collateral*, and no way concerning the thing demised, the covenant shall not bind the assignee; as, if it be to build an house upon other land of the lessor, (a) or to pay a collateral sum, || or to grind all the corn, grain, or malt, the lessee may have occasion to use or spend, at the lessor's mill according to the custom. *Secus* perhaps, of a covenant to grind all the corn, &c., the lessee may spend ground; for this might relate to the premises, and running with the land, bind the assignee. ||

Lord Uxbridge
v. Staviland,
1 Ves. 56.

5 Co. 16. b.
17. a. (b) So,
of a lease of a
fair, wine-
licence, &c.
Hard. 88.
— But,
where such an
assignee may
be made liable
in equity, *vide* 2 Vern. 423. (c) If A. having land charged with the payment of a fee-farm rent, grants part of the land to B., and covenants that the same shall be discharged of the said rent, and after grants the residue of the land to C., this shall not be taken as a covenant real, which shall in equity charge the other land granted to C. with the whole rent. Hard. 87.

So, if a man demises sheep or other personal things for a certain time, and the lessee covenants, for himself and his assigns at the end of the term, to deliver such sheep, &c. or the price of them, and the lessee assigns them over; the assignee shall not be bound by the covenant; for it is but a (b) personal contract, and there is not (c) such privity as between lessor and lessee of land and his assigns.

5 Co. 17. a.
3 Wils. 27.
(d) A man
possessed of a

So, (d) if a man leases lands for years (e) with a stock of cattle, and the lessee for himself and his assigns covenants to deliver the stock at the end of the term.

tavern for six years, leases to another for three years; and it was covenanted that during the three years *quolibet mense* the lessee should give an account to the lessor of the wine which he sold, and should pay unto him, for every ton so sold, so much, and after the lessor grants the remaining three years to another: the covenant being collateral, it passes not by the assignment of the three years, Godb. 120. Moor, 243., though the covenant was to account to the lessor or his assigns. (e) As in Owen, 139. Leon. 42. Godb. 113.

Cro. Ja. 125.
adjudged.

If lessee for years for himself, his executors and administrators, covenants with his lessor to leave fifteen acres every year for pasture, *absque culturâ*, and after the lessee assigns; the assignee, though not named, must perform the covenant, because it is for the benefit of the estate, according to the nature of the soil: but a collateral covenant, as to build *de novo*, &c. shall not bind him, unless named.

Mayor, &c. of
Congleton v.
Pattison,
10 East, 130.

|| Where in a lease of ground, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, administrators, and assigns, not to hire persons to work in the mill, who were settled in other parishes, without a parish

parish certificate; this covenant was holden not to run with the land, or to be obligatory upon the assignee; for it does not directly affect the nature, quality, or value of the thing demised, nor the mode of occupying it, but is merely collateral, and will not bind the assignee of the term, though named.||

If *A.* demises to *B.* several parcels of land, and the lessee covenants for himself and his assigns to repair, &c. and after the lessee assigns to *D.* all his estate in parcel of the land demised, and *D.* does not repair that to him assigned, the lessor may have an action of covenant against *D.* the assignee.

Congham v. King, Roll. Abr. 522. Cro. Car. 221. S. C. adjudged, because this covenant is di-

vidable, and follows the land, with which the defendant is chargeable by the common or by statute law. *Jones, 245. S. C. adjudged.* || So, covenant will lie against the assignee of a lessee of an estate for part of the rent, as the action in that case is on the real contract in respect of the land; and in case of eviction the rent may be apportioned, as in debt or replevin. *Stevenson v. Lambard, 2 East, 575. Moor, 93.* || — So, if the lessor had granted the reversion of part to one, and of other part to another, they might have brought an action of covenant. *Lev. 109. Sid. 157. Raym. 80. Kitchen and Buckley.*

If a man leases for years, and the lessee covenants for himself and his assigns, to pay the rent so long as he and they shall have the possession of the thing let, and the lessee assigns, the term expires, and the assignee continues the possession afterwards; an action of covenant (*a*) will lie against him for rent behind after the expiration of the term; for though he is not an (*b*) assignee strictly according to the rules of law; yet he shall be accounted such an assignee as is to perform the covenants.

Stile, 407. Bromefield and Sir John Williamson, [Q. the form of action?] (b) If a lessee for years, with covenants to repair, assigns to J. S. by

way of mortgage, and *J. S.* never enters, equity will not compel him to repair, though he had the whole interest in him; and though it was his own folly to make an assignment of the whole term, when he should have taken a derivative lease, by which means he would not be liable at law. *Sparkes v. Smith, 2 Vern. 275.* — But such an assignee, though he never entered, and had lost his mortgage money, was by law compelled to pay the rent; and having sued in equity, could have no relief. *Pilkington v. Shallor, 2 Vern. 374.* [But this case was over-ruled in *Eaton v. Jaques, Dougl. 455.*, where it was determined, that covenant will not lie against a mortgagee of a term, though the mortgage be forfeited, till he takes actual possession. It is otherwise indeed in the case of an assignee under an absolute indefeasible assignment of the whole interest in the term; for there actual entry is not necessary to make him chargeable. *Walker v. Reeves, id. 461. n.*] || This decision in *Eaton v. Jaques*, that a mortgagee, who has not entered, is not liable to an action of covenant as assignee, though recognized in *Jackson v. Vernon, 1 H. Bl. 114.* and *Chinnery v. Blackburne, cited ibid. 117.* was questioned by Lord *Kenyon* in *Westerdell v. Dale, 7 T. Rep. 312.* and *Stone v. Evans, cited in 7 East, 341.* — The devise of the equity of redemption (the legal fee being in the mortgagee,) is not liable in covenant as assignee of all the estate, right, title, and interest of the original covenantor. *Mayor, &c. of Carlisle v. Blamire, 8 East, 487.* — Where a trustee, to whom two leases were assigned for securing an annuity, said to the occupier of one of the houses, "you must pay the rent to me. I am become landlord for "my client, "who has the annuity, and you must pay the ground-rents for me;" the court held this to be evidence of an admission by the defendant, that he was assignee, and that he had done that which approached as nearly to an entry on the land assigned as was possible under the circumstances, and that he was therefore liable in covenant as assignee of both leases for non-payment of rent and not repairing. *Gretton v. Diggles, 4 Taunt. 766.* ||

If *A.* leases to *B.*, and *B.* covenants to repair, &c. and he assigns to *J. S.* who dies intestate; the premises being out of repair, the lessor may bring covenant against his administrator as assignee, and declare that he made a lease to *B.* &c. *cujus*

Carth. 519. Tilney and Norris adjudged, Ld. Raym. 553, status Salk. 309.

status & residuum termini annorum, &c. devenit, &c. per assignationem to the administrator.

4. Where the Assignor continues still liable.

Bro. Covenantant, 32. Roll. Abr. 522. S. C. Jones, 223. S. P. *per Cur.* (a) He may charge both, but execution shall only be against one of them; for if he takes both in execution, he that is last taken shall have an *audita querela*. Cro. Ja. 523.

Roll. Abr. 522. So, if a man leases for years, rendering rent, and the lessee covenants for him and his assigns to repair the house during the term, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and after the covenant is broken; notwithstanding the acceptance of the rent from the assignee, an action of covenant lies against the first lessee, for the lessee hath covenanted expressly for himself and his assigns, and this personal covenant cannot be transferred by the acceptance of the rent.

Cro. Car. 188. 580. Jones, 223. Saund. 240. Brownl. 20. Style, 300. 2 Mod. 139. Sid. 402. 447. 2 Keb. 640. [But *debt* for the rent in such case would not lie. *Vide* the cases *supra*, and 1 Freem. 336. Cro. Ja. 309. Wadham v. Marlow, B. R. M. 1784. And if the covenant be merely implied by law, the lessor's acceptance of the assignee will entirely discharge the lessee. Bachelor v. Gage, 1 Sid. 447. Sir W. Jones. 223. S. C. Mills v. Auriol. 4 T. Rep. 98.

3 Lev. 233. So, if *A.* leases to *B.* rendering rent, and *B.* covenants to pay it, and after *B.* assigns to *C.*, and *A.* grants the reversion to *D.*, and *D.* after accepts rent from *C.*, yet for non-payment at another day, *D.* may have an action against *B.* it being upon (a) an express covenant.

(b) Brownl. 20. Sid. 447. S. P.

Knight v. Freeman, Raym. 303. Also, an assignee, who assigns over, is liable, and shall pay the rent which incurred due before, and during his enjoyment.

1 Vent. 329. 331. T. Jones, 109. [In this case of Knight and Freeman, the assignment was fraudulent, and the fraud was averred, and upon that ground the decision proceeded. But in a later case, this circumstance, it is said, would not alter the case at all, but that immediately upon the assignment, the assignee is discharged. Lekeux v. Nash, 2 Str. 1221. Bull. Ni. Pri. 159. Be the rule of law upon this point what it may, it seems to be now settled, that courts of equity will compel an assignee of a term to account for the rent the whole time he enjoyed the land. Treacle v. Coke, 1 Vern. 165. Whether they will, in order to secure the future rents under any circumstances, restrain an assignee from assigning to a beggar or insolvent person, was considered, but not determined, in the case of Philpot v. Hoare, 2 Atk. 219. Ambl. 480. S. C. See this point examined in Fonbl. Eq. Tr. 351. n.]

Carth. 177. Tovey and Pitcher, adjudged. Salk. 80. 2 Vent. But in covenant against *A.* as assignee for non-payment of rent, he may plead, that before any rent was due and payable, *viz.* on such a day, he granted and assigned all his term and estate to *J. S.* who by virtue thereof entered, and was possessed for the residue of

of the term; and this shall be a good discharge, without alleging any notice of the assignment, or that the lessor accepted *J. S.* as his tenant.

S. C. Show, 340. S. C. 12 Mod. 23. S. C. Holt, 73. pl. 1. S. C. 1 Salk. 81. S. C. Boulton v. Canon, 1 Freem. 326. S. P. Cooke v. Harris, 1 Ld. Raym. 368. Keightley v. Buckley, 1 Lev. 215. S. P.

[Although all the estate and interest of the covenantee be divested out of him and assigned by act of parliament, yet without a special clause therein to release him, he is still liable upon his express covenant;] || so that bankruptcy is no bar to an action upon it for rent afterwards accrued; nor will his discharge under an insolvent act protect him from his liability upon it to the payment of the arrears of an annuity that have become subsequently due. ||

97. *Marks v. Upton, 7 T. Rep. 305. ||*

5. *Where an Assignee shall take Advantage of a Covenant.*

As an assignee shall be bound by a covenant real annexed to the estate, and which runs along with it, so shall he take advantage of such; and therefore if the lessor covenants to repair, or if he grants to the lessee so many estovers as will repair, or he shall burn within his house during the term; these, as things appurtenant, shall go with it into whose hand soever it comes.

with the land, it is not sufficient that it be concerning the land; there must also be a privity of estate between the covenanting parties. If therefore a mortgagor and mortgagee of a term make a lease, in which the covenants for the rent and repairs are with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his assignor's interest in the land, and therefore do not run with it. *Webb v. Russell, 3 T. Rep. 393.* But such action may be maintained by the mortgagor himself. *Stokes v. Russell, id. 678., affirmed in error, 1 H. Bl. 562.]*

So, if a man leases lands to another by indenture, this covenant in law, created by the word *demise*, shall (a) go to the (b) assignee of the (c) term, and he shall have advantage of it.

resolved. (a) So, of a tenant by statute-merchant, &c. of a term, &c. though they came to the land by act in law. *5 Co. 17. a. —* But not to an assignee of a lease by estoppel only. *Moor, 419. Cro. Eliz. 373.* (b) The assignee of the assignee, the executors of the assignee, the executors or administrators of every assignee, are all comprised within this word *assigns*. *5 Co. 77. b. Carth. 519. Ld. Raym. 553. Salk. 309.* (c) When the estate passes, though by parol, the warranty and covenants follow it, and the assignee of the estate shall have the benefit thereof. *Cro. Eliz. 373. 436.*

But, if one by indenture leases a house for forty years, and the lessee covenants with the lessor, that he will sufficiently repair the house during the term, and that the lessor may enter every year to see if the repairs are done; and if upon view of the lessor it be repaired according to the agreement, that then the lessee shall hold the house for forty years after the first term ended; and the lessee grants to another *totum interesse, terminum & terminos quæ tunc habuit in tenementis*, and after the first term ends, the assignee shall not take benefit of this agreement.

3 Co. 18. Co.
Lit. 384. b.
S. P.

Upon equality of partition, if one coparcener covenants to acquit the other and her heir of suit, the assignee of the land shall have benefit of this covenant.

Roll. Abr. 521.
Midlemore
and Goodal,
Cro. Ja. 503.
505. Jones,
406. S. C.

If *A.* seised of lands in fee, conveys it by deed indented to *B.* and covenants with *B.*, his heirs, and assigns, to make any other assurance upon request, for the better settlement of the land, &c. and after *B.* conveys it to *C.*, who conveys it to *D.*, and after *D.* requires *A.* to make another assurance according to the covenant, and he refuses; *D.* shall have an action of covenant in this case against *A.* by the common law, as assignee to *B.*

Moor, 185.
per Cur.

If *A.* by deed enfeoffs *B.* of certain lands, reserving rent, fealty, and suit of court, and by the same deed grants, that if the feoffee shall be distrained, vexed, or charged for other rents or services, then he may enter and distrain for his amends in other lands; this is annexed to the estate of the land, and shall go with it to every assignee.

Leon. 61.
Maschall's
case adjudged.
Moor, 242.
S. C. adjudged. (a) But
an assignee
shall not have
an action upon
a breach of
covenant
before his
time. Cro.
Eliz. 863.
3 Leon. 51.
2 Vent. 278.

If *A.* leases an house to *B.* for years, who covenants to repair, and that *A.*, his heirs, executors, and administrators, may at all times enter, and see in what plight the same is; and if upon such view any default shall be found in the not repairing, and thereof warning shall be given to *B.*, his executors, &c. then within four months after such warning, such default shall be amended; and after, the house in default of *B.* becomes ruinous, and *A.* grants the reversion to *C.* who upon view of the house gives warning to *B.* of the default, &c. if it is not repaired, *C.* may have an action as assignee of *A.* against *B.* though the house became ruinous before *C.* was entitled to the reversion; (a) for the action is not founded upon the ruinous estate of the house, and the time when it first happened, but for not repairing within the time appointed by the covenant after the warning.

—But upon
a breach during
his time, though

his estate is determined, he may. Roll. Rep. 80. Owen, 152. 2 Bulst. 281.

Cro. Eliz. 599.
617. Gouldsb.
175. S. C.
(b) So, where
the lessor
covenants to
make a new
lease at the
end of the term,

If lessee for years covenants to leave the houses in good repair at the end of the term, and the lessor grants his reversion to another; (b) though this covenant is not to be performed during the term, yet for a breach thereof the grantee of the reversion may bring an action, and there cannot be a more apt covenant to run with the land.

and the lessor grants over his reversion. Moor, 150. And. 82.

Cro. Car. 137.
Jones, 242.
S. C.

If *A.* leases lands to *B.* for 200 years, and by the same deed covenants for himself, his heirs and assigns, with *B.*, his executors, and assigns, that if *B.* is disturbed for respite of homage, or enforced to pay any charge, or issues lost, that he shall withhold so much of his rent as he shall be enforced to pay, and *A.* grants his reversion to *C.*, and *B.* assigns the term to *D.*, *D.* may take the benefit of this covenant against *C.*, for it runs with the land.

6. *Of Covenants which bind by Force of the Statute 32 H. 8. c. 34.*

By the 32 H. 8. c. 34. reciting, Where divers had leased manors, &c. or other hereditaments (a) for life or lives, or years, by writing, containing certain conditions, covenants, and agreements, as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors and grantors, their heirs and successors; and forasmuch as by the common law, no stranger to any covenant, action, or condition could take advantage thereof, by reason whereof all grantees of reversions, and all grantees and patentees of the king, of abbey lands, could have no entry or action for any breach, &c. it is enacted, That all persons and bodies politick, their heirs, successors, and assigns, which have or shall have any grant of our (b) said lord the king, of any lordship, &c. rents, tithes, portions, or other hereditaments, or any reversion thereof which belonged to the monasteries, &c. or which belonged to any other person, &c. and also all other persons, (c) (d) being (e) grantees or assignees (f) to or (g) by our said lord the king, or to or by any other person or persons, and the heirs, (h) executors, successors, and assigns of every of them, (i) shall and may have (k) like advantage by entry for non-payment of rent, or for doing waste or (l) other forfeiture; and the (m) same remedy by action only for not performing other conditions, covenants, and agreements contained in the said leases against the lessees and grantees, their executors, administrators, and assigns, as (n) the (o) lessors and grantors, their heirs or successors ought, should, or might have had at any time or times.

(a) Extends not to gifts in tail, Co. Lit. 215. Cro. Eli. 863. (b) Extends to his successors, though not named. Co. Lit. 215. a. (c) It extends not to grantees by fine till attornment; for it must be intended of such only as have had all ceremonies requisite by law. Co. Lit. 215. 5 Co. 112, 113. (d) Though after breach, and before the action brought, their estate determines. Roll. Rep. 80. Owen, 151. 2 Bulst. 281.

(e) It extends to grantees of part of the estate of the reversion, &c. Co. Lit. 215. a. Godb. 162. Roll. Rep. 80. Owen, 151. 2 Bulst. 181. & vide Leon. 252. Moor, 93. pl. 230. — But not to grantees, &c. of the reversion in part of the land. Co. Lit. 215. Cro. Eliz. 833. Moor, 98. (f) It extends to him that comes in by limitation of an use, though in the post; for coming in by the act and limitation of the party, he is a sufficient grantee, &c. within the statute. Co. Lit. 215. Moor, 98. 4 Leon. 27. 29. — But it does not extend to such as come in merely by act in law, as the lord upon an escheat, alienation upon a mortmain, &c. Co. Lit. 215. b. — Nor to him who is in of another estate. Moor, 876. (g) But, if a copyholder by licence of the lord leases for years, &c., and after surrenders the reversion to the use of another in fee, who is admitted, yet he is not a grantee, &c. within the act; for he is not privy to the lease made by the copyholder, nor in by him, but may plead a grant of his estate immediately from the lord. Brasier and Beal, Yelv. 222. *per Curiam*, upon the first opening. Cro. Ja. 205. Adjudged by two judges, & vide Cro. Car. 25. 44. Hob. 178. But in the case of Glover and Cope, 3 Lev. 326. it is adjudged, that such surrenderee may have an action of covenant by this act. (h) Lessee for twenty years leases for ten years, and his lessee covenants, &c., and the first lessee grants his reversion; this grantee is a sufficient assignee within the statute. Moor, 525. 527. Cro. Eliz. 599. 617. 649. Gouldsb. 175. Godb. 161. (i) Whether this doth not imply that the grantor shall not, 3 Lev. 155. *dubitat*, & vide Sid. 402. (k) But he shall not take advantage of a condition before he has given notice to the lessee. Co. Lit. 215. 5 Co. 113. b. — *Secus*, of a covenant. Godb. 262. Cro. Ja. 476. Bridg. 130. (l) *Viz.* by force of a condition incident to the reversion, as rent, or for the benefit of the estate, as for doing waste, not keeping houses in repair, &c., and not for the payment of any sum in gross, delivery of corn, &c. Co. Lit. 215. b. & vide 5 Co. 18. Moor, 159. 243. 876. Owen, 41. And. 82. Rayn. 250. Saund. 159. If the *proviso* be to enter for non-payment of a rent, or gross sum by way of a fine, the grantee of the reversion shall not take advantage of it; for the condition cannot be apportioned.

Style, 316. *Sed qu?* (m) The privity of action is transferred, and it may be brought in the county where the covenant was made, though the lands lie in another. Saund. 237. adjudged; but a writ of error was brought in *Cam. Scacc.*, and it was after compounded. Sid. 401. Lev. 259. Vent. 10. & 3 Mod. 338. and tit. *Actions Local and Transitory.* (n) Therefore if the conusee of the reversion before attornment, bargains and sells to another, to whom the lessee attorns, the bargainee may, &c., though his bargainor could not. 5 Co. 113. a. (o) *A.* devises to *B.* for years, rendering rent, upon condition to re-enter for non-payment; and afterwards devises the reversion in fee to another, and dies; the devisee may take advantage of the condition, though there never was any reversion, &c. in the devisor. 2 Leon. 33.

(a) But, if lessee for 30 years leases to another for 10, he is no assignee within the statute; for he is not tenant to the first lessor. Moor, 93.

And by the same act it is enacted, That all farmers, lessees, and grantees of the lordships, &c. rents, tithes, portions, or other hereditaments for years, life or lives, their executors, administrators, and (a) assigns, shall and may have like action and remedy against all persons and bodies politick, their heirs, successors, and assigns, which by grant of the king, or other persons, shall have the reversion of the same lordships, &c. so letten, or any part thereof, for any condition, covenant, or agreement contained in their leases, as the lessees, or any of them, might or should have had against the lessors and grantors, their heirs and successors; recovery in value by reason of any warranty in deed or law by voucher or otherwise only excepted.

Carth. 289, 290. Midgley and Gilbert v. Lovelace, adjudged.

A. demised a house for a term of years to *B.* who assigned to *J. S.* the lessor devised one moiety of the reversion to *C.* and the other to *D.* who granted the reversion to *J. S.* after which grant *C.* and *D.* brought covenant against *J. S.* for rent due before the assignment by them; and it was holden, 1. That *C.* and *D.* being tenants in common, may at their election join or sever, as well in debt as in covenant, for the rent; but, if they sever, they must not each of them make his demand of such a certain sum, which amounts to a moiety; but the demand must be *de unâ meditate* of the whole rent; and if they can count in debt, they may in covenant; and if debt will lie, *a fortiori* covenant. 2. That this action was maintainable for the arrears of the rent, notwithstanding the reversion was out of the plaintiffs; for though the defendant was but an assignee of a term, yet the very privity of contract was transferred by the statute of 32 H. 8. c. 34. which gives the action for and against assignees; and the contract still remains, though the privity of estate is gone.

(F) How Covenants are to be construed.

Moor. 458. 8 Co. 83. Sir Richard Pexhall's case. (b) Lev. 102. Hookes and, Swain, Sid. 151. Keb. 511. S. C.

ALL contracts are to be taken according to the intent of the parties, expressed by their own words, and if there be any doubt in the sense of the words, such construction shall be made as is most strong against the covenantor, lest, by the obscure wording of his contract, he should find means to evade and elude it. Hence, (b) if *A.* covenants with *B.* that, if *B.* marries his daughter, he will pay him 20*l.* per ann. without saying for how long,

long, yet it shall be for the life of *B.* and not for one year only; (c) If I covenant for by the word *per annum*, the (c) meaning of the parties appears to be, that it should continue longer than one year; and this is the construction that is most strong against the grantor.

pieces, and then deliver it, this is a breach; for the law regards the real and faithful performance of contracts, and discountenances all such acts as are done in *fraudem legis*. Raym. 464. — So, if the condition of a bond be to pay 5*l.* though it is not said of money, yet it must be so intended. Sid. 151. — But, if a man covenants that his son, then *infra annos nobiles*, shall marry the daughter of *B.* before such a day, and he marries her accordingly, but at the age of consent disagrees to the marriage, yet is the covenant performed; for it was a marriage, though subject to be defeated by disagreement, and no other could be had within the time. Owen, 25. adjudged.

If two men lease for years, and covenant that the lessee shall enjoy free from all incumbrances made by them, and, after, the lessee be disturbed by *J. S.* to whom one of the lessors had made a precedent lease; this is a breach, for they shall be taken severally, and not jointly only.

If a man leases for six years, and covenants, that if he shall be disposed to lease the land after the expiration of the term of six years, the lessee shall have the refusal; and within the six years he leases to another for twenty-one years, to commence immediately; this is no breach, because (a) out of the words of the covenant.

|| It appears from Rolle's Report, that there was ultimately no adjudication in this case, the court being equally divided. When it was first moved, Mr. Justice *Chamberlayne* was sitting in Chancery, and the C. J. was so positive in his opinion, that he would not suffer the plaintiff's counsel to argue it, and interrupted him with some warmth. — Lessee covenanted, that after lessor had repaired the house, he would keep it constantly in good repair. The house consisted of several houses, outhouses, &c., and some of them were in good repair, and some ruinous: these last the lessor rebuilt, and the others the lessee pulled down, and for this the lessor brought covenant, and adjudged that it did not lie; for though they were in good repair, and the lessee pulled them down, yet that is not within the reach of the covenant, if the lessor had not first repaired them, but his true remedy was by action of waste. Slater v. Stone, 2 Ro. Rep. 248. Cro. Ja. 645. S. C. || (a) If *A.* leases land to *B.* for six years, and covenants that he shall enjoy it during the term without interruption, discharged from tithes, and after the six years he is sued for tithes, this is a breach; for the meaning was, that he should be freed from suits, and the payment of tithes; and a suit after the expiration of the term is as prejudicial as if before. Cro. Eliz. 916. 2 Brownl. 22.

If a man lease for nine years by indenture, dated 1 Jan. 16 Car. 2. and covenant to save the lessee harmless from all evictions during the term, but this deed be not delivered till 1 Jan. 17 Car. 2. if he be in possession and evicted before the delivery, this is a breach: for during the term, shall be construed during the term in computation, and not only from the time of the delivery of the deed, when it first commenced, in point of interest.

to pay for corn *then laden*; for if it were delivered ten months after the date, the party should not have any benefit of the corn laden, and spent or sold before the time of the delivery, therefore he shall not be charged with it for the time before the delivery. Offley v. Hicks, Cro. Ja. 263. So, a covenant for "the free use of the newly-intended road, whenever the same may be made," will not apply to a road which, at the time of the contract, was newly intended to be made, but was executed and complete before the sealing of the covenant. Crisp v. Price, 5 Taunt. 548. ||

covenant to deliver so many yards of cloth, and I cut it in

Noy, 86. Meriton's case. Latch. 161. and Poph. 200. S. C.

Waterer v. Mountague, Godb. 335. & 2 Roll. Rep. 332. 347. S. C. by the name of Walter v. Mountague.

Sid. 374. Lewis and Hilliard. || But a grant of trees *then growing* shall refer, not to the date, but to the delivery of the grant. So, a covenant

Williamson
v. Butterfield,
2 Bos. & Pull.
63.

¶ Where a man, possessed of a lease for years, covenanted in an indenture for making a family provision, that if he should die during the continuance of the term of the lease, his executors or administrators should assign the residue to *B.*, and he afterwards purchased the reversion, and died; his executors were holden not to be liable upon the covenant, there being nothing in the terms of it to shew that it was his intention to preclude himself from purchasing the fee.¶

3 Lev. 264.
Douse and
Earl. 2 Vent.
126. S. C. ad-
judged; be-
cause taken as
several cove-
nants; but
Rokeby
doubted, it
seeming to him
to be all one
covenant, and
that the sub-
sequent mat-
ter, concern-
ing leaving the
to be built.

If *A.* leases three messuages to *B.* for forty-one years, and *B.* covenants to pull them down, and erect three other in their place, *ac etiam de tempore in tempus* to maintain the messuages agreed to be erected in sufficient repair, *ac etiam* to repair the pavements, &c. *ac etiam dicta præmissa, & domos superinde fore erect.*, at the end of the term to leave in good repair; and after *B.* pulls down the three houses, and builds five; he must leave them all in good repair at the end of the term; for though by the first covenant he is bound only to repair, &c. the messuages *agreat. fore erect.*, yet by the last covenant he is obliged to leave in good repair *domos superinde erect.* indefinitely, which extends to all houses which shall be built upon the premises during the term.

3 Lev. 265.
per Curiam.
S. P. ad-
judged be-
tween Brown
and Blunden,
Skin. 121. For
it is a continuing covenant; and though the house had no actual, yet it had a potential be-
ing, at the time of the lease.

So, if a man takes a lease of a house and land, and covenants to leave the demised premises in good repair at the end of the term, and he erects a messuage upon part of the land, besides what was before, he must keep and leave this in good repair also.

Lant v. Norris,
1 Burr. 287.

[But, where in a building and repairing lease the lessee covenanted to lay out a given sum in erecting and rebuilding messuages or tenements, or some other buildings upon the ground and premises; and from time to time, &c. all and singular the said messuages and tenements so to be erected, with all such other houses, edifices, &c. as should at any time or times thereafter be erected, &c. to repair, &c.; and the said demised premises, with all such other houses, &c. so well repaired, &c. at the end, &c. of the term to deliver up, &c. it was holden, that the covenant to repair extended only to the new erections.]

Naylor v. Col-
linge, 1 Taunt.
19.

¶ Where a lessee covenanted to repair the messuage and premises demised, and all erections and buildings then already erected and built, or thereafter to be erected and built thereon, and the same in good repair, at the expiration of the lease, to surrender and yield up; it was holden that this covenant included buildings erected and used by the lessee for the purpose of trade and manufacture, if they were let into the soil or otherwise fixed to the freehold; but not such as merely rested upon blocks or pattens.¶

If a lease be made for years, rendering 8*ol. per annum* rent, free and clear from all manner of taxes, charges, and impositions whatsoever, the lessee is bound to pay the whole rent without any manner of deduction for any old or new tax, charge, or imposition whatsoever.

Carth. 135,
Giles and
Hooper.

So, where *A.* by deed, dated 1649, granted a rent-charge of 4*ol. per ann.* to *B.* and his heirs, and on the same deed there was an (a) indorsement, that the rent was to be paid clear of all taxes; and by the 3 W. & M. 4*s. per pound* was laid upon land, and power given to the tenant to deduct 4*s.* in the pound, with a *proviso*, not to alter the covenants or agreements of parties; it was holden, that such a covenant, if made in the year 1640, would not have freed the rent-charge from the taxes imposed by those acts, because there were no such parliamentary tax in being or known at that time; but because there were such taxes in the year 1645, which was before the grant, therefore this covenant must be construed to extend to them.

Brewster v. Kidgil, Salk. 198. Ld. Raym. 318. S. C. 12 Mod. 169. 171. S. C. Comb. 424. 467. S. C. Carth. 438. S. C. 5 Mod. 368. S. C. (a) Which must be presumed to have been made be-

fore the deed was executed, and so parcel thereof. Carth. 439. *per Cur.*

¶ If the lessee of a coal-mine covenant to pay a moiety of all such sums of money as the coals there raised *should sell for at the pit's mouth*; he is not liable to pay any part of the money produced by the sale of the coals elsewhere.

Gerrard v. Clifton, 7 T. Rep. 676. in error, reversing a judgment of 5 T. Rep. 564.

the Court of C. P. 1 Bos. & Pull. 524. See also Clifton v. Walmsley,

Where *A.* being tenant to *B.* under a lease with covenants to fetch 75 bushels of coals from *Poole* yearly, and deliver them at the mansion-house of *B.*, and also to supply him with as much good wheat as he should want in his family at 5*s. per bushel*, it was agreed between them that the lease should be surrendered up, and a new one granted, omitting these covenants; and such a lease was accordingly executed, and an agreement was at the same time entered into, whereby *A.* agreed with *B.* that he would fetch and bring to the dwelling-house of *B.*, his heirs and assigns, 75 bushels of coals a-year during the term of the new lease, and yearly supply his heirs and assigns with as much good wheat as he should want in his family at 5*s. per bushel*; *B.* having parted with his reversion in the farm, and also quitted the mansion-house in which he resided at the time the agreement was made, was not entitled to bring an action against *A.* for not delivering the wheat at the stipulated price; for the agreement being entire, must receive one uniform construction; and being clearly local in respect of the delivery of the coals, it cannot be deemed personal in respect of the wheat. ||

Coker v. Guy, 2 Bos. & Pull. 565.

[In a demise of corn-mills, there was a covenant on the part of the lessor, that "if the lessee, his executors, &c. should, before the expiration of the term, be minded to renew, then, upon application, &c. the lessor, his heirs or assigns, should grant such further lease, as should by the lessee, his executors, &c. be desired, without any fine to be demanded therefore, and under the same rents and covenants only as in the then lease;"

Bridges, v. Hitchcock, 1 Br. P. C. 522.

and the question was, Whether there must be a covenant for renewal again in the second lease? The court of Exchequer were of opinion, that under the words *the same rents and covenants*, the covenant for renewal ought to be inserted; and on appeal to the House of Lords, their decree was affirmed.

Furnival v.
Crewe, 3 Atk.
83.

Again, in a lease for three lives, the lessor covenanted, that he, his heirs, &c. should and would (in consideration of a certain sum to be paid to him, &c. at *Crewe Hall*, or at the place where the said hall then stood, in the name of a fine, for adding one life to the remaining lives therein before mentioned) execute one or more lease or leases, *under the same rents and covenants* which were expressed in the then lease, *and so to continue the renewing of such lease or leases* to the lessee, or his assigns, paying as aforesaid to the lessor, his heirs or assigns, the sum before mentioned for every life so added or renewed from time to time. Lord *Hardwicke* held this to be a covenant of perpetual renewal, and decreed a new lease to be granted to the assignee of the original lessee, with a covenant inserted in it to that effect.

Cook v. Booth.
Cowp. 819.
Where the
terms of a co-
venant are
plain and un-
ambiguous, a
court of law
cannot admit
of evidence
dehors, to ex-
plain the in-
tent of the
parties, though
the conduct
of one of
them may be
a fraud upon
the covenant.

Again, in such a lease, the lessor had covenanted, that if the lessee, his heirs, &c. should be minded upon the falling in of any of the lives, to surrender the demise and take a new lease, and thereby add a new life to the then two in being, in lieu of the life so dying, that he the lessor, his heirs, &c. upon payment of so much for every life so to be added, in lieu of the life of every of them so dying, would grant a new lease for the lives of the two persons named in the former lease, and of such other person as the lessee, his heirs, &c. should appoint in lieu of the person named in the preceding lease, as the same should respectively die, *under the same rents and covenants*. *There had been successive renewals from the time of the first lease; and in every lease the like covenant for renewal had been inserted*. The court of King's Bench held, that the lessors *by their own acts* (a) construed this to be a covenant for perpetual renewal.

Clifton v. Walmsley, 5 T. Rep. 564. (a) || This was the first time, we think, that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed. This case has been impeached upon all occasions, and the Court of King's Bench were misled by the renewals stated in the case from the Court of Chancery. *Per Mansfield C. J.* 2 N. R. 451, 452. Accordingly it is now settled, that a covenant in an indenture of lease to grant a new lease *with all covenants, grants, and articles in the said indenture contained*, does not bind the lessor to insert a covenant of renewal in the renewed lease. *Iggulden v. May*, 7 East, 237. 2 N. R. 449. S. C. 9 Ves. 325. S. C. ||

Russel v. Dar-
win, 2 Br. Ch.
Rep. 639. n.

But, where in a lease for years determinable upon lives, the covenant was, that the lessor would, upon the death of any of the appointees (by name) add a new third life upon payment of 200*l.* within six months; or upon the death of two of them (by name), within six months add two new lives upon payment of 500*l.*; or upon the death of all of them (by name) would, upon payment of 1150*l.* make a new lease or grant for any three new lives to be nominated and appointed by the lessee, his executors, &c. for the like term as was thereby demised, *at and under the like rent, covenants, and agreements therein contained*; Lord *Camden*

Camden was of opinion, that the lessors were not under any obligation to grant any further lease than for three new lives only, and that the lessee was not entitled to have any covenants inserted for any further renewal; the words of the covenant not obliging the lessors to grant a new lease, but upon the death of some one of the persons named in that lease; and they being all dead, no further renewal could be claimed.

So, under a covenant in a lease for twenty-one years, that the lessor, his executors, &c. would, at the end and determination of the said term of twenty-one years, execute a new lease of the demised premises, for the further term of seven years, to commence from the end of the said term of twenty-one years, thereby demised, *subject to the same rents, and pursuant to the same exceptions, covenants, reservations, conditions, and agreements in all respects as were in and by the then granted indenture of lease mentioned and expressed*, in case the lessee, his executors, &c. should desire the same; the lessee, his executors, &c. first giving twelve months' notice in writing to the lessor, his heirs or assigns, of his or their desiring such further term of years as aforesaid; Lord *Thurlowe* declared the lessee entitled to a lease for seven years only, it appearing that the lessee himself had put that construction upon it *.]

¶ The rule, that the words of a covenant are to be taken more strongly against the covenantor, must not be rigorously insisted upon, nor indeed is it of universal application. The true key to the exposition of covenants is the intention of the parties; and a rule, which founds itself upon a presumption of intent, as this does, must give way to that clearer evidence of intent, which is to be collected from the whole context of the instrument, and its general scope and design.

Richards, 11 East, 639. which comprise almost all the learning upon this subject.

In debt on bond conditioned that whereas the defendant had sold to the plaintiff a lease for years of the manor of *S.*, *he would not do, nor had done*, any act to disturb the plaintiff's possession of it; *but* that the plaintiff should hold and enjoy it peaceably, without the disturbance of the defendant, *or any other person*; it was holden, by all the justices, that the defendant was not bound by the words of the condition to warrant peaceable possession to the vendee, but only against his own acts; and that all the sequel of the condition from the word *but* should be referred to the antecedent part, and expounded in like manner; that is, that the plaintiff should enjoy it without disturbance of any person by any act by the defendant done or to be done.

So, if one grant a lease for years of a manor, and covenant that the lessee shall make estates for life or years, and that they shall be good; this covenant shall not, it seems, be taken to enable the lessee to make estates for a longer term than his own estate will bear.

Tritton v. Foote, 2 Br. Ch. Rep. 636.

See the very elaborate arguments of Lord *Eldon* in *Browning v. Wright*, 2 Bos. & Pull. 13. and of Lord *Ellenborough*, in *Howell v.*

Broughton v. Conway, Moore, 58. *Dyer*, 240. S.C.

Touchet, 169. Per Justice *Bridgman*.

* For cases upon the renewal of leases, see tit. LEASES, &c. (U), *infra*.

Browning v. Wright, 2 Bos. & Pull. 13. If a grantor covenant that, *notwithstanding any act by him done to the contrary*, he is seised in fee simple, and that he hath good right, full power, &c. to convey; he covenants in both cases with the same qualification, the restrictive words in the first clause being carried on by the connective particle *and* to the last clause.

Munns, 3 Lev. 46. In this case of Browning v. Wright, the Chief Justice, in delivering his judgment, entered into a minute examination of the deed, and demonstrated that the same restrained construction was required by the context, supposing any doubt to exist on the words. His argument is a fine illustration of the law upon the subject, and states, in a masterly manner, the principles which govern the construction of covenants.

Trenchard v. Hoskins, Ro. Abr. tit. Pards, (D) fol. 4. Upon a conveyance of land from *A. to B.*, *A.* covenanted that he was seised in fee; that he had good power to convey; and that there was no reversion in the crown, *notwithstanding any act done by him*. The estate had been granted under letters patent from the crown, though that fact is not stated in any of the reports; and in such grants it is usual to reserve a reversion, which reversion the grantee cannot bar. The question was, whether the concluding words, *notwithstanding any act, &c.* in the last covenant were to be applied to the two prior covenants.

2 Bos. & Pull. 25. It was at length decided, after great difference of opinion between the individual judges, and between the different courts in which it was argued, that they were not; the decision proceeding, as it would seem, on this ground; that it appeared to be the intention of the parties that the vendor should enter into an absolute covenant for his seisin in fee in all cases but one, namely, that he should not be liable on the objection of a reversion existing in the crown, unless that reversion should appear to have been so vested by his own act.

Johnson v. Procter, Yelv. 175. 2 Brownl. 212. S. C. Cro. Ja. 233. S. C. 1 Bulstr. 2. S. C. 2 Bos. & Pull. 25. Where a grantor had stated in the recital, that he was interested in the whole of the premises, when in fact he was interested in a moiety only, and had covenanted for quiet enjoyment, "*notwithstanding any act done by him*;" the court held, that this covenant was not satisfied by a compliance with the mere words, in a case where the grantee had suffered eviction, not in consequence of any act done by the grantor, but in consequence of the badness of his title. The recital itself amounted to a warranty.

Howell v. Richards, 11 East, 633. Where releasors covenanted, that, *notwithstanding any act, &c. by them done to the contrary*, they were seised of the land in fee; and also that, *for and notwithstanding any such matter or thing as aforesaid*, they had good right to grant the premises; and likewise, that the releasee should peaceably and quietly enter, hold, and enjoy the premises *without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever*; and that the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c., *save and except the chief rents issuing and payable out of the premises to the lord of the fee*; it was holden, that the generality of the covenant for quiet enjoyment against the releasors and their heirs was not restrained by the

the qualified covenant for good title and right to convey, *for and notwithstanding any act done by the releasors to the contrary*; for that the covenants for title and for quiet enjoyment were affected by different considerations, and addressed to different objects; the one being an assurance that the grantor has the very estate, in quantity and quality, which he purports to convey; the other being an assurance against the consequences of a defective title, and of any disturbance thereupon; for the purpose of which covenant, and the indemnity it affords, it is immaterial in what respects, by what means, or by whose acts the eviction of the grantee may take place; if he be lawfully evicted, the grantor stipulates to indemnify him at all events.

Where the assignor in a deed of assignment, after reciting the original lease granted to another *for the term of ten years*, which by mesne assignments had vested in himself, and that the plaintiff had contracted for the absolute purchase of the premises, bargained, sold, &c. the same to the plaintiff, to hold *for and during all the rest, &c. of the said term of ten years*, in as ample manner as the assignor might have holden the same, subject to the payment of rent and performance of covenants; and then covenanted that it *was a good and subsisting lease, valid in law in and for the said premises thereby assigned*, and not forfeited, &c. or otherwise determined, *or become void or voidable*; it was holden that this general covenant, supported, as it was, by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants, which went only to provide for or against the acts of the assignor himself, and those claiming under him; and therefore, as it appeared that the original lease was not for ten years absolutely, but for ten years determinable on a life then in being, which life had dropped before the expiration of the term, but after the covenant, the assignee might assign a breach upon such covenant.

Barton v. Fitzgerald, 5 East, 530.

In covenant by the assignor of certain shares in a patent right, that he had good right, full power, and lawful authority to assign and convey the said shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have had over the same; it was holden, that the generality of the former words of the covenant was not restrained by the latter; for that there was nothing in the deed from which it could be inferred that the parties did not intend a general covenant; that, on the contrary, the warranty, instead of being framed in the usual words, where parties mean to be bound by their own acts only, viz. "*for and notwithstanding any act by him done to the contrary*," omits them altogether; an omission which is almost of itself decisive.||

Hesse v. Stevenson, 3 Bos. & Pull. 565.

(G) Where the Principal, and all Auxiliary Covenants shall be said to be void and extinguished.

6 H. 4. 1. Roll. **I**F a man covenants with tenant for life of an house, to find a chaplain to sing, &c. every *Saturday* during the life of the covenantee, if the covenantee surrenders the house, and (a) retakes an estate for years, yet the covenant remains. law would be the same, if he had not retaken the estate. But Rolle questions this; for how could the chaplain enter the house after the grant without being a trespasser?||

Mod. 223. **I**f *A.* grants a rent-charge to *B.* for the life of *C. habend.* to *B.* his heirs and assigns, to the use of *C.*, and *A.* covenants to pay it *ad usum C.*; if the rent is behind, *B.* may have an action of covenant against *A.*; for though the rent-charge is executed by the statute, and the power of distraining, as incident thereto, transferred to *C.*, yet the covenant being collateral is not transferred nor discharged, but remains with *B.*

2 Lev. 26. **I**f a man hath good title to lands by virtue of a fine, and sells the same, and covenants with the vendee, his heirs and assigns, that he shall enjoy against him and *B.* and all claiming under them; and after, by an act of parliament, reciting that *B.* had settled this estate upon *C.*, and that certain persons had unduly procured the said fine from her, it is enacted, That the fine shall be void, and that every person may enter as if no such fine had been; and after, one enters, claiming title under *C.*, this is a breach of the covenant; for the act makes no new title, but removes the obstruction of the old; and it was said, that doubtless *B.* was named in the covenant for this purpose, in case this fine unduly obtained should be avoided.

Salk. 198. As to covenants which are repealed or extinguished by act of parliament, the following diversities are laid down, *viz.*: Where *A.* covenants not to do any act or thing which was lawful to do, and an act of parliament comes after, and compels him to do it, the statute repeals the covenant. So, if *A.* covenants to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, the covenant is repealed. But, if a man covenants to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such an act of parliament does not repeal the covenant.

Cro. Eliz. 529. **I**f *A.*, being a custom-house officer by patent, makes *B.* his deputy, and covenants, *inter alia*, to surrender the old patent, and procure a new one to *B.* and himself before a day, and that if *B.* dies before *A.*, that *A.* shall pay 300*l.* to the executors of *B.*, and gives bond for the performance thereof; admitting these covenants void by (b) the 5 Ed. 6. c. 16. the whole bond is void, though some of the covenants are not void or illegal. to allow *A.* 100*l.* yearly for this deputation, and adjudged, because the obligation is one entire act and deed of the party; § vide 2 And. 207. 3 Co. 82. S. C. cited. (b) So, where a sheriff takes a bond in part against 23 H. 6. c. 9., and also for a just debt, the whole bond is void according to the letter of the statute; for a statute is a strict law, but the common law divides

divides according to common reason; and having made that void which is against law, lets the rest stand. *Norton v. Simmes*. Hob. 14. *per Cur.* Moor, 856. S.C. Godb. 213. S.C. || The distinction taken in the case of *Norton v. Simmes* between the avoidance of the instrument by the common, or by the statute law, and alluded to by *Twisden J.* in *Maleverer v. Redshaw*, 1 Mod. 35. by *Hale J.* in *Mosdell v. Middleton*, 1 Vent. 237. and by *Wilnot C. J.* in *Collins v. Blantern*, 2 Wils. 351. holds in the case in which it was taken, *viz.* of Sheriff's bonds, which are authorized by the statute to be taken only with a certain condition, and therefore if they are taken with any other condition, they are void *in toto*, and cannot stand good in part only; but that does not apply to different and independent covenants in the same instruments, which may be good in part and bad in part. As in *Mouys v. Leake*, 8 T. Rep. 411., where a rector having granted an annuity out of his benefice, which was void by the st. 13 Eliz. c. 20. was yet holden to be liable on his personal covenant to pay it contained in the same deed; though the statute says, that "all chargings of benefices with any pension "out of the same, &c. shall be utterly void." So in *Kerrison v. Cole*, 8 East, 231. where a bill of sale for transferring the property in a ship by way of mortgage did not recite the certificate of registry as required by st. 26 Geo. 3. c. 60. § 17. and was therefore, in the words of the act, "utterly null and void to all intents and purposes," yet the mortgagor was liable to be sued on his personal covenant, contained in the same instrument, for the repayment of the money lent. See also *Mestaer v. Gillespie*, 11 Ves. 629. In cases on the property-tax act, 46 Geo. 3. c. 65. § 116. by which "all contracts, covenants, and agreements made or to be "made for payment of any interest, rent, or other annual payment aforesaid, in full, without "allowing any such deduction as aforesaid (that is, on account of the property-tax), shall be "utterly void;" the courts have gone further, and have holden not only that distinct and independent covenants are not avoided by a covenant for the payment of the tax, *Gaskell v. King*, 11 East, 165. *Wigg v. Shuttleworth*, 13 East, 87. but that upon the fair construction of the above clause, coupled with that of § 195. which provides, that all such deductions and repayments shall be allowed, notwithstanding such contracts, covenants, or agreements, the covenant itself for any annual payment, *without deduction of the tax*, is not void *in toto*, but only *quoad* the deduction, and that, subject to the deduction, it is still binding. *Redshaw v. Balders*, 4 Taunt. 57. *Fuller v. Abbott*, *Id.* 105. *Howe v. Synge*, 15 East, 440. ||

If the principal thing to be performed, as the conveying an estate, &c. be void, further covenants which are relative and dependent thereon are so likewise. Sid. 309. *Yelv.* 19. *Style*, 357.

So, if lessee for years grants so much of the term as shall be to come at the time of his death, and covenants that the lessee shall enjoy it, although he gives bond for performance of covenants, yet the principal thing, *viz.* the grant, being void for uncertainty, (a) both bond and covenants are void likewise. Lev. 45. *Caponhurst* and *Caponhurst*, Raym. 27. S.C. (a) For though they are several deeds, yet

they make but one assurance; and are but one contract. 4 H. 7. 6. 20 H. 6. 293. *Bro.* *Obligation*, 6. *Dyer*, 4. 28. Hob. 168.

|| So, if an indenture of apprenticeship be void as against the statute of 5 Eliz. all covenants entered into by a third person for securing the performance of it are void also. || *Guppy v. Jennings*, Anstr. 256.

But, where the dean and chapter of *Norwich*, 8 Eliz. leased to *B.* for ninety-nine years, and after in 42 Eliz. they leased to *C.* for three lives, and covenanted to save him harmless against *B.*; if he is disturbed by *B.* he may have an action of covenant against the dean and chapter, though the lease is void; because the covenant is for a thing collateral, as that the lessor is owner, &c. and the covenant was broken immediately upon sealing the lease to *C.* Owen, 136. *Waller* and the Dean and Chapter of *Norwich*, Brownl. 21. Moor, 875. S.C. 2 Brownl. 134. 158., &c. S.C.

So, where in covenant the plaintiff declared, that the defendant by his deed did grant, bargain, and sell to the plaintiff and his heirs, &c. provided that if the grantor paid so much money, it judged. Salk. 159. *Ld.* Raym. 388. *Northcote* and *Underhill*, ad-

it should be lawful for him to re-enter; and that he covenanted to pay the said money; and the breach assigned was the non-payment of the money; although it was admitted that nothing passed by the deed for want of enrolment, yet the covenant in this case being to pay money, it is a distinct, separate, and independent covenant; and therefore not material whether any estate passed or not.

(H) What shall be deemed a Breach, or construed a good Performance.

Sid. 48. Robinson and Amp-ton, adjudged. Raym. 25. **Keb. 103. 118.** S. C. The same law, in case of a promise. Roll. Abr. 448. **IF A.** enters into a statute to *B.*, and afterwards *B.* by his deed covenants, that, upon payment of such a sum at a day to come, the statute shall be void, and that he will deliver it in, and cause it to be vacated; if before the day *B.* sues execution, *A.* may bring covenant; and it is no objection, that nevertheless *B.* at the day may deliver it in, and cause it to be vacated; for it is an apparent present breach; for after the statute was set a-foot, and had its course, *transiit in rem judicatam*, and could not be vacated.

5 Co. 20. Sir Anthony Scot and Main, 2 And. 18. **Moor. 452.** **Cro. Eliz. 450.** **Poph. 109.** S. C. adjudged. (a) So, if the lessee assign his old lease, he disables himself to take benefit of the covenant. **Bulst. 22.** **IF A.** lease to *B.* for twenty-one years, and covenant at any time during the life of *B.*, (a) upon surrender of the old lease, to make a new lease, and after *A.* lease to a stranger, he hath disabled himself, and broken his covenant.

Griffith v. Goodhand, Sir T. Raym. 464. Sir T. Jones, 191. S. C. **Skin. 39.** S. C. If one covenants to leave all the timber upon the ground at the expiration of a term, and after cuts it down, it is a breach of covenant, though he carry it not away; but, if a stranger cuts it down, it is no breach of covenant. **Skin. 40. per Cur.**—So, if a man covenants to deliver a horse, and he poisons him, and then delivers him, this is a breach. **Skin. 40. per Cur.** **IF A.**, being a common brewer, covenants that *B.* shall have seven parts of the grains made in his brewhouse for seven years; and after, *A.* renders them unfit for the use of *B.*, this is a breach.

Nash, v. Ash-ton, Sir T. Jones, 195. **Skin. 42.** S. C. If two men, upon sale of their wives' lands, covenant that they and their wives have good right to convey lands, and to make further assurance; if one of the women is under age, this is a breach; for she hath not power to convey the estate according to the covenant.

Charnley v. Winstanley, 5 East, 266. **||** If a feme sole enter into a covenant to abide an award, and before the award made marry, the marriage is a breach of the covenant; for she thereby disables the arbitrator from making any award.

Doe v. Keeling, 1 Maule and Selw. 95. Where a lessee of a house and garden covenanted with the lessor "not to use or exercise, nor permit or suffer to be used or exercised upon the demised premises, or any part thereof, any trade or business whatsoever, &c. without the licence of the lessor," and afterwards, without such licence, assigned the lease

lease to a schoolmaster, who carried on his business therein; this assignment was holden to be a breach of the covenant.||

If the lessor covenants with his lessee for years, that he quietly and peaceably shall enjoy the land without the impediment or disturbance of the lessor; if the lessor exhibits a bill in Chancery against the lessee, to restrain his committing waste; this is no breach, though the bill be dismissed with costs, because the suit does not relate to his title or possession.

If a parson leases his rectory for years, and covenants that the lessee shall have and enjoy it during the term, without expulsion or any thing to be done by the lessor, and after, for not reading the articles, he is *ipso facto* deprived by the statute 13 Eliz. c. 12. and the patron presents another, who ousts the lessee; this is no breach, for he was not ousted by reason of any act done by the lessor, but for a (*u*) non-feasance; and so it is out of the compass of the covenant.

term, and covenants that his lessee shall enjoy, without impeachment of him, or any other, occasioned by his impediment, means, procurement, or consent, and after he neglects to pay his rent, upon which the first lessor enters, &c., this is a breach. *Stevenson v. Powell*, 1 Bulstr. 182.

|| Where the defendant demises a part of a messuage, with certain easements, to the plaintiff, and covenanted that he would permit the plaintiff to have the use of the pump in the yard jointly with the defendant, *whilst the pump should remain there*, paying half the expence of repairing it; it was holden, that a breach could not be assigned in taking away the pump during the term; the lessor having reserved to himself power to remove it under the words, *whilst, &c.*; and the pump not being in truth a specifick subject of the demise.

If a lease for 99 years, determinable on three lives, be conveyed in trust for *A.* for life, and *A.* covenant to use his utmost endeavours, as often as any of the lives drop, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail; he may, without breach of the covenant, procure a renewal upon his own life.||

Tenant in tail of a rent purchases the land out of which it issues, and makes a feoffment thereof, and covenants that it is free from all former incumbrances; this is a charge, though not *in esse*, yet in suspense; for if tenant in tail dies, his issue may distrain, and then the covenant is broken.

If *A.* be tenant in tail, the reversion in the king, and *A.* lease for years, and covenant that the lessee shall enjoy it against all persons, and without the interruption of any, except the king, his heirs and successors, kings and queens of *England*, and the king grant his reversion to *B.*, and *A.* die without issue, and *B.* enter; the covenant is broken; for that extends only to the king and his successors, in which words his patentee is not included.

If *A.*, by the means and procurement of *B.*, by fine conveys lands to *B.* and his wife, and the heirs of *B.*, and after *B.* leases the same for years, and covenants that the lessee shall quietly enjoy

Morgan v. Hunt, 2 Ventr. 213.

Anon. 4 Leon. 38.

(a) But, if lessee for years, rendering rent, with a condition of re-entry for non-payment, leases part for a less

or any other, or any other, he neglects to pay his rent, upon which the first lessor enters, &c., this is a breach. *Stevenson v. Powell*, 1 Bulstr. 182.

Rhodes v. Bullard, 7 East, 116.

Scudamore v. Stratton, 1 Bos. & Pull. 455.

Owen, 7. *per Cur.* but *vide Co. Lit.* 389. a.

Cro. Eliz. 517. *Woodruff v. Greenwood*, *Cro. Eliz.* 517.

Cro. Ja. 657. *Butler v. Swinerton*, adjudged *per*

totam Curiam.
Palm. 339.
S.C. adjudged;
absente Cham-
berlain, though
objected, by his
means and pro-
curement must

enjoy during the term, without the disturbance of him, his heirs or assigns, or of any other person, by or through his means, title or procurement, and *B.* dies, and his wife enters; this is a breach, for she claims by the means of the baron; and therefore it is within the covenant.

refer to subsequent acts. 2 Roll. Rep. 286. S. C. *adjournatur*.

(I) Where the Breach shall be said to be well assigned.

Lev. 78. Co-
niers and
Smith. (a) In
covenant for
not repairing,
the breach was
generally al-
leged, without
shewing in

IF in an action of covenant the plaintiff declares upon a lease for twenty-one years to the defendant, and that he covenanted to pay 20*l.* *per ann.* by equal portions, at *Michaelmas* and *Lady-day*, and assigns for breach, that he did not pay the rent *debit. ad præd. separalia festa durante termino*; this breach is (a) sufficiently assigned, and it shall be intended that the rent was not paid at either of those days.

what; 1 Brownl. 23. adjudged, it was helped after verdict; so, 2 Mod. 176.; and see Sir T. Jones, 125., where the covenant was to repair all the pales, except those on the west side; and the breach assigned was, in not repairing the pales, *contra formam conventionis*, and held good after verdict, though objected, that the defect might be in the parts excepted.—The breach assigned by the plaintiff should specify the particulars, and he may assign every possible breach, within the meaning of the covenant; and though he proves only *part*, he will be entitled to recover. As to the defendant, if he means to plead that he did repair, and if the term is ended, that he yielded up the premises in repair, he should pursue the words of the covenant, fully, without regarding the *particulars* assigned by the plaintiff.

Cro. Eliz. 830.
Cutler and
Brewster ad-
judged.

If in debt upon an obligation, the condition whereof is of three parts, 1. that he shall serve the plaintiff well; 2. that he shall duly account; 3. that within three months after notice he shall make satisfaction for all losses sustained by his apprenticeship; the defendant pleads performance specially, and the plaintiff assigns for breach, that upon account he was found in arrear 60*l.* which he received and converted to his own use, and so had not served the plaintiff well; this is a good replication, without alleging notice; for though it might be alleged as a breach of the third part of the condition, yet the conversion of the money to his own use may be alleged as an ill service.

Cro. Car. 176.
Ld. Raym. 106.

In an action of covenant several breaches may be assigned; otherwise, in debt upon an obligation, conditioned to perform covenants.

|| The object of
this statute was
to meet the
case of non-
performance
of covenants
and agree-
ments secured
by bonds or
indentures,
which cove-
nants are to

But now by the 8 & 9 W. 3. c. 11. it is enacted, "That in all actions upon any bond, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing, contained, the plaintiff may assign as many breaches as he shall think fit; and the jury, upon trial of such action, may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken,

broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assise, or *nisi prius* of that county, to inquire of the truth of every one of those breaches, and to assess the damages which the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices, &c., that he or they shall make a return thereof to the court from whence the same shall issue at the time in such writ mentioned; and in case the defendant, after such judgment entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of the plaintiff, or his executors or administrators, such damages so to be assessed, by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution on the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff, or his executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his costs of suit, and all reasonable charges and expences for executing the said execution, the body, lands or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but notwithstanding in each case such judgment shall remain as a further security to answer to the plaintiff, and his executors or administrators, such damages as shall or may be sustained for further breach of any covenant in the same indenture, deed, or writing contained, upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution shall not be had or awarded upon the said judgment, upon which there shall be the like proceeding, as was in the action of debt upon the said bond or obligation, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof, upon a writ to be awarded in manner as aforesaid; and that upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*; and the defendant, his body, lands, or goods, shall be discharged out of execution, as aforesaid."

dict is erroneous, and a *venire de novo* will be awarded. So it is, where there is a judgment on demurrer, or by default. *Drage v. Brand*, 2 Wils. 377. *Goodwin v. Crowle*, Cowp. 357. *Hardy v. Bern*, 5 T. Rep. 626. *Roles v. Rosewell*, *Id.* 528. *Walcot v. Goulding*, Vol. II. B b

be performed at different times, or the monies paid by instalments; and extends as well to bonds with conditions thereunder written for the performance of any thing contained therein, and to penalties on articles of agreement or the like, for the non-performance of covenants or agreements contained in the same articles, &c., as to covenants and agreements contained in another indenture, deed, or writing. *Collins v. Collins*, 2 Burr. 824. It is now settled, that it is compulsory on the plaintiff to proceed according to this statute; and that he *must* assign the breach of such covenants as he would recover satisfaction for; and if the defendant plead to issue, the jury upon the trial *must* assess damages for such of the breaches assigned as the plaintiff shall prove, otherwise the ver-

ing, 8 T. Rep. 126. In one case the plaintiff was permitted, after issue joined on *non est factum*, to enter on the record an assignment of breaches; *Ethersey v. Jackson*, 8 T. Rep. 255, but where in debt on bond for performance of covenants the defendant prayedoyer, and pleaded performance of each covenant specially, and also general performance, and the plaintiff took issue on the general performance, and entered a separate assignment of breaches on the record, a replender was awarded, the issue being immaterial; for instead of so general a traverse, the plaintiff ought to have assigned in his replication the particular breaches on which he meant to rely. *Plomer v. Ross*, 5 Taunt. 386. The statute does not enable the plaintiff, after having obtained judgment, (which is the common-law judgment for the debt, damages, and costs,) to enter up another equitable judgment for the damages assessed upon the writ of inquiry, but only to obtain an equitable execution upon the first judgment. If he enters up a second judgment, it will be error. *Hankin v. Broomhead*, 3 Bos. & Pull. 607. || —[Whether an obligee in a bond of this kind may recover damages beyond the amount of the penalty, is a point which hath not yet received a final adjudication. See *White v. Sealy*, Dougl. 49. *Brangwin v. Perrot*, 2 Bl. Rep. 1190. *Wilde v. Clarkson*, 6 T. Rep. 303, that he cannot. But *Lord Lonsdale v. Church*, 2 T. Rep. 388. *contr.* See Mr. Serjeant Williams's note (1), 1 Saund. 58.]

9 Co. 60, 61. If *A.* leases to *B.* for years, and covenants that he hath full power and lawful authority to lease, &c. and in an action upon this covenant *B.* says he had (*a*) not full power and lawful authority to lease, &c., the breach is well assigned, for he hath well pursued the words of the covenant *negative*; and what estate he had lies more in the knowledge of the lessor than of the lessee; and therefore he ought to shew what estate he had at the time of making the lease, that it may appear that he had full power, &c. Bradshaw and Salmon, Cro. Ja. 304. S. C. adjudged, and that the defendant must shew he was seised in fee, and then the plaintiff must shew a special title in somebody else; but the covenant being general, the general assignment of a breach *prima facie* is good. (*a*) So, that he was not lawfully seised in fee of an indefeasible estate. *Muscot v. Ballet*, Cro. Ja. 369. || And this, though the covenantee be not with lessee for years, who has not the title deeds. *Glinister v. Audley*, Sir T. Raym. 14. ||

Gale v. Reed, 8 East, 79. || Where *A.* covenanted with *B.* and *C.* not to carry on the business of a rope-maker during his life (except on government contracts), and that he would, during his life, exclusively employ *B.* and *C.* and no other person, to make all the cordage ordered of him by or for his friends and connexions, on the terms before mentioned in the deed, and should not employ any other person to make any cordage on any pretence whatsoever; it was holden, that breaches assigned generally against *A.* for having made cordage for divers persons, other than for government, and for employing other persons than *B.* and *C.* to make cordage for his friends, &c. were well assigned; though no particular persons were named, nor the quantities nor kinds of cordage mentioned, &c. such facts lying more particularly within *A.*'s knowledge. ||

Cro. Ja. 171.
Hancock v.
Field.

(a) Cro. Ja.
661. S. P.

If *A.* leases to *B.* for years, and *B.* covenants to repair during the term, and at the end of the term to leave the premises well repaired; in an action upon this covenant, it may be assigned for a breach, that he did not leave them well repaired at the end of the term; and if the defendant pleads, that at the end of the term he delivered them up well repaired, then if the plaintiff will assign a breach, he ought to shew particularly in what part they were not repaired, so that the defendant may give a particular answer thereto; but it was said that in a declaration in covenant, it sufficeth to assign the breach as (*a*) general as the covenant is.

In an action of covenant the plaintiff declared that Queen Elizabeth leased a messuage, &c. to the defendant for twenty-one years, and that the defendant, his executors and assigns, were thereby bound to repair and leave the premises at the end of the term in good repair, and that the queen granted the reversion to B., and that B. granted the same to the plaintiff; and for not repairing, &c.; this is a good declaration, though the plaintiff is not named assignee.

Cro. Ja. 240.
Lord Ewre v. Strickland, adjudged.

If in an action of covenant the plaintiff declares, whereas by indenture, bearing date, &c., *testatum existit*, that the plaintiff had demised to the defendant a messuage and garden for two years, and the defendant, by the said indenture, covenanted not to erect any building in the garden, &c., and avers *in fact*, that he did erect, &c., this is a good declaration, though he does not expressly say *quod demisit & convenit*; and it is the (a) usual course in B. R. to declare in this manner.

Cro. Car. 188.
Batchelor and Gaye, adjudged. Cro. Eliz. 195. Cro. Ja. 383. S. P. adjudged, & vide Sid. 375, where the plaintiff de-

clares *per quoddam scriptum per quod testatum existit*, &c. (a) And so are the precedents in B. R. & C. B. Cro. Eliz. 195. Cro. Ja. 537. 2 Roll. Rep. 210.—But the usual method now is to declare, that whereas by such an indenture made between, &c. at, &c. (with a proferet) such a one demised, &c.

If baron and feme, being seised of an house to them and the heirs of the baron, lease to A., and he covenant with them and the heirs and assigns of the baron, to repair, &c., and the baron and feme convey the inheritance to B.; in an action upon this covenant, B. may shew the whole matter, and conclude *quod actio ei accrevit**, as assignee of the baron, without shewing the death of the feme; for the estate for life being transferred with the fee, it is drowned therein.

Cro. Car. 285.
Major and Talbot, adjudged. Jones, 205. S. C. adjudged; but by the report thereof, the baron was dead, and the

feme and the heir of the baron conveyed, and the action was brought as assignee of the heir, and said that it was no benefit to the lessee to have the estate for life continue, and therefore, &c.

* This conclusion is not now used, unless in cases of debt on penal statutes, &c. But in such actions of covenant, the usual conclusion, after assigning the breach, is, And so the plaintiff says that the defendant (although requested, &c.) hath not kept with the plaintiff the covenant made between such an one and such an one, but hath therein failed and made default, to the plaintiff's damage of so much; wherefore the plaintiff saith he is injured, and hath sustained damage, &c.

If in an action of covenant the plaintiff declares upon an indenture, in which the defendant had covenanted that he was seised in fee, &c., and would free the premises from all incumbrances, and that the plaintiff should quietly enjoy, and for breach assigns an entry and eviction by a stranger, & *sic conventionem suam* (in the singular number) *fregit*, this is well enough; (b) for *conventio est nomen collectivum*, and if twenty breaches are assigned, the count is *de placito quod teneat ei conventionem*.

2 Mod. 311.
Aster and Ma-zeen, adjudged. (b) *Quod teneat*, &c. & *de conventionione fracta*, all one. Hard. 178.—If a breach of covenant is

sufficiently alleged, the plaintiff need not conclude & *sic non tenuit conventionem in hoc*, &c. for that is but repetition. Cro. Ja. 298. adjudged. 2 Mod. 229. S. P. adjudged, though it is the usual way.

If in an action of covenant the plaintiff declares upon a lease in London, of a messuage in D., *in com. S.*, and that the lessee covenanted to repair, &c., and assigns for a breach, that *apud London*

Sheirs v. Bretton, Cro. Ja. 446, adjudged.

London he permitted the houses to decay, &c. this is naught, because the breach is in a matter local, and not transitory.

Lev. 170.
Procter and
Burdet, ad-
judged.
3 Mod. 69.
S. C. Mills v.
Astell, Cro. Ja.
486. *contr.*

If in an action of covenant the plaintiff declares upon a covenant, to find the plaintiff with meat, drink, apparel, and other necessities, and assigns the breach as general as the covenant, viz. that he did not find him with meat, drink, apparel, and other necessities; this is good, without shewing in particular what other things are necessary, and the *alia necessaria* shall be intended small things, as trimming, washing, &c., which would be too long to insert, and the breach being assigned in the words of the covenant, it is sufficient.

Lev. 94.
French and
Pierce, ad-
judged.

(a) *Vide supra*,
8 & 9 W. 3.,
and Salk. 137.

* So, assigning
that he had re-
ceived of di-
vers persons

divers sums of money, in the whole amounting to a large sum, to wit, the sum of 100*l.*, and converted the same to his own use, contrary to the condition, would be good.

Doughty v.
2awn, Yelv.
126. Brownl.
117. 2 Bulst.
19. S. C.

If in debt upon an obligation conditioned to save the plaintiff harmless from all charges and troubles, by reason of the last will of *A.*, or any thing therein mentioned, touching one *B.*, or any legacy to her given, &c., the defendant pleads *non damnificatus*, and the plaintiff replies that he paid 60*l.* to *B.* for a legacy, &c., this is no good replication; for he ought to shew that a legacy of 60*l.* was given her by the will; for though the will is recited in the date, against which recital the defendant cannot say *A.* made no such will, yet the legacy given to *B.* is not recited, but in general; against which the defendant may take a traverse.

Jones, 218.
Symons and
Smith. Cro.
Car. 176. S. C.
& *vide* Hard.
132. (b) But
non permisit
alone is too

If *A.* covenants to permit *B.*, his heirs and assigns, to take and enjoy the rents, issues, and profits of certain lands, and in an action of covenant the plaintiff assigns for breach, that *A.* took the profits, & (b) *non permisit B.* to enjoy, &c., this breach is well assigned, for the taking of the profits by *A.* is a special disturbance.

general. 8 Co. 89. b. 91. b. || Where in debt upon bond, conditioned to permit the plaintiff to take, reap, and carry away corn, the defendant pleaded *quod permisit*, and the plaintiff replied, that when he went to reap the corn, the defendant and three others came on the land with staves, and the defendant forbade him to reap (setting forth the very words he used); on demurrer there was judgment for the plaintiff. Burr v. Higgs, || And. 137.

Mod. 223.
Boscawin & al.
and Cook,
2 Mod 138.
S. C. adjudged;
and said, that
if it was paid
to *C.*, which is
this *vide* 2 Leon. 197.

If *A.* grants a rent to *B.* and his heirs, for the life of *C.*, to the use of *C.*, and covenants with *B.* to pay the rent *ad opus & usum* of *C.*, and in an action upon this covenant, *B.* assigns the breach, in not paying the rent to him *ad opus & usum* of *C.*, this breach is well assigned in the words of the covenant, though a (c) negative pregnant.

in substance, the defendant ought to have pleaded it. (c) For If

If in an action of covenant the plaintiff declares upon a charter-party, by which the plaintiff, being master of a ship, was to pay two parts of the port-charges, and the factor of the defendant the other part, and the plaintiff shews that he sailed from *L.* to *C.*, and there paid all the port-charges, *viz.* two parts for himself, and the other part for the defendant, and that the defendant had not repaid him, this breach is well assigned; for when the plaintiff says he paid the third part, it shall not be intended the defendant did, but that the plaintiff was necessitated to pay it, otherwise his ship would have been stayed in the port.

2 Jones, 186.
Bellamy and
Russel, ad-
judged.

In covenant, which was that the defendant should make out a good title in law and equity, before such a time, to the satisfaction of the plaintiff, his heirs or assigns, or of his or their counsel learned in the law, the breach was assigned in the very words of the covenant; and it was objected, that the covenant, being in the disjunctive, *viz. to satisfy the plaintiff or his counsel*, he had his election, and therefore the plaintiff ought to have given notice who his counsel was, before which time the defendant could not satisfy him; but it was resolved that the breach, being in the very words of the covenant, was sufficient; and if the truth was, that the defendant did not know who the plaintiff's counsel was, he should have set it forth in pleading.

Carth. 124.
Rawline and
Vincent, ad-
judged.

¶ If *A.* covenant that he, his executors and assigns, will repair, and it be assigned for breach that *A.*, his executors and assigns, have not repaired; this assignment is ill, for it ought to be alleged in the disjunctive, not in the conjunctive, as, if any of them have repaired, the action will not lie.

Colt v. Howe,
Cro. Eliz. 248.

But, if *A.* covenant that he or his heirs will convey to *B.* or his assigns, the breach may be assigned that he did not convey to *B.* himself, omitting his assigns; for there is a difference where a thing is to be done *by* a person or his assigns, and *to* a person or his assigns: in the first case, the breach must be assigned that it was not done by the one or the other; but, in the last case, it will be intended to be done to the person himself; and if he assign his interest, then to the assignee, and if he did assign, that ought to be shewed on the other side.

Smith v. Sharp,
5 Mod. 133.
1 Salk 139.

But, where in an action against the lessee himself, who had covenanted for himself and his assigns to plant every year during the term a certain number of trees, the breach assigned was, that he had neglected to do it; it was holden sufficient, without negating that his assigns had done it, for the court will not intend an assignment.

Gyse v. Ellis,
1 Str. 228.

Where the plaintiff declared on an indenture of demise for years of certain coal-mines, reserving a fourth part of the coals raised, or its value in money, at the election of the lessor; but, if the fourth part fell short of the annual value of 400*l.* then reserving such additional rent as would make up that annual sum, to be rendered on the first day of every month in each year of the term, by equal portions, and that the plaintiff elected to be paid in money; and assigned for breach, that 900*l.* of the rent reserved for two years and three months was in arrear; it was

Buckley v.
Kenyon,
10 East, 129.

objected on demurrer, that the rent being reserved yearly, the breach was not well assigned, as it included a fraction of a year. But the objection was over-ruled as not sustainable on the construction of the covenant; for though it spoke of an annual sum of 400*l.* to be made up in case the proportion of coals reserved should fall short of that sum; yet the rent was to be rendered monthly. But, even admitting it to be a yearly rent, the excess for the three months might be remitted, and judgment given for the residue, as was done in *Incedon v. Cripps*, 2 Salk. 658., and 2 Ld. Raym. 814.; upon this principle, that the more or less depends upon matter extrinsick, and so the variance is not inconsistent with the deed; and as the plaintiff is to recover on the trial what appears to be due, so, on demurrer, he is to have judgment for no more than he ought to recover, and may remit the less.||

Salk. 196.
Griffith and
Harrison, ad-
judged.

If an assignee of a term has a covenant from the assignor, that he shall quietly enjoy, free and clear from all taxes, and all arrears of rent, &c., though there be rent arrear, yet he cannot assign this as a breach of the covenant; for the rent being arrear, is no damage to him, unless he be sued or charged therewith, and if paid at any time before he is damnified, it is sufficient for him.

Salk. 196. *per*
Cur.

So, if a counter-bond or covenant be given to save harmless from a penal bond, after the condition of the obligation be broken, or to save harmless from a single bill, without a penalty, the counter-bond cannot be sued without a special damnification.

Salk. 197. *per*
Cur.

But, where the counter bond or covenant is given to save harmless from a penal bond, before the condition broken, there, if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counter-bond forfeited.

Howes v.
Brushfield,
3 East, 491.

|| If the vendor covenant with the vendee of an estate that he shall enjoy and receive the rents, &c. without any action, &c. or interruption by the vendor or those claiming from him, or by, through, or with his or their acts, means, *default*, &c.; a breach is well assigned in respect of certain quit-rents in arrear before and at the time, though not stated to have accrued while the vendor was tenant of the estate.||

5 Mod. 352.
Toddard and
Middleton.

The defendant covenanted to pay so much *per* chaldron for all coals laden either at *Newcastle*, or upon the river *Tyne*, and brought to *London*; and the breach assigned was, that the coals were laden on such a ship *infra portum de Tinnmouth*, viz. at *North Shields*, and brought from thence to *London*; and on demurrer, the court inclined that the breach was not well assigned, for that they could not take notice judicially, that *Tinnmouth* is upon the river *Tyne*, but they gave the plaintiff leave to discontinue upon payment of costs.

Loggin v.
Comitem Or-
rery, 1 Ld.
Raym. 133.

[In an action on a covenant to pay money on one of two contingencies, which shall first happen, if the plaintiff shew that one has happened, he need not aver it to be the first.

In a declaration in this species of action it is not merely unnecessary, but improper, to state the whole of the deed. So much only as will entitle the plaintiff to his action must be shewn; and that part need not be literally recited, but may be set forth according to its substance and effect; though it is usual and advisable to deviate as little as may be from the expressions in the instrument.]

Dougl. 667.
Cowp. 665.
727.

(K) Where the Performance shall be said to be well set forth and pleaded.

IF a man is bound to perform all the (a) covenants in an indenture, if they are all in the affirmative, he may plead performance thereof generally.

Co. Lit. 303. b.
Keilw. 95.
Leon. 136.
Palm. 70. Lev.

303. S. P. (a) But in debt upon an obligation, conditioned to do several things in the condition mentioned, the defendant cannot plead performance generally, but ought to plead to every thing particularly by itself. Lev. 303. Sid. 215. Keilw. 95. b. — *Quod conditio nunquam infracta fuit*, is naught. 2 Vent. 156. [See too Sayre v. Minns, Cowp. 578.]

But to (b) such as are in the (c) negative, he (d) must plead specially, (for a negative cannot be performed,) and to the rest generally.

Co. Lit. 303. b.
Moor, 856.
Cro. Eliz. 691.
Palm. 70.

(b) But, if the negative covenants are all void and against law, and the affirmative good and lawful, he may plead performance generally, and the court shall take notice that the negative covenants are void and against law. Moor, 850. Godb. 212. Hob. 12, 13. (c) Unless the negative covenant is only in affirmance of the affirmative covenant precedent. Sid. 87. (d) But it is only matter of form, and helped upon a general demurrer. Cro. Eliz. 232. Leon. 311. & vide All. 72. Style, 63.

If any of them are in the disjunctive, (e) he must shew which part he hath performed.

Co. Lit. 303. b.
Sav. 120. S. P.
arguendo. Cro.

Eliz. 560. Palm. 70. S. P., and if performance generally is pleaded, it is naught upon a general demurrer; for that the court cannot tell which part he hath performed. Cro. Eliz. 232. Leon. 311. (e) But, if the condition of an obligation be to perform the award of J. S., and he award the obligor to pay 100*l.* or to procure a stranger to be bound in 200*l.* &c., the defendant may plead performance generally, because one part is void; and it will be intended that he pleads performance of that part which he was bound to perform, and not of the other part. Sav. 120.

If any of them are to be done (f) of record, the performance thereof must be shewn specially, and it cannot be involved in the general pleading.

Co. Lit. 303. b.
(f) As to levy a fine. Cro.
Ja. 560.

Roll. Rep. 159. Palm. 70. S. P. adjudged; and the reason given is, because the record shall be tried by itself, and its credit shall not be examined by a jury; and perhaps the plaintiff will reply, that all the lands are not comprised in the fine, or other matter upon which the fine shall be examined.

If in debt upon an obligation conditioned that the plaintiff shall enjoy certain lands (g) discharged or otherwise saved harmless (h) from all incumbrances, the defendant pleads that the plaintiff hath enjoyed the lands discharged, and kept indemnified from all incumbrances; this plea is naught; for being in the affirmative (i) it ought to have been shewn (k) how; but, if he

2 Co. 4. a.
Manser's case,
adjudged. Cro.
Ja. 363. Winch.
9. March, 1211.
Like point
adjudged.

(g) If the condition be to acquit, discharge, and save harmless from such a bond, *non fuit damnificatus*, it had been otherwise.

and save harmless from such a bond, *non damnificatus*. Leon. 71. — But in an action upon a bond, conditioned to acquit, discharge, and save harmless, a parish from a bastard child, the defendant pleaded *non damnificatus*, and the plaintiff demurred; and because it did not appear upon the whole record, that the parish was damnified, it was adjudged for the defendant. 3 Mod. 252. *vide* March, 121. — But, if in debt upon a bond, conditioned to save harmless *J. S.* and the mortgaged premises, and to pay the interest for the principal sum, the defendant pleads *J. S. non fuit damnificatus*, for that the defendant paid the principal money, and all interest due at such a day; this is no good plea, because *non damnificatus* goes to the person, and not to the premises. 2 Mod. 305. adjudged. — If the condition be to save harmless the obligee against another, *non damnificatus* is a good plea. Keilw. 80. — But, if to discharge the obligee, it ought to be shewn in the affirmative how. Keilw. 80. *per* Frowick.

(h) So, if the condition be to save harmless from all bonds entered into for the obligor, *exoneravit & indemnem conservavit* is no good plea, without shewing how. Cro. Eliz. 216. But that he need not shew from what bond he saved him harmless; and *per* Cro. Eliz. 433. *per* Gaudy, there is a diversity when the condition is to discharge from a particular thing, and when from a multiplicity of things; for in the last case it is sufficient to plead generally.

(i) Cro. Ja. 165. S. P. adjudged. All. 72. S. P. adjudged, & *vide* Cro. Eliz. 477. Cro. Ja. 503. (k) But a man may plead *quod exoneravit*, &c. from an arrest, without shewing how, for that it may be done by composition, &c. without deed. Cro. Eliz. 914. adjudged. — So, in debt upon a bond, conditioned to perform the award of *J. S.*, if it is awarded that a suit in Chancery, by the defendant against the plaintiff, shall cease, and the plaintiff shall stand acquitted *de quolibet materia in eadem contenta*; the defendant may plead *quod stetit inde quietus*, without shewing how, or that he *in facto* discharged him; for it was not intended that an actual discharge should be given, but that by the arbitrament he should be acquitted. Cro. Ja. 339. Roll. Rep. 8. 2 Bulst. 93, 94. — Otherwise, if the award had been, that he should discharge and save him harmless from a certain obligation. Leon. 71.

Keilw. 95. b. In debt upon an obligation, conditioned that the defendant shall repair and do other things, and also pay his rent every day of payment, he cannot plead performance generally, but must plead specially.

Keilw. 95. b. But, where the condition refers to such a generality, that by intendment it is past the remembrance of man; as, if the undersheriff is bound to discharge his master from all accounts and returns of writs within the county, he may plead performance of the condition generally.

Keilw. 95. b. In debt upon a bond, conditioned that the defendant shall enfeoff the plaintiff of all his lands, the defendant must plead performance specially.

Keilw. 95. But, if the condition be that (a) a stranger shall enfeoff the (a) But by the obligee, a general performance may be pleaded. case of Lee and Luttrell, Cro. Ja. 559. 2 Roll. Rep. 159. Palm. 70., it is otherwise.

Keilw. 95. b. If the condition of an obligation be to make to the obligee a lawful estate in certain lands, it is safe to plead that he hath (b) If the condition be to convey an estate, in pleading it must be shewn by what manner of conveyance it was done. Leon. 72. 2 Leon. 39. Godb. 360. 2 Mod. 240. So, if the condition be to shew a sufficient discharge of an annuity, in pleading performance it must appear what manner of discharge it was, that the court may judge whether sufficient or not. 9 Co. 25. a. Hob. 107. 2 Mod. 240.

Keilw. 95. b. But, if the condition be to build a sufficient house, the defendant

dant must say that he hath built such an house, which is sufficient.

In debt upon an obligation conditioned to deliver all evidences concerning such lands, the defendant (*a*) must plead that he hath delivered such and such charters, which are all the charters concerning the land. *Keilw. 95. b. (a) But in Cro. Eliz. 750. per Cur., he may plead that he hath delivered all, &c.; and the contrary, in some particular, ought to be shewn on the other side.*

In debt upon an obligation, conditioned that the defendant at all times, upon request, should deliver to the plaintiff all the fat and tallow of all beasts which should be killed or dressed by the defendant, his servants, or assigns, before such a day; the defendant may plead, that upon every request to him made, he did deliver to the plaintiff all the fat and tallow of all beasts, &c. without shewing how many beasts were killed or dressed, or what quantity of fat he delivered; for when matters tend to infinity and multiplicity, whereby the rolls would be incumbered with length, the law allows of such general pleading. *Mints v. Be- thill, Cro. Eliz. 749. || Bradam v. Bacon, Id. 916. S. P. Church v. Brownwick, 1 Sid. 334. S. P. Parkes v. Middleton, Lutw. 419. S. P. Cryps v. Bainton, 3 Bulstr. 8. S. P. P'Anson v. Stuart, 1 T. Rep. 752. S. P. by Buller J. Barton v. Webbe, 8 T. Rep. 459. Shum v. Farrington, 1 Bos. & Pull. 640. Gale v. Reed, infra.||*

In debt upon an obligation, conditioned for the payment of 6*l.* viz. 3*l.* at one day, and 3*l.* at another day, the defendant may plead payment of the 6*l.* *secundum formam & effectum conditionis præd.*; for *reddendo singula singulis*, it is as if he had pleaded the several payments at the several (*b*) days. *Cro. Eliz. 281. Fox and Lee, adjudged. (b) But such general pleading is not good, where a cer-*

tain day of payment is not mentioned in the condition. 2 Bulst. 267. — In debt upon an obligation conditioned to deliver such briefs such a day, the defendant pleads that he delivered them *secundum formam conditionis præd.*, and the court inclined to think it bad; but the matter was adjourned. Lev. 145.

|| In debt on bond conditioned for the payment of all such costs as the plaintiff's attorney should charge in respect of the prosecution of a suit between the plaintiff and defendant, and that the defendant should exonerate the plaintiff therefrom, the defendant pleaded payment to the plaintiff generally of all the said costs. The court held the bar not good, because too general; for it ought to have shewn that the attorney charged so much and no more, and that the defendant had paid it. It was agreed, that where matter tends to great prolixity, there, to avoid that, a more concise manner of pleading ought to be admitted; but the certainty of pleading in this case has no such tendency.|| *Parkes v. Middleton, Lutw. 419.*

If in debt upon an obligation, conditioned that if the obligee shall enjoy such lands till the full age of *J. S.* and if *J. S.* within one month after his full age, makes an assurance thereof to the obligee, then, &c. the defendant pleads that *J. S.* is not yet of full age; this plea is not good, without shewing the obligee hath enjoyed the lands in the mean time; for the condition is in the copulative. *Cro. Eliz. 870. Waller and Croot, adjudged.*

If in debt upon an obligation, conditioned to pay 3*l.* to *A. B.* and *C. tam cito* as they shall come to the age of twenty-one years, *Halsey v. Carpenter, Cro. Ja. 359.*
the

2 Bulst. 267. the defendant pleads that he paid those sums *tam cito* as they
 S. C. || Stone v. came of age, this is no good plea; for the (a) time, place, and
 Bliss, 1 Bulst. manner of performance, ought to be shewn in certain; so that
 43. S. P. a certain issue might be taken upon it.
 Woodcock v. Cole, 1 Sid. 215. S. P. Wimbledon v. Holdrip, 1 Lev. 303. S. P. Fitzpatrick v. Robinson,
 1 Show. 1 S. P. || (a) If the condition be to surrender a copyhold, the defendant must not
 plead generally, that he hath surrendered it, but must shew when the court was held, &c.
 Winch. 11. adjudged. — If the condition be, that the obligee shall enjoy an office accord-
 ing to letters patent, the defendant must not plead *in hæc verba*, but shew the effect of the
 letters patent, and the enjoyment accordingly. Hob. 295.

2 Mod. 33. If in debt upon an obligation, conditioned to perform cove-
 Duck and Vin- nants, one of which was for the payment of money upon the
 cent, adjudged. making of an assurance, the defendant pleads that he paid the
 money such a day, but saith not when the assurance was made,
 this is naught; for that it ought to appear that the money was
 immediately paid, pursuant to the covenant.

2 Saund. 420. In an action of covenant, the plaintiff declared that his father
 Walton and was seised in fee of a messuage, and leased to the defendant for
 Waterhouse. twenty-one years, and that the defendant covenanted to repair,
 (b) 1 Vent. 38. support, and amend the same, during the term, and that his
 S. P. || *Twis-* father died, &c. and that the messuage was *totaliter dirut. & ru-*
 den J. holding, *inos.*, and the defendant pleaded, that before the house was ruin-
 that the de- *ous*, &c. he assigned to J. S. and that after the house was burnt,
 fendant ought *quodque in convenienti tempore post destructionem domus præd.*,
 to shew by and before the action brought, *messuag. præd. cum pertinentiis*
 whom the *sufficienter reædificat.*, &c. *fuit, & adhuc in bonâ reparatione suf-*
 house was re- *ficienter existit.* Adjudged, upon a special demurrer, that this
 paired; for rebuilt; though it was objected, that (b) it was not material by
 otherwise it whom it was rebuilt; and if by a stranger, it could not be built
 might be in- again by the defendant; and he having assigned all his interest
 tended that before, it lay not in his notice by whom it was built; but that
 the plaintiff it could not be presumed to be built by the plaintiff; for that he
 himself had re- could not intermeddle with the possession during the term. But
 paired it; and by the report, it being alleged that the plaintiff had rebuilt it
 although *Kc-* at his own charge, *Hale* refused to hear the reasons, and *quasi*
lynge C. J. in a passion, without considering the matter in law, gave judg-
 and *Rainsford* ment for the plaintiff.
 J. were of a
 contrary
 opinion, yet
 the case was
 adjourned. ||

Carth. 4. In debt on a bond, for performance of covenants in an inden-
 Seems to be ture, the defendant cannot plead performance generally, without
 admitted, that setting forth the indenture.*

plead performance, without shewing it. All. 72 1 Vent. 37. Sid. 50. Mod. 266. —
 Where he swears he never had part thereof, or hath lost it. Saund. 8, 9. Cro. Ja. 429.

Skin. 397. In covenant by an assignee of a lease, against the assignor,
 Griffin and who covenanted to indemnify the assignee from all rent arrear,
 Harrison, &c. the breach assigned was in the non-payment of the rent; to
 4 Mod. 249. which the defendant pleaded as to part, payment to the lessor;
 Salk. 196. S. C. and as to the other part, that he left money with the plaintiff *eâ*
 adjudged.

* For cases on bonds, *vide* tit. "OBLIGATIONS," (F.)

intentione quod solveret to the lessor; though it was objected, no issue could be taken on his intention, yet the court (*Holt C. J. contra*) inclined the plea was good, but held clearly that if it had been *reliquit ad solvendum*, it had been good, and that *non reliquit modo & forma*, had been a good traverse.

[On a covenant "to permit the plaintiff in the last year of the term to sow clover among the barley and oats sown by the defendant," the breach assigned was, "that the defendant sowed barley and oats *without giving notice* to the plaintiff;" to which the defendant pleaded, "that he did not prevent the plaintiff from sowing as much clover as he thought fit;" and adjudged a good plea.]

Hughes v.
Richman,
Cowp. 125.

(L) *What may be pleaded in Bar to the Action.*

IN an action of covenant for non-payment of rent, the defendant cannot plead *levied by distress*, for that is a confession it was not paid at the day; for it could not be distrained for till after the day; but it was agreed, that the covenant alters not the nature of the rent; but that nothing behind, or payment at the day, is a good plea.

¶ If a lease be by indenture, the lessee cannot in covenant against him plead *nil habuit in tenementis*, for both parties are estopped from avoiding the indenture; and the estoppel appearing on the record, the plaintiff, instead of replying it, may demur. But, if he will not rely on the estoppel, but reply *habuit*, he waives the estoppel, and leaves it at large, and the jury shall find the truth notwithstanding the indenture.

Hare v. Savil,
2 Brownl. 272.

Palmer v.
Ekins, 2 Str.
817. 2 Ld.
Raym. 1550.
S. C. Trevivan
v. Lawrence,
1 Salk. 276.
2 Ld. Raym.
1036.

In covenant by the assignee of a reversion for non-payment of rent, it was stated in the declaration that *J. P.* on a certain day was seised in fee, and on the same day demised by indenture to the plaintiff, and that *J. P.* afterwards assigned the reversion in fee to the plaintiff. The plea was, that before the demise and assignment of the reversion to the plaintiff, *J. P.* conveyed the premises to *J. S.* in fee, and traversed that at any time after that conveyance *J. P.* was seised in fee. On demurrer it was holden that this plea was a special *nil habuit in tenementis*, which was no more to be allowed where the demise was by indenture, than a general plea of that kind; and although the plaintiff was an assignee, yet he might take advantage of the estoppel, because it ran with the land.

Palmer v.
Ekins, *ubi su-
pra*.

In covenant on an indenture of lease by lessor for not repairing, the lessee cannot plead in bar that the lessor had only an equitable estate in the thing demised; for that is tantamount to a plea of *nil habuit in tenementis*. But it seems, the lessee is not estopped from shewing the lessor was seised only in right of his wife for her life, and that she died before the covenant broken, because an interest passed by the lease.

Blake v. Foster, 8 T. Rep.
487.

In covenant, the declaration stated that *A.* demised the premises to *B.* for 99 years, and covenanted that he had good right

Andrew v.
Pearce, 1 N.
Rep. 158.

to make such demise, and for quiet enjoyment by *B.* that *B.* assigned to *C.* and *C.* afterwards assigned to the plaintiff, who was ejected by the defendant (the executor of *A.*) under a title superior to that of *A.* The defendant pleaded, that *A.* at the time of the demise was seised of the premises in tail male, and before the assignment by *C.* to the plaintiff died so seised without heirs male of his body, whereupon the term of years ceased and determined. On demurrer to the plea, it was holden that no action of covenant upon the lease could be maintained against the representative of the grantor, the lease being void at the time of the assignment, and nothing passing under it.

Hodson v.
Sharps, 10
East, 350.

In covenant by lessor against lessee of land in *Bedford Level* for not repairing, defendant pleaded that the indenture was of no force by the statute of 15 Car. 2. c. 17. for want of being registered; and on demurrer disallowed, the act not affecting the lease as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers registering their titles before.

Park v. Man-
ning, 7 T. Rep.
537.

In covenant for rent on an indenture of lease by assignees of lessor, a bankrupt, the defendant pleaded, that the lessor *nil habuit in tenementis*, and adjudged bad on general demurrer.

Taylor v.
Needham,
2 Taunt. 278.

So, an assignee of lessee under a lease by indenture cannot plead that the lessor did not demise.

Ludford v.
Barber,
1 T. Rep. 86.

But, in covenant against a lessee for years on an indenture of lease, it appearing on the declaration that the lease was executed by a tenant for life, and that the plaintiff, the reversioner, who was then under age, and named in the lease, had not executed until after the death of the tenant for life, the lease was adjudged to be void, by the death of the tenant for life; and that the doctrine of estoppel did not apply in this case, because it was admitted on the pleadings, that the plaintiff had not executed it until after the death of the tenant for life.

Frontin v.
Small, 1 Str.
705. 2 Ld.
Raym. 1418.
S. C.

Where in covenant the plaintiff declared that by deed made between her as attorney for *J. F.* on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted to pay the rent to *J. F.*, and then assigned a breach in the non-payment of the rent, to the damage of *J. F.* the attorney; the Court held, that it appearing on the face of the declaration that the deed was void, because not made in the name of the principal, (a) but of the attorney, there could not be any estoppel; and then the covenant to pay the rent was void, and the plaintiff could not maintain the action.

(a) An attorney executing a deed for another, must do it in the name of his principal. *Combe's case*, 9 Co.

76. b. *White v. Cuyler*, 6 T. Rep. 177. *Wilks v. Beck*, 2 East, 142. One who covenants for himself and his heirs, &c. and under his own hand and seal, for the act of another, shall be personally bound by the covenant, though he describe himself in the deed as covenanting for and on the part and behalf of such other person. *Appleton v. Binks*, 5 East, 148.

Friend v.
Eastbrook,
2 Bl. Rep.
1152.

In covenant upon *non est factum*, the issue is that there is no such deed as stated in the declaration; the deed only therefore need be proved, and that being done, the defendant, who is in possession under it, shall not question the title of the plaintiff.

tiff to make the demise, and thereby evade the performance of what he himself has stipulated.

If the plaintiff declares for a breach of covenant, and states the covenant by itself, in its own absolute terms, without the qualifying context which belongs to it, this being an untrue statement, in point of substance and effect, of the deed, will entitle the defendant to a nonsuit on the ground of a variance on the plea of *non est factum*.

By stat. 11 Geo. 1. c. 30. § 43. in actions of covenant upon policies of insurance under the common seal of either of the two insurance companies, the *Royal Exchange* and *London Assurance*, the defendants may plead that "*they have not broken the covenants in such policies contained, or any of them.*"

But in covenant on a lease for not repairing, the defendant cannot plead *non infregit conventionem*, because the breach and plea being both in the negative, there can be no issue. So, (a) in covenant for non-payment of an annuity.

(a) *Boone v. Eyre*, 2

Adm. per Cur.
in Howell v.
Richards,
11 East, 632.

Pitt v. Russell,
3 Lev. 19.
Taylor v.
Needham,
2 Taunt. 278.
Bl. Rep. 1312.

In covenant for quiet enjoyment, and several breaches assigned, in which were stated evictions by different persons, the count concluded with these words, "and so the defendants have not kept their covenants." The defendants pleaded *non infregerunt conventionem*, and upon special demurrer the plaintiff had judgment, the plea being only argumentative.

Hodgson v.
E.I. Company,
8 T. Rep. 278.

In covenant that *C.* was seized in fee, and breach assigned that he was not seized in fee, and *sic infregit conventionem*, the defendant pleaded *non infregit conventionem*; though in covenant the defendant ought to traverse either the deed or the breach, and both cannot be involved in *non infregit conventionem*, because the gist of the action lies on the deed, which must be traversed by itself; yet when the defendant pleads a bad plea, which is found against him, the plaintiff may have judgment either for the insufficiency or falsity of the plea.

Walsingham
v. Combe,
1 Sid. 289.
Gilb. H. C. P.
155.

In covenant for seven quarters' rent, a plea shewing a surrender of the lease before the last four of the seven quarters' rent accrued due, is bad: for there is no such entiertty in alleging a breach of covenant, that if a part of the breach be proved, it will not suffice.

Barnard v. Dinty, 5 Taunt. 27.

In covenant on an insurance against fire, a tender may be pleaded and money paid into court under 19 Geo. 2. c. 37. § 7. ||

Solomon v.
Bewicke,
2 Taunt. 317.

In debt upon an obligation, conditioned that if a ship that was going such a voyage should return, (the perils of the sea excepted,) the defendant should pay so much; but if the ship should be lost, nothing, &c. the defendant pleaded, that the ship did go on her voyage, and, in her return, such a day *amissa fuit*; and it was adjudged a good plea, though it was not said *quod amissa fuit periculo maris*; and she might be lost by the defendant's own default; for the plea is in the last part of the words of the condition, which makes the bond void, as well as if the ship had returned, &c.

2 Lev. 7. *Watson v. Weddington.*

(a) Lev. 151.
Johnson v.
Carr.

It has been adjudged, that to avoid circuity of action where there are reciprocal covenants in the same deed, one covenant may be pleaded in bar to another; as (a) in an indenture of a lease for years, where the covenant was that the lessee might subduct for charges, and he pleaded this covenant in bar to an action of debt for the rent, it was holden good.

|| Whether
mutual cove-
nants may be
pleaded one in
bar of another,
and whether

But in 2 Mod. 309. it is said, that reciprocal covenants cannot be pleaded one in bar of another, and that in the assigning of a breach of covenant it is not necessary to aver performance on the plaintiff's side.

it be necessary for the plaintiff in assigning a breach to aver performance on his part, must depend upon the nature of the covenants, that is, upon their dependence or independence upon each other. Where the covenants are independent, there one party may maintain an action for the non-performance by the other party of his covenant, without averring performance of the covenant on his own part, and the defendant cannot in such case plead non-performance of the plaintiff's covenant in bar. Ughtred's case, 7 Co. 9. b. Merrit v. Rane, 1 Str. 458. Blackwell v. Nash, *Id.* 535. Wyvil v. Stapleton, *Id.* 615. Dawson v. Myer, *Id.* 712. Martindale v. Fisher, 1 Wils. 88. Beany v. Turner, 1 Lev. 293. 1 Mod. 61. S. C. 2 Keb. 666. S. C. Boone v. Eyre, 2 Bl. Rep. 1312. 1 H. Bl. 273. n. and 4 East, 483. Campbell v. Jones, 6 T. Rep. 570. Terry v. Duntze, *Id.* 389. Cole v. Shallett, 3 Lev. 41. Smith v. Cudworth, 1 Show. 390. But, where the covenants are dependent, it is otherwise; for whether they are conditions precedent, that is, where the performance of one act depends on the prior performance of another act by the other party, and where, until the prior act is done, no right is vested in the party who ought to perform it, nor is the other party liable to an action on his covenant; or whether they are concurrent acts or covenants, that is, where the acts of each party are to be performed at the same time; in both cases, the party suing must aver, that he has performed, or was ready to perform, or was prevented by the other party from performing, the covenant on his part; and, consequently, the defendant may plead non-performance by the plaintiff in bar of the action. As to the first of these subdivisions, see the cases of Hesketh v. Gray, Say. 185. Collins v. Gibbs, 2 Burr. 899. Hotham v. E. I. Company, 1 T. Rep. 638. Davis v. Mure, and White v. Middleton, *Id.* 642. Pole v. Harrobin, *Id.* 644. Campbell v. French, 6 T. Rep. 200. Porter v. Shepherd, *Id.* 665. Worsley v. Wood, *Id.* 710. Oldham v. Bewicke, *Id.* 714. 2 H. Bl. 577. n. a. S. C. Routledge v. Burrell, 1 H. Bl. 254. Smith v. Wilson, 8 East, 437. Walker v. Harris, Anstr. 245. Cook v. Jennings, 7 T. Rep. 381. Thomas v. Cadwallader, Willes's Rep. 496. As to the last, see Lock v. Wright, 1 Str. 569. 2 Mod. 40. S. C. Jones v. Barkley, Dougl. 685. Kingston v. Preston, *Id.* 688. Goodisson v. Nunn, 4 T. Rep. 761. Lord Aldborough v. Lord Newhaven, *Ibid.* Morton v. Lamb, 7 T. Rep. 125. Glazebrook v. Woodrow, 8 T. Rep. 366. Duke of St. Albans v. Shore, 1 H. Bl. 254. Heard v. Wadham, 1 East, 619. The above cases shew that the nature of covenants, their bearing with respect to each other, does not depend upon any formal arrangement of the words, but upon the sense and reason of the thing, as it is to be collected from the whole instrument: whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason, depend upon the performance of the other: and they furnish us with this clear and well founded distinction made by Lord Mansfield in Boone v. Eyre, and which we are ever to bear in mind in inquiries of this sort, that where mutual covenants go to the whole of the consideration, on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent; a distinction recognized in Duke of Northumberland v. Shore, *ubi supra*, in Glazebrook v. Woodrow, *ubi supra*, Campbell v. Jones, *ubi supra*, Hall v. Cazenove, 4 East, 483. Ritchie v. Atkinson, 10 East, 295. Havelock v. Geddes, *Id.* 555. Davidson v. Gwynne, 12 East, 389. ||

Saund. 319.
Pordage v.
Cole, Lev. 274.
Sid. 423.
Raym. 183.
2 Keb. 542.
S. C.

[A writing was drawn in these words, *It is agreed that A. shall pay to B. 170l. for his land and house, &c. the money to be paid before Midsummer. In witness, &c. It was sealed by both parties. The money not being paid at the day, [B. brings an action of debt upon the bill, but makes no averment in his declaration that he had conveyed the land, or tendered any conveyance*

veyance of it; it was holden to be well brought notwithstanding, for both parties sealed the deed; and if the plaintiff had not conveyed the land to the defendant, he might have had an action against the plaintiff on the agreement contained in the deed, and so each party had mutual remedy against the other: but it might have been otherwise, if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement, as in the case stated.]

So, in an action of covenant the case was, *A.* covenants with *B.* to make him a good lease of his land and his sheep, and that *B.* should have fire-wood upon his land, and *B.* covenants to pay one half year's rent at *Michaelmas* following; in an action of covenant for this rent, *B.* pleads, that *A.* refused to lease the land before *Michaelmas*; & *per totam curiam*, The plaintiff must have judgment, for *B.* has his remedy upon the covenant of *A.*

Hil. 29 &
30 Car. 2.
Dyesly and
Tuer, ad-
judged.

But, if there be a covenant, that an obligee shall not put the bond in suit at any time, such covenant is pleadable in bar as a release, because in effect it is so. But, where the covenant is, that it shall not be put in suit for a certain time limited in the deed, this is only a covenant; and for breach thereof an action is maintainable; but it is not pleadable in bar to the bond.

Carth. 64.
per Cur.

|| In covenant for the non-payment of a proportion of certain taxes and assessments, there was a plea of a discharge (in the nature of a release) without deed of all damages and demands, which the plaintiff had against the defendant, and on demurrer adjudged ill; for that a covenant to pay money, which is by deed, cannot be discharged without deed.

Rogers v.
Payne. 2 Wils.
376. Selw.
N. P. 469.
S. C. more
fully reported.

In covenant for the non-payment of rent, the defendant pleaded accord with satisfaction before breach; and on demurrer disallowed; for the covenant being created by deed cannot be discharged but by deed. But accord with satisfaction is a good plea in discharge and satisfaction of the damages on a covenant broken.||

Snow v.
Franklin,
1 Lutw. 358.
Kaye v. Wag-
horn, 1 Taunt.
430. S. P.

COURTS, AND THEIR JURISDICTION IN GENERAL.

FOR the better understanding of the nature and jurisdiction of courts, it may be necessary to premise some considerations concerning them in general, before each particular court comes to be treated of; and this I shall do by considering,

(A) The

- (A) The Nature and Original of our Courts, and by what Authority constituted.
- (B) The Judges and Persons exercising a Jurisdiction.
- (C) What determines their Jurisdiction and Authority.
- (D) Their Division, and the Subordination of one Court to another: And herein,
 1. *In general, the several Kinds of Courts which exercise a Jurisdiction.*
 2. *Such as are of Record or not.*
 3. *How inferior Courts must claim their Jurisdiction; and herein of Pleading to the Jurisdiction, and demanding Consuance.*
 4. *Where it must appear that inferior Courts have a Jurisdiction.*
- (E) What is incidental to all Courts in general.

- (A) The Nature and Original of our Courts, and by what Authority constituted.

Lamb. Arch.
57. 239. 245.
Mirror, c. 5. § 1.
* Or *witen-agemot*, or *witten-agemot*.
See *Squire on the Anglo-Saxon Government*, 165.

Lamb. Arch.
239.

IN the Saxon times, the *Wittingham Mote* * was the chief court of the kingdom, where all matters both civil and criminal, and also relating to the revenue, were debated and determined; but for civil and criminal matters, it was only a court in the first instance, for facts arising within the county where it sate; but by way of appeal from the injustice of other courts, it heard and determined causes from all other counties.

To this court were summoned the earls of each county, and the lords of each leet, and likewise representatives of towns, who were chosen by the burgesses of the town, who appeared on the king's summons, which issued once a year at least; and here new laws were enacted, or old ones repealed, after the manner of our parliaments.

Maddox, c. 7.

But *William the Conqueror* caused the states to recognize him, and fearing that these parliaments, consisting of *Englishmen*, might prove dangerous, he established a constant court in his own hall, made up of the officers of his palace, and they transacted the business both criminal and civil, and likewise the

matters of the revenue; and, as they sate in the hall, they were a court criminal, and when up the stairs, a court of revenue; the civil pleas they heard in either court.

The court consisted, 1. Of the *Justiciar*, who presided, and was called *Capitalis Justiciarius totius Anglie*, and chiefly determined all pleas civil and criminal, and was also the chief officer of state. 2. The chancellor who formed all patents, and put the seal to them, and had the custody thereof, both for writs and patents. 3. The treasurer, before whom all accounts were chiefly audited; and he it was that presided in matters relating to the revenue. 4. The constable and marshal, to whom all matters of honour and of war and peace were referred, to determine according to the law of nations and of arms. 5. The seneschal or steward, and marshal, who determined the quarrels and disputes between the king's menial servants; the marshal was also to keep the prisoners, and take care that no indecency was committed in the king's house. 6. The chamberlain, who was to count the king's money as it came in, and issued out of the treasury.

This was the sovereign court of the kingdom, where justice was administered, and where all matters of the highest moment were transacted by the king himself and these officers; yet, in some cases, of great importance, as upon the levying of a new war, or raising an escuage, most of the great persons that held *in capite* were called, and then it was termed the *commune concilium regni*, or the parliament; to which afterwards the representatives of boroughs that held *in capite* were called.

Towards the *Norman* period, the power of the *justiciar* became formidable, and in the barons' war was turned against the king. The king also found, that the barons who held large districts were likely to grow more and more troublesome to the crown; for though in the Conqueror's time, and for some reigns after the conquest, they were kept in very good subjection, the *Norman* and *English* barons being a balance for each other; yet time wearing away the distinction, and the *Normans* growing up *English*, they became fond of those liberties and privileges which the *English* had enjoyed in the *Saxon* times. Hence it was necessary to introduce a new policy, and hence the original of our courts, as we have them at this day in *Westminster-hall*.

To give countenance to this new erection and division of courts, (which was completed by E. 1.) as also that it might still be seen that all justice flowed from the king, the king himself (a) sat in person in the court of (b) King's Bench; and hence the power of this court, which it still retains, of exercising a superintendency over other jurisdictions. But, though the king was sometimes present, yet the chief justice gave the rule, that the king might not decide in his own cause.

(a) Speed, 527.
Roll. Abr. 535.
(b) Is still supposed to have always the king himself in person sitting in

it. Dyer, 187. pl. 6. Crompton of Courts, 78.—And hence every process in the King's Bench is made returnable before the king himself. 28 Ass. pl. 52.

2 Inst. 73.

2 Hawk.P.C.2.

But, however this regulation might have been begun, or how-
ever it might have been formerly, as to the king's sitting and de-
termining in causes, it seems now agreed, that the king having
delegated his whole judicial power to the judges of his several
courts, those judges, by the long, constant, and uninterrupted
usage of many ages, have now gained a known and stated juris-
diction, regulated by certain and established rules, which the
king himself cannot make any alteration in without an act of
parliament.

S.P.C. 54, 55.

2 Hawk.P.C.2.

(a) Therefore,
if an ordinary
certify, or try

But, as the king is the fountain of justice, and the supreme
magistrate of the kingdom, entrusted with the whole executive
power of the law, no court whatsoever can claim (*a* any juris-
diction, unless it some way or other derive it from him.

bastardy, without a writ from the king's temporal courts, it is void; for the spiritual jurisdic-
tion within these kingdoms is derived from the king, and must be exercised in the manner the
king has appointed. Roll. Abr. 361.

6 H. 7. 4. b. 5. a.

4 Inst. 125.

127. 6 Co. 11.

b. 12. a.

But it is clearly agreed, that the king cannot give any addi-
tion of jurisdiction to an ancient court, but that all such courts
must be holden in such manner, and proceed by such rules, and
in such cases only as their known usage has limited and pre-
scribed. And hence it followeth, that the court of King's Bench
cannot be authorized to determine a mere real action between
subject and subject; nor can the court of Common Pleas, to in-
quire of treason or felony.

4 Inst. 87. Sid.

338. (b) That

the king can-

not grant a

mere spiritual

jurisdiction, as

to ordain, institute, &c., to a lay person, nor can he exercise it himself;

but must administer those laws by bishops, as he does the common law by judges.

And it is said, that the king is so far restrained by the ancient
forms, in all cases of this nature, that his grant of a (*b*) judicial
office for life, which has been accustomed to be granted only at
will, is void.

4 Ass. 5. Bro.

Commission. 3.

15, 16. 12 Co.

30, 31. 2 Inst.

478. A com-

mission under the great seal to take *J. N.*, a notorious robber, and to seize his lands and goods,

illegal. 2 Inst. 54.

Also, commissions to seize the goods, and imprison the bodies
of all persons who shall be notoriously suspected of felonies and
trespasses, without any indictment or other legal process against
them, are illegal and void.

And it is said, that the king cannot grant any new commission
whatsoever that is not warranted by ancient precedents, how-
ever necessary it may seem, and conducive to the publick good;

(c) 4 Inst. 163.

18 E. 3. 1. 4.

and, therefore, (*c*) commissions to assay weights and measures,
being of a new invention, were condemned by parliament. And

(d) 2 Inst. 478.

it is (*d*) said, that the king could not authorize persons to take
care of rivers, and the fishery therein, according to the method
prescribed by the statute of Westm. 2. c. 47. before the making
of that statute.

(B) The Judges, and Persons exercising a Jurisdiction.

THE king himself, though he be entrusted with the whole executive power of the law, cannot sit in judgment in any court, but his justice, and the laws, must be administered according to the power committed to and distributed among his several courts of justice.

4 Inst. 70, 71.
2 Inst. 103.
8 H. 4. 13. b.
S. P. C. 54.
Dalt. c. 1.

All judges must derive their authority from the crown, by some commission warranted by law. The judges of *Westminster* are all (except the Chief Justice of the King's Bench (a), who is created by writ) appointed by patent, and formerly held their places only during the king's pleasure. (b) But now, for the greater security of the liberty of the subject, by the 12 & 13 W. 3. c. 2. their commissions are to be *quamdiu se bene gesserint*; but, upon the address of both houses of parliament, it may be lawful to remove them. (c)

rius. Ibid. (b) The chief and other barons of the Exchequer were created in Sir E. Coke's time, *quamdiu se bene gesserint. Id.* 117. (c) || Our distant settlements are not considered as within the compass of this statute, which is understood to be limited to the courts of Westminster-hall; and therefore the commissions of the king's judges in the East Indies are still *during pleasure*. The statutes of 13 G. 3. c. 63. and 39 & 40 G. 3. c. 79. under which the courts in that country were constituted, are wholly silent as to the estate which the judges shall take in their office, and being left as at common law, an estate at will only is granted to them.||

4 Inst. 74, 75.
(a) [He was anciently made by patent also; the alteration took place under E. 1., when his title was changed from *summus* to *capitalis justiciarius*.]

And by the 27 H. 8. c. 24. it is enacted, "That no person or persons, of what estate, degree, or condition soever they be, shall have any power or authority to make any justices of eyre, justices of assise, justices of peace, or justices of gaol delivery, but that all such officers and ministers shall be made by letters patent under the king's great seal, in the name and by the authority of the king's highness, in all shires, counties palatine, *Wales*, &c., or any other his dominions, &c., any grants, usages, allowance, or act of parliament to the contrary notwithstanding."

As all judges must derive their authority from the crown, by some commission warranted by law, they must also exercise it in a legal manner, and hold their courts in their proper persons, for they cannot act by (d) deputy, nor any way transfer their power to another, as the judges of ecclesiastical courts may. town, unless the custom allows, cannot make a deputy; for this is a judicial office, *vide* Raym. 88. Lev. 125. Keb. 538. 639. 659., and the title *Office and Officers*.

Bro. Judges,
11. Latch. 7.
Cro. Car. 259.
Cro. Eliz. 314.
(d) That a recorder of a

But it seems, that, regularly, where there are divers judges of a court of record, the act of any one of them is effectual, especially if their commission do not expressly require more.

2 Hawk. P. C.
3. and *vide* the authorities there cited.

The judges are bound by oath to determine according to the known laws and antient customs of the realm; and their rule herein must be the judicial decisions and resolutions of great numbers of learned, wise, and upright judges, upon a variety of

Vide the statutes 18 E. 3.
c. 1. 20 E. 3.
c. 1. 2. 4 Inst.
88. 109. Dalt.
par- 13.

particular facts and cases, and not their own arbitrary will and pleasure, or that of their prince.

S. P. C. 173.

Co. 24. 12 E.

4. 18. 21 E. 4.

67. a. Salk. 397.

(a) But, where

for wilful cor-

ruption they

have been complain-

ed in parliament.

Hawk. P. C. c. 72. § 6.

12 Co. 24.

But, though they are to judge according to the settled and established rules and antient customs of the nation, approved for many successions of ages, yet are they freed from all prosecutions for any thing done by them in court, which appears to have been an (a) error of their judgment.

have been complained of in the star-chamber, *vide* Vaugh. 139. and may still be called to an account in parliament. Hawk. P. C. c. 72. § 6. 12 Co. 24.

Vaugh. 138.

Nor is a judge, constituted by the king, and thereby stampd with his approbation, and to whom alone it belongs to judge of his fitness, to be reflected on, censured, defamed, or vilified with respect to his ability, parts, fitness for his place, &c.; for, if this were allowed, it would be impossible to keep in the people that veneration of his person, and submission to his judgments, without which it is impossible to execute the laws with vigour and success; and hence all scandalous reflections on the judges of *Westminster-hall* are within the statute of *scandalum magnatum*.

8 H. 6. 19. b.

2 Roll. Abr.

92. Salk. 398.

(b) The Mayor

of Hereford

was laid by the heels,

for sitting in judgment

in a cause where he

himself was lessor of the

plaintiff in ejectment,

though he by the charter

was sole judge of the court.

Salk. 396.

No person can be a judge in his (b) own cause, but the chief justice of the Common Pleas may bring an action in that court, but then the entry must be special, *viz. placita coram Johanne Blencow milite, &c.*

1 H. 7. 26. a.

3 Inst. 29.

Fortesc. Rep.

389.

No judge of any court of record is compellable to deliver his opinion before-hand, in relation to any question which may afterwards come judicially before him.

¶ By st. 12 G. 2. c. 27. reciting that by st. 8 R. 2. c. 2. no man of law shall be thenceforth justice of assize, or of the common delivery of gaols in his own country; and that by st. 33 H. 8. c. 24. no justice, nor other man learned in the law of this realm, shall use or exercise the office of justice of assize within any county where the said justice was born or doth inhabit, upon pain to forfeit for every offence contrary to the said act one hundred pounds; and that such acts had been construed to extend, not only to justices of assize and of gaol delivery, but also to justices of *nisi prius*, and justices of *oyer* and *terminer*; which construction had been attended with very great inconveniencies; it is enacted, that “it shall and may be lawful from time to time, and at all times thereafter, to and for the chief justice “and justices of either Bench, and to and for the chief baron “and other barons of the court of Exchequer, and to and for “any other person or persons learned in the law, who shall be “appointed justice or justices of *oyer* and *terminer*, or gaol-delivery, in any county or counties within that part of *Great Britain* called *England*, to use and exercise the office or offices “of justice or justices of *oyer* and *terminer*, or gaol-delivery, “in any such county or counties, notwithstanding they or any “of them shall have been born or do inhabit within any such “county

“ county or counties; and that they shall not be liable for so
 “ doing to the said penalty or forfeiture of one hundred pounds,
 “ or to any other punishment or penalty whatsoever; any thing
 “ in the said recited acts, &c. notwithstanding. ||

(C) *What determines their Jurisdiction and Authority.*

IT has been determined, that at common law the patents of the judges, (a) sheriffs, escheators, commissioners of *oyer and terminer*, gaol-delivery, and of the peace, and of the attorney general, are determined by the death of the king, in whose name they are made. And. 44. Dyer, 165. 7 Co. 30. a. Cro. Car. 1, 2. N. Bendl. 79.
 in such places where he is chosen by a corporation, having by its charter the inheritance of the office, does not determine by the demise of the king. 7 Co. 30. b. — Nor the authority of a coroner or verderor. Dals. 15. Dyer, 165. 2 Inst. 175. 1 Lev. 120. — Nor does any corporation officer, who by the charter is invested with judicial authority, lose it by such demise. 2 Hawk. P. C. 3. (a) But the office of a sheriff,

But to prevent the disorders and other inconveniencies which may happen upon the death of a king, from the want of persons armed with competent authority to execute the laws before the successor can have time to appoint others, by the 7 & 8 W. & M. c. 27. it is enacted, that “ no commission, either civil or military, shall cease, determine, or be void, by reason of the death and demise of his then majesty, or of any of his heirs or successors, kings or queens of this realm; but that every such commission shall be, continue, and remain in full force and virtue for the space of six months next after any such death or demise, unless in the mean time superseded, determined, or made void by the next and immediate successor, to whom the imperial crown of this realm, according to the act of settlement in the said statute before mentioned, is limited and appointed to go, remain, or descend.” 1 W. & M. st. 2. c. 2.

And by the 1 Ann. c. 8. ||reciting, forasmuch as some doubt may be conceived of the extent of the above clause in the act of 7 & 8 W. 3., therefore, for the avoiding of any dispute or question that may arise concerning the construction thereof, it is declared and enacted, that “ no patent or grant of any office or employment, either civil or military, shall be taken, construed or adjudged to cease, determine, or be void, by reason of the death or demise of his said late majesty, but that every such patent or grant shall be, continue, and remain in full force and virtue, from and after the 7th day of *March* 1701, for the space of six months then next ensuing, unless in the mean time superseded, determined or made void by her then present majesty.” ||

And by § 2. it is further enacted, “ That no patent or grant of any office or employment, either civil or military, hereafter to be made, shall cease, determine, or be void, by reason of the death or demise of any king or queen of this realm; but that every such patent or grant shall be, continue, and remain

“ main in full force and virtue for the space of six months next
 “ after any such death or demise, unless in the mean time
 “ superseded, determined, or made void by the next immediate
 “ successor, to whom the imperial crown of this realm is limited
 “ and appointed to go, remain, or descend.”

And it is further enacted by § 5., “ That no commission of
 “ assize, *oyer* and *terminer*, general gaol-delivery, or of associ-
 “ ation, writ of admittance, writ of *si non omnes*, writ of assist-
 “ ance, or commission of the peace, shall be determined by the
 “ demise of her then majesty, or of any king or queen of this
 “ realm; but every such commission and writ shall be and con-
 “ tinue in full force and virtue for the space of six months next
 “ ensuing, notwithstanding such demise, unless superseded and
 “ determined by the next successor; and also no original writ,
 “ writ of *nisi prius*, commission, process, or proceedings what-
 “ soever, in, or issuing out of any court of equity, nor any pro-
 “ cess or proceedings upon any office or inquisition; nor any
 “ writ of *certiorari*, or *habeas corpus* in any matter or cause,
 “ either criminal or civil: nor any writ of attachment, or pro-
 “ cess for contempt; nor any commission of delegacy or review
 “ for any matter ecclesiastical, testamentary, or maritime, or
 “ any process thereupon, shall be determined, abated, or dis-
 “ continued by the demise of her then majesty, or any king or
 “ queen of this realm; but every such writ, &c. shall remain in
 “ full force, to be proceeded upon as if her majesty or such
 “ king or queen had lived.”

|| By st. 1 G. 3. c. 23. it is enacted, “ That the commissions
 “ of judges for the time being shall be, continue, and remain in
 “ full force, during their good behaviour, notwithstanding the
 “ demise of his majesty, or of any of his heirs and successors.” ||

Dyer, 159.
 Cro. Car. 128.
 S. C. cited, and
 agreed.

If a judge of the Common Pleas is made a judge of the King's Bench, by this the inferior authority is determined; for it would be impertinent for him to reverse his own judgment, which otherwise he might do upon a writ of error.

Dyer, 159.
 4 Inst. 73.
 9 Co. 118.

The authority of justices in *eyre*, *oyer* and *terminer*, &c., is (a) determined by (b) the King's Bench sitting in the same county.

(a) Their authority, how suspended by writ of *supersedeas*, which is grantable on proof that their commission was unduly obtained, *vide* Reg. 124, 125. 12 Ass. 21. 4 Inst. 163. H. P. C. 162. (b) Whether they have notice thereof or not. 4 Inst. 73. But *qu.* 21 H. 7. 29. b. [Bro. Commission, 10., saith that it is not determined, unless proclamation is made of the coming of the King's Bench. But see 2 Hawk. P. C. c. 3. § 11.]

Kelw. 116.

(c) But where, by the issuing and notice of the second commission, the first is determined, and what shall be

If a commission is made to judges of assize, and after the king makes other judges of assize in the same county, (c) by this the first commission is not determined, but they may proceed thereupon (d) till notice of the second; and they are not bound to take notice of a proclamation thereof in the county, for the law hath not provided that any such proclamation thereof should be made.

sufficient notice, *vide* Leon. 270. Godb. 105. 34 Ass. 8. Bro. Commission, 14. Moor, 186. pl. 333. H. P. C. 162. 4 Inst. 165. Dyer, 355. p. 36. — And yet the proceedings shall not be discontinued, *vide* the statutes of 11 H. 6. c. 6. and 1 E. 6. c. 7., and 2 Hawk,

2 Hawk. P. C. c. 5. § 12. (d) The old sheriff may act till the new patent is shewn him, so that he may have notice of his discharge. Cro. Eliz. 12. 440. Moor, 186. pl. 353. 4 Inst. 165. S. P. cont. — But justices of the peace left out of the new commission, must take notice thereof after publication of the new commission at the next sessions. Moor, 187. 4 Inst. 165. S. P.

If the justices hold a session without adjourning it, and the commission hath no time limited for its continuance, as where it is appointed *pro hac vice* only, their authority is determined; but, if the commission be granted for a certain time, or *quamdiu nobis placuerit*, as it does not necessarily require any adjournment, if the court holden by virtue of such commission break up without any adjournment, or upon a void one, as being made without the consent of the majority of the commissioners; yet it may be holden again on a new summons.

It was (a) formerly holden, that by the justice's acceptance of any new name of dignity, the commission was determined; but this is remedied by 1 E. 6. c. 17. by which it is enacted, "That if any person, being in any of the king's commissions whatsoever, shall fortune to be made or created duke, archbishop, bishop, marquis, earl, viscount, baron, bishop, (b) knight, justice of the one bench or of the other, or serjeant at law, or (c) sheriff, yet that notwithstanding he shall remain commissioner, &c."

(a) Bro. Commission, 4. 22. (b) But it hath been doubted whether the dignity of a baronet, which has been created since that statute, be within the equity of it. Cro. Car. 104. Lit. Rep. 81. (c) But now by the 1 Ma. c. 8. No person being sheriff shall exercise the office of justice of the peace.

"By the 2 & 3 Ph. & M. c. 18. a new commission of the peace, or gaol-delivery for the county, &c., shall not supersede a former commission for a city or town corporate being no county."

(D) Of their Division, and the Subordination of one Court to another: And herein,

1. In general, of the several Kinds of Courts which exercise a Jurisdiction.

THE most general division of our courts is, into such as are of record, or not; those of record are again divided into such as are supreme, superior, or inferior. Hale's An. 35.

The supreme court of this kingdom is the high court of parliament, consisting of the king, lords, and commons, who are invested with a kind of omnipotency in making new laws, repealing and reviving old ones; and it is on the right balance of these three depends the well-being, and indeed the very being, of our constitution. Hale's An. 35.

Superior courts of record are again, those that are more principal or less principal; the more principal ones are the Lords House in Parliament, the Chancery, King's Bench, Com-

mon Pleas, and Exchequer; and by *Hale*, such are the justices itinerant *ad communia placita* & *ad placita foreste*.

Hale's An. 36. The less principal ones are such as are held by commission of gaol-delivery, *oyer* and *terminer*, assise, *nisi prius*, &c., by custom or charter; as the courts of the counties palatine of *Lancaster*, *Chester*, *Durham*; or by virtue of acts of parliament, and the king's commission, as the court of sewers, justices of the peace, &c.

Hale's An. 36. The inferior courts of record, as ordinarily so called, are corporation courts, courts leet, and sheriffs torn, &c.

Courts not of record are the courts baron, county courts, hundred courts, &c.

Vide post, of the Admiralty and Ecclesiastical Courts.

Also, the admiralty and ecclesiastical courts, which are not courts of record, but derive their authority from the crown, and are subject to the controul of the king's temporal courts, when they exceed their jurisdiction.

Hale's An. 35. All these are bounded and circumscribed by certain laws and stated rules, to which, in all their proceedings and judicial determinations, they must square themselves.

Dyer, 236. And here it may be proper to observe, that where a statute prohibits a thing, and appoints that the offence shall be heard and determined in any of the king's courts of record, it can be proceeded against (*a*) only in one of the courts of *Westminster-hall*, because those being the highest courts of record, shall be intended only to be spoken of *secundum excellentiam*.

(*a*) But on a statute so worded, the prosecution may be in any court of *oyer* and *terminer*. 4 Inst. 164, H. P. C. 261.

2. Of such as are of Record, or not.

Co. Lit. 17. Every court of record is the king's court, though the profits may be another's: if the judges of such court err, a writ of error lies; the truth of its records shall be tried by the records themselves, and there shall be no averment against the truth of the matter recorded.

(*b*) **Co. Lit.** All such courts are created (*b*) by act of parliament, letters patent, or prescription, and (*c*) every court, by having power given it to fine and imprison, is thereby (*d*) made a court of record; the proceedings of which can only be removed by writ of error or *certiorari*.

(*b*) **Co. Lit.** 260. a. (*c*) **Salk.** 200. **Ld. Raym.** 213. 252. 454. (*d*) The leets and torns are the king's courts, and of record. 2 Inst. 143. 4 Inst. 263. **Hetl.** 62. S. P.—But neither the admiralty nor ecclesiastical courts are of record. **Roll. Abr.** 527.—Nor the *English* court in Chancery proceeding by *subpena*. 37 H. 6. 14. 1 **Roll. Abr.** 527.—Nor the county court; **Co. Lit.** 117 b. 2 Inst. 380. 4 Inst. 264., though plea held there by justices. 2 Inst. 140. 312. 6 Co. 11. b.—Nor the hundred court. **Co. Lit.** 117. 2 Inst. 143. 4 Inst. 264.—Nor the court baron. **Co. Lit.** 117. 2 Inst. 143. 4 Inst. 264.—The proceedings thereof may be denied, and tried by a jury; and a writ of false judgment, not of error, lies on their judgments. **Co. Lit.** 117. b.

Co. Lit. 117. A court, that is not of record, cannot impose any fine on an offender, nor award a *capias* against him, nor hold plea of debt or trespass, if the debt or damages amount to 40s., nor of a trespass

trespass done *vi & armis*, though the damages are laid to be under 40s.

Also, by the statute of (a) *Gloucester*, the superior courts shall not hold plea of any (b) trespass under the value of 40s. (a) Made 6 E. 1. c. 8. (b) Trespass is put but for an example; for so are debt, detinue, covenant, and the like. 2 Inst. 311. See further, tit. *Abatement*, (K.)

But the superior courts may hold plea of trespass, &c. though under 40s. relating to the freehold, as detinue for charters, &c. or trespass *vi & armis*. 2 Inst. 311.

As, where in trespass by way of original, the plaintiff declared, that the defendant *vi & armis clausum suum apud H. fregit*, and concluded *ad damnum ipsius* 20s., upon demurrer it was held well enough; for this being done *vi & armis*, if it could not be punished in the superior court, it could not be punished at all, for an inferior court cannot assess a fine. Carth. 108. Lambert and Thurston, 3 Mod. 275. S. C.

3. *How inferior Courts must claim their Jurisdiction; and herein of pleading to the Jurisdiction, and demanding Consuance.*

The courts of *Westminster* are the superior courts of the kingdom, and have a superintendancy over all other courts by prohibition, if they exceed their jurisdiction; or writs of error, and false judgment of their proceedings; and every thing is supposed to be done within the jurisdiction of the superior courts, unless the contrary especially appears; on the other hand, nothing shall be intended within the jurisdiction of an inferior court, but what is expressly alleged. Carth. 11, 12.

In all transitory actions they have a jurisdiction, unless the plaintiff by his declaration (c) shews, that the action accrued within a county palatine; or it be between the scholars of *Oxford* and *Cambridge*; in which case the university shall have consuance; because by their charter, confirmed by act of parliament, they have jurisdiction over the persons of their scholars. And though an inferior court might have determined it, yet the superior court, being once possessed of the action, cannot be (d) hindered from proceeding. 12 Co. 114. Sid. 103. (c) But the defendant must plead it, and cannot take advantage of it in arrest of judgment. Carth. 11.—Nor can he take advantage

of it by way of demurrer, but must plead to the jurisdiction of the court. Carth. 354, 355. (d) It was moved for an attachment against the registrar and commissioner of the court of requests, called the court of conscience, confirmed by the act 3 Ja. 1. c. 15. because that where *J. S.* had brought debt upon an obligation of 10*l.* for payment of 5*l.* in *B. R.* against a freeman of *London*; who after cited the plaintiff in the court of Conscience, surmising that less than 40s. was due, and the plaintiff appeared there, and shewed the obligation; notwithstanding, the commissioners there, upon allegation of the defendant, that less than 40s. was due, ordered the plaintiff to accept it, and stay proceedings in *B. R.*, which he refusing, the commissioners ordered the registrar to keep the obligation, so that the plaintiff could not proceed; upon which matter the court granted an attachment against the commissioners and registrar; for that court cannot any way prohibit or stay the proceedings in a superior court. Mich. 27 Car. 2. in *B. R.* 3 Keb. 533. S. C. ill reported.

In local actions inferior courts have a jurisdiction. But here 4 Inst. 224. a difference must be observed as to the manner of claiming it; for as to the principal courts of this kind, and into which *brevia domini regis non currunt*, as the counties palatine, they may

(a) So, antient demesne held of the king's superior courts. may (a) (plead their jurisdiction when intrenched upon by the superior courts.

manor may be pleaded. Herne's Pleader, 7. 351. Hans. 103. Tho. 2. Rast. 419.—So, may the jurisdiction of the *cinque ports*, 4 Inst. 224. But *vide* Carth. 109. & Q. For it is there said to be such a franchise as *Ely*; and there resolved, that *Ely* being no county palatine, but only a royal franchise, the defendant cannot plead to the jurisdiction of a superior court, but must demand conusance.—And *note*, that wherever the defendant can plead to the jurisdiction of the courts at *Westminster*, there the franchise may demand conusance; but not *vice versâ*.

Roll. Abr. 489. 490. (b) There are three sorts of conusance, 1. *Tenere placita*, which does not oust another court of their jurisdiction, but only creates a concurrent one. 2 *Cognitio placitorum*, when the plea is commenced in one court, of which the conusance belongs to another. 3. A conusance with an exclusive jurisdiction; as that no other court shall hold plea, &c. Hard. 509. But, where a franchise, either by letters patent or prescription, hath a privilege of holding pleas within their jurisdiction, if the courts at *Westminster* intrench on their privileges, they must demand (b) conusance; that is, desire that the cause may be determined before them; for the defendant cannot plead it to the jurisdiction. And the reason is, because when a defendant is arrested by the king's writ within a jurisdiction where it doth not run, he is not legally convened, and therefore may plead it to the jurisdiction; but the creating of a new franchise does not hinder the writ from being made out as before, nor the courts above from having the same jurisdiction over the cause, but grants jurisdiction to the lord of the liberty; and whenever the king's courts intrench on his jurisdiction, he may make his claim, and demand that the cause be determined before him.

2 Inst. 140. Co. Lit. 117. b. No court can demand it unless it be of record, and of a plea of record; because all courts of record are the king's, though another may have the profits of them; so that although the cause goes out of the king's courts at *Westminster*, yet it goes to another of the king's courts, to which he has granted the privilege of determining the causes arising within a limited jurisdiction; but it is below the dignity of the king's court to part with any cause to another's court, such as the county court, &c.

Dals. 12. Roll. Abr. 489. Also, where a franchise cannot give a remedy, and there would be failure of justice, they shall not have conusance, although the action accrue within their jurisdiction.

(c) 44 E. 3. 29. b. Bro. Conusance, 12. S. C. 26 E. 3. 73. Dals. 12. Co. cannot do. As in (c) a *quare impedit*, because they cannot send a writ to the bishop; or in (d) replevin, because if the plaintiff be non-suited, a second deliverance shall be granted, which the franchise

Lit. 134. b. S. P. (d) 38 E. 3. 31. conusance is not grantable, because the original writ of replevin is in nature of a *justicies*, and not returnable, and in a *justicies* no conusance can be demanded, because none can demand conusance but he that hath a court of record; but the county court, though the plea is holden by *justicies*, is no court of record; and if the sheriff should grant the conusance, he could not award a re-summmons. 2 Inst. 140. Bro. Conusance, 4. 23.

1 H. 4. 5. Dals. 12. (e) No conusance can be granted upon an attaint, because all attaints, *per* 23 H. 8. c. 3., are to be taken before the king in his bench, or before justices of the Common Pleas, and in no other court. Co. Lit. 294. Dyer 202. Kelw. 210. N. Bendl. 99. Nor in waste, because by the statute the writ must issue out of the Chancery at *Westminster*, and those writs are returnable into the (e) king's courts there, and not into any inferior court.

Nor in admeasurement of pasture, because the franchise cannot grant a writ *de secundâ superoneratione*. Dals. 12.

So, if a fine be removed out of a franchise by writ of error in *B. R.* and a *scire facias* issue out to have execution, they shall not have consuance; because the king never parts with the records of his court, and without it they can do no right to the party. 50 Ass. 9. Bro. Consuance, 61. Roll. Abr. 492. S. C.

If a borough have an ancient charter, by which it was granted to them *quod nullus burgensis inhabitans infra burgum præd. placit. vel implacitetur de terris, tenementis, contractibus, &c.* within the borough, elsewhere out of, &c. and the mayor and burgesses of the said borough are empleaded *in Banco* for lands within their borough, they shall not have consuance; for in this action (a) the whole body is empleaded. N. Bendl. 88. pl. 134. (a) So, where consuance is granted to the chancellor of the university to hold plea where scholars

or privileged persons are concerned, this shall extend to an action against the president and scholars of a college. Magdalen College case, 1 Mod. 163.

If the king grants *majori, ballivis, & juratis quinque portuum*, that they shall not be empleaded for land or other cause elsewhere, than within the said ports, yet in a *quo warranto*, &c. where the king is directly a party, they shall not be empleaded there. 22 H. 7. Kelw. 88, 89, 90.

If a scholar of *Oxford* or *Cambridge* be sued in Chancery for a specifick performance of a contract to lease land in *Middlesex*, the university shall not have consuance, because they cannot sequester the lands. [The like determination, in the case of a visitor, because he cannot act in a trust. Lit. Rep. 252. Crips and Webb. (b) So, for the same reason, it shall not be granted to them in ejectment, though nothing but a term for years be to be recovered. Lit. Rep. 252. Cro. Car. 87, 88. S. P. adjudged.]

So, in (b) trespass *quare clausum fregit, et damnum, &c. intravit in Oxford*, consuance was denied to the university, because the freehold might come in question. Lit. Rep. 252. Crips and Webb. (b) So, for the same

reason, it shall not be granted to them in ejectment, though nothing but a term for years be to be recovered. Lit. Rep. 252. Cro. Car. 87, 88. S. P. adjudged

If an action of (c) trespass be brought for a trespass done within a franchise, against a foreigner that hath nothing within the franchise, consuance shall not be granted, (d) because they cannot do right to the party, for they cannot amesne a stranger to answer who hath nothing within the franchise. 22 Ass. 83. Roll. Abr. 493. (c) So, of debt. 22 Ass. 83. Roll. Abr. 493. (d) So, if a conspiracy against two, for a conspiracy within a franchise, of whom one is a foreigner, they cannot have consuance, for the action is entire. 22 Ass. 83. — So, an heir cannot be sued upon an obligation of his ancestor, within a borough, where he hath not assets within the jurisdiction of the court. Roll. Abr. 494. Cro. Ja. 502. 2 Roll. Rep. 48. S. C.

As they shall not have consuance where there is a failure of justice, so shall they not likewise where the plaintiff is a privileged person in any of the superior courts at *Westminster*; for it would be inconvenient, and below the dignity of those courts, that their officers should be compelled to quit their attendance, to obtain justice in an inferior court. Lit. Rep. 40. 304. [3 Leo. 149. Willes's Rep. 240. Semb. But see Bendl. 233, 234. Whoper alias Hooper v.

Harewood, an attorney of C. P. for battery, consuance granted to the Bishop of Bath and Wells,

But

(a) Bro. Conu- But the defendant being *in (a) custod. mar.* in the King's
sance, 50. & Bench, or the plaintiff's commencing a suit in the Exchequer
vide Carth. 12. on (b) a *quo minus*, as debtor to the king, are not such privileges
(b) Hard. 505, as will oust an inferior jurisdiction; for they are now grown the
506. 2 Vent. common methods of suing in those courts.
362. Hard. 189.

14 H. 4. 20. Nor can they have conu-
(c) But, if an esse at the time of their charter, but (c) created since by act of
action at com- parliament.
mon law is
given against a person by another name, as debt against an administrator, they shall have
conu- 14 H. 4. 20. 22 E. 4. 23.

(d) Sid. 103. As to the manner of demanding it, (d) if it be by attorney,
Lev. 87. S. C. the letter of attorney must be produced in court, and (e) if the
and said, the conu-
warrant of at- sance be demanded by virtue of a charter time out of mind,
torney must be or by prescription, (f) there, an allowance must be pleaded be-
filed in court, fore justices in *eyre*.
& *vide* Dals.

12. Palm. 446. N. Bendl. 233. pl. 262. Lane, 81. 87. Sid. 283. (e) 9 Co. 27. b. 28. a.
[Where cognisance of pleas is granted by act of parliament, it is unnecessary to shew that the
charter hath at any time before been allowed by the king's writ, or any of his superior courts.
2 Wils. 412.—(f) Cognisance of pleas cannot be claimed by prescription. Co. Lit. 114. b.
1 Salk. 184. But see 4 Inst. 220.]

Hard. 505. If by charter, confirmed by act of parliament, conu-
Castle and sance of
Litchfield, pleas, &c. is granted to the chancellor of Oxford, or his commis-
adjudged. sary, the vice-chancellor, by his deputy, may demand it, though
(g) Bro. Co- the vice-chancellor is but a deputy himself; for a (g) bailiff may
nu- sance, 36. properly demand conu-
50. S. P. sance, and upon notice of the patent, the
court ought to supersede.*

(h) In such But (h) a plea to the jurisdiction must be put *in propria per-*
plea the de- sona, for the defendant cannot plead by attorney without leave
fendant must of the court first had, which leave acknowledges their jurisdic-
make but half tion; for the attorney is an officer of the court; and if a plea be
defence, for if put in by an officer of the court, it must be supposed to be put
he makes full in by leave of the court.

quando & ubi
cur. consideraverit, he submits to the jurisdiction. Co. Lit. 127. b.—Must be pleaded before
any imparlance. 2 H. 6. 30. 22 H. 6. 7. Hard. 365. Lutw. 46. [*Vide supra* tit. *Abate-*
ment C. the authorities there cited.]—Except where antient demesne is pleaded. Dyer
210. in margine. Style 30. Latch 83.—So, conu-
sance must be demanded before impar-
lance, and the same term the writ is returnable after the defendant appears; because until he
appears there is no cause in court. Sid. 103. 6 H. 7. 9, 10. Welles v. Trahern, Willes's
Rep. 240.

4. Where it must appear that inferior Courts have a Jurisdiction.

Roll. Abr. 545, Inferior courts are bounded, in their original creation, to
546. (i) Where causes arising within such limited jurisdiction: hence it is ne-
the style of the cessary for them to (i) set forth their authority; for, as hath
court must be been already observed, (k) nothing shall be intended within the
set forth, and jurisdiction of an inferior court, but what is expressly alleged to
that they have be so.
power to hold
plea by pre-

* See further tit. "UNIVERSITIES," *infra*.

scription, or by letters patent of the king. Roll. Abr. 795. Cro. Eliz. 489. Moor, 422. Owen, 50. Noy, 35. S. C. Cro. Ja. 184. 493. Yelv. 46. Moor, 601. [Where the style of a court shall be helped by intendment, see *Gibbons v. Roberts*, 1 Salk. 265. Where a sheriff is empowered by a private act of parliament to take inquisition of the value of lands, giving notice to the owners, the notice must appear on the back of the inquisition, to shew that he hath a jurisdiction, else all the proceedings will be quashed. *Rex v. Mayor, &c. of Liverpool*, 4 Burr. 2244.] — But, where the proceedings of an inferior court need not be set forth at large, but by way of *tailor processum fuit*, vide 2 Lev. 81. 3 Lev. 403. Carth. 53. [2 Mod. 195. Lord Raym. 80. 1 Wils. 316. 2 Wils. 5. Cowp. 20. — Greater indulgence hath of late years been shewn to inferior courts, and the presumption hath rather been in favour of their jurisdiction. In a justification under the process of an inferior court, it is sufficient to state that a plaintiff was levied for a cause of action arising within the jurisdiction, without setting it forth at length, or alleging that the defendant became indebted there. Cowp. 20. 3 T. Rep. 185.] — (*k*) Saund. 74. Sid. 331. Same rule — whether *Hull bridge* should be intended within the jurisdiction of the court of *Hull*, Lev. 289. Vent. 72. *dubitatur*, § *vide* Style, 200. Lev. 154.

Therefore, if an action is brought on a (*a*) promise in a court below, not only the *promise* but the *consideration* must be alleged to arise within the inferior jurisdiction; for a debtor, who has contracted a debt, does not, by coming into the limits of such jurisdiction, give such court authority to hold plea thereof; nor is it sufficient to allege the cause of action within the jurisdiction of the court; but it must be proved upon the trial; and if the plaintiff proves a consideration out of the jurisdiction, it cannot be given in evidence; and if it be, the defendant's counsel (*b*) may propose a bill of exceptions, and upon such bill of exceptions the judgment will appear to be erroneous.

inferior court cannot hold plea of an obligation, contract, battery, or other transitory action, if it was not made within the jurisdiction of the court. 2 Inst. 231. (*b*) Where he must plead to the jurisdiction, and if such plea be refused, an attachment lies. 2 Inst. 229, 230. 2 Lev. 230. Raym. 189. Mod. 81. But such plea must be put in *propria persona*, and whilst the court is sitting, and oath must be made of the truth thereof. 6 Mod. 146. — But *vide* Carth. 402., that a plea to the jurisdiction need not be on oath, as a foreign plea must. By 4 Ann. c. 16. § 11. no dilatory plea is to be received without affidavit of the truth, and the affidavit must state that the plea is true in substance. — Where upon the statute of Westminster 1. c. 35. a prohibition will be granted. Salk. 201. pl. 5. 202. and by F. N. B. 45, 46. 2 Roll. Abr. 317., though the defendant by plea admits the jurisdiction, yet the superior court may grant a prohibition; but in 2 Mod. 271. Meudyke and Stint, it is adjudged, that after verdict and judgment, no prohibition lies; but there said, that if any matter appears in the declaration, which sheweth that the cause of action did not arise *infra jurisdictionem*, a prohibition may be granted at any time: so, if the subject matter in the declaration be not proper for the judgment and determination of such court; or if the defendant, who intended to plead to the jurisdiction, is prevented by an artifice, as by giving a short day, or by the attorney's refusing to plead it, &c., or if his plea be not accepted, or be over-ruled; in all these cases, a prohibition will lie at any time. 2 Mod. 273. — Where trover, trespass, or false imprisonment lies. 22 E. 4. 31. 10 H. 6. 13. As, where in an action of false imprisonment, the defendant justified the apprehending of the plaintiff by virtue of a parol command, and the prescription being that it must be by precept, (which must be understood in writing,) the plaintiff had judgment. Hob. 63. But an officer may proceed on his duty, and execute a process, though there be no cause of action, or though it arose out of the jurisdiction, unless the contrary appears to him. Salk. 202.

But here a distinction must be observed between counties palatine and other inferior courts; for a county palatine is a general court for all the subjects of the palatinate, and not merely for the causes arising within that palatinate; for if a debtor goes from a foreign county into a palatinate, his obligations go along with him, as much as if he went from one kingdom into another; and

Roll. Abr. 545, 546. Several cases to this purpose. [See too 1 Lev. 50. 96. 137. 156. 2 Lev. 87. 1 Saund. 73. Ld. Raym. 1310. 2 Wils. 16. Cowp. 20. Freem. 321. 1 T. Rep. 151.] (*a*) An Saund. 74. Peacock and Bell, adjudged. Sid. 331. S. C.

and if it were otherwise, a palatinate jurisdiction would be a shelter and *asylum* to debtors, for no process but the supreme prerogative process runs there; and therefore it is determined, that though the cause of action be out of the palatinate, yet if the party be a subject of that palatinate, as he is by coming into that dominion, that the action may be brought against him there.

Roll. Abr. 546.
adjudged.

In an action upon the case in the court of *Launceston in Cornubia*, if the plaintiff declares, that whereas he was an attorney of the hundred court of *Stratton in Cornubia*, the defendant having communication with *J. S.* of the said office of the plaintiff, said these scandalous words of him within the jurisdiction of the said court of *Launceston*, *Thou art a cheater, &c.* after verdict for the plaintiff, and damages given, the judgment was reversed upon a writ of error; for the jury could not inquire whether the plaintiff was an attorney of the hundred court or not, being out of their jurisdiction; and this was the principal cause of the action.

Lev. 50. Ram-
say and Atkin-
son, adjudged,
and the judg-
ment in the
Marshalsea
reversed. Sid.
65. S. C.

(a) Judgment
upon an *assumpsit*, in consideration that the plaintiff would solicit a cause in Chancery, reversed for want of jurisdiction. Vent. 28. & vide Lev. 289. 1 Vent. 72.— Where in debt against an heir, if he pleads *riens per descent*, the plaintiff must reply assets within the jurisdiction. Roll. Abr. 494.

If in the marshal's court the plaintiff declares, that in consideration the plaintiff, at the request of the defendant, had taken pains to procure him a lease of an house in *Holborn*; the defendant *apud S. infra jur.*, &c. promised to pay him 10*l.* &c., this is not sufficient to entitle the court to a jurisdiction; in as much as it does not appear that *Holborn*, where the house stands, is within the jurisdiction, and the jury are not only to try the promise, (a) but the consideration also.

Sid. 87. Raym.
75. Lev. 96.
105. 137. 208.
S. P. Vent. 2.
243. 2 Lev. 87.
Jones 230. S. P.

In an *indebitatus assumpsit* for money for a cow sold, it must appear that the sale was within the jurisdiction; for the being indebted there does not necessarily imply that the sale was there, for he that is indebted in one place is so in every place.

Drake v. Beare,
Lev. 104. Sid.
101. Vent. 2.
S. C.

In debt for rent, upon a lease made *infra jur.* of an inferior court, it must appear also, that the lands lie within the jurisdiction; for if part of the cause arises within the inferior jurisdiction, and part without, the inferior court ought not to hold plea.

Sid. 85. 95.
Raym. 63. Lev.
69. Selk. 404.
S. P. For the
loss of mar-
riage is the gist

In an action for calling the plaintiff *whore*, by which she lost her marriage, the loss of the marriage must be laid within the jurisdiction, because the words are not actionable without special damage.

of the action, & vide Sid. 342. Lev. 153. Keb. 798. 837. March, 48.

Roll. Abr. 546.
Howel and
Ireland, Cro.
Car. 570.
Jones, 450.
S. C.

But, if in an action upon the case in the court of *Bath, in com. Somerset*, the plaintiff declares that he was a *tailor*, and that he used the said art for several persons inhabiting *tam infra civitatem prædict., quam alibi infra regnum Angliæ*, and the defendant, to scandalize him in his said art, said these words of him: *Thou hast*

he stole as much cloth out of my suit and cloak which thou madest for me, as did make thy wife a waistcoat; by which he lost his customers; the action lies in that court, notwithstanding the allegation quam alibi infra regnum Angliæ, for that is only matter in aggravation of damages.

So, if in the court of *H.* the plaintiff declares that he lent his horse at *H.* for the defendant to ride to *B.* and that the defendant assumed at *H.* to re-deliver him, this is well enough; for it is not the riding, but the re-delivery, which is the cause of the action.

Sid. 151. 182.
Vent. 72.

So, in a writ of error of a judgment in the Palace Court, in an action on the case, wherein the plaintiff declared, that such a day, in such a parish in the county of *Middlesex*, he delivered to the defendant (being an inn-keeper) a gelding, safely to be kept in his inn, and that he suffered him to be taken out of his stable, and rid so immoderately that the gelding was spoiled; it was objected as error, that the riding did not appear to be within the jurisdiction of the Marshal's Court; but *per cur.* in actions in inferior courts, it is necessary that every part of that, which is the gist of the action, should appear to be within their jurisdiction; otherwise, of such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remains, as in this case; and therefore the judgment was affirmed.

Salk. 404.
2 Ld. Raym.
795. Stannian
and Davis,
6 Mod. 223.
S.C. 11 Mod. 7.

(E) What is incidental to all Courts in general.

IF the king grants a court by letters patent, to a corporation of a town to hold pleas, &c. in this case, though there is not any clause in the patent to make a bailiff or serjeant to (a) execute the process of the court, and to return juries, yet it is incident to their grant to do it; for otherwise they cannot hold a court.

Roll. Abr. 526.
(a) But they cannot make a bailiff to execute writs of inquiry of damages, without a clause in the patent for that purpose. Roll. Abr. 526.

Every court of record, as incident to it, may injoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving (b) opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and may immediately order them into custody.

Vide each respective court, & 11 H. 6. 12.
Roll. Abr. 219.
8 Co. 38. b.
11 Co. 43. b.
Cro. Eliz. 581.
Sid. 145. [For contempts in the face of the

court, courts not of record may commit.] (b) As was the case of one *Redding*, who was convicted of tampering with *Bedloe*, one of the king's witnesses, in the popish plot, and endeavouring to make *Bedloe* deny what before he had affirmed, concerning several great persons engaged in the plot; for which he was adjudged to pay 1000*l.*, to stand in the pillory, and to be imprisoned for a year; and this conviction being before commissioners of *oyer and terminer*, of whom *Sir Thomas Jones*, and *Sir William Dolben*, judges of *B. R.* were two; he afterwards, being set at liberty, came into *B. R.* with an information against all the commissioners of *oyer and terminer*, and after having demanded the justice of the court, he said, that *Sir Thomas Jones*, and *Sir William Dolben*, contrary to *Magna Charta*, the king's oath, and

and their oath, have ruined me; for which words (a record being presently made of them) he was adjudged to be fined 50*l.*, and imprisoned till payment of it; to find surety for his good behaviour for seven years; and, being a barrister at law, his gown, by order of the court, was pulled over his ears by the tipstaff.

Lamb. 403.

Lev. 159.

Brownl. 15.

Raym. 100.

Bro. Privilege,

35. Mod. 66.

10 Mod. 333.

Keb. 845. (a) || This protection is not confined to courts of record, but is incidental to all courts. It is due indeed to persons attending in the character of parties or witnesses on an arbitrator under a rule of *nisi prius*, or on commissioners of bankrupt, for these sit in the nature of a court in the administration of justice. And it is equally due, whether the attendance be voluntary, or under the compulsion of a *subpœna*. Arding v. Flower, 8 T. Rep. 534. *Ex parte King*, 7 Ves. 312. ||

The courts of record (a), as incident to them, have a power of protecting from arrests, not only the parties themselves, but also all witnesses *eundo & redeundo*; for since they are obliged to appear by the process of the court, it would be unreasonable that they should be molested whilst paying obedience to it.

COURT OF PARLIAMENT.

- (A) Of the Original and Antiquity of Parliaments.
- (B) Of the Persons of whom it consists.
- (C) Of the Manner of their Summons and assembling.
- (D) Of Elections : And herein,
 - 1. *Of the Electors, and their Qualifications.*
 - 2. *Of the Elected, and their Qualifications.*
 - 3. *Of the Duty of Returning Officers, and the Remedies against them, [and herein of the Mode of proceeding upon Complaint of undue Elections.]*
- (E) Of the Method of passing Bills.
- (F) Of the Continuance, Adjournment, Prorogation, and Dissolution of the Parliament.
- (G) Of the Jurisdiction of the House of Lords.

Of the Privileges of Members, vide tit. PRIVILEGE.

(A) Of the Original and Antiquity of Parliaments.

TO trace out exactly the original and antiquity of the supreme court of Parliament, whose transcendent jurisdiction, saith my Lord *Coke*, is such, that it maketh, enlargeth, diminisheth, abrogateth, repealeth, and reviveth laws, statutes, acts, and ordinances concerning matters ecclesiastical, capital, criminal, common, civil, martial, maritime, &c.; and to point out the several alterations it met with, and how it came to be modelled into the shape we see it at this day, seems indeed, if not impossible, a work of the greatest difficulty. But this difficulty is not to be attributed to any peculiar defect in our constitution, but only to time, the loss and destruction of our records, especially in the barons' wars. Nor have the prejudices and different views which conducted the pens of those who have written on this subject, helped a little to obscure and perplex the matter.

However, it appears by those lights which we have still remaining, and from the inquiries and reasonings of our best antiquaries, that there hath always been something of the nature of a parliamentary assembly, as ancient as any thing which we know of our constitution, in which the people shared with the prince in the legislative power. This assembly was sometimes called *magnates regni, omnes regni nobiles, proceres & fideles regni, universitas regni, communitas regni, discretio totius regni, generale concilium regni, &c.*

In the *Saxon* times, the general court of the whole kingdom was the *Wittingham Mote* or *Witnagemote*, to which were summoned the earls of each county, and the lords of each leet; and likewise (a) representatives of towns, who were chosen by the burgesses of the towns, and appeared on the king's summons. This court met once a-year at least, and generally twice, about *Easter* and *Michaelmas*.

and *Camden*, prove the commons to be part of this court; but they do not prove, says he, that they were elected, or that they consisted of knights, citizens, and burgesses. Sir Robert Atkins of the Jurisdiction of Parliaments, 25.—In the preface to Fortescue, of absolute and limited Monarchy, 78., it is said, that by reading the *Saxon* laws, and the prefaces and preambles to them, it will appear, that the commons of *England*, always in the *Saxon* times, made part of that august assembly.—*Spelm. Gloss. verb. subsidium*, the commons attended in extraordinary cases, as in granting new aids and taxes, as *Danegelt*, &c. and *Maddox*, c. 7, 8, 9. agrees herein, and gives us a full account of those aids and taxes, which he says were but seldom raised; the king, in those days, being abundantly supplied by his antient demesne lands, fines, forfeitures, &c.

Co. Lit. 110.
4 Inst. 36.

Spelm. Gloss.
in verb. *Parl.*
Pryn's Right
of the *Commons*, 99.

Wilk. L. L.
Saxon. 205.
Lamb. Arch.
57. 239. 245.
Mirror, c. 5. § 2.
(a) Sir Robert
Atkins says,
that *Spelman*,
Bede, *Selden*,

Upon the coming in of *William the Conqueror*, every person found in arms against him forfeited his whole estate, in which he placed his *Normans*; and he compelled all those who were not in arms against him, to take out patents of their lands to hold of himself; and in order to this he made a general survey of the whole kingdom, which was called *domesday*, and changed the nature of the tenures, which in the *Saxon* times was *allodial*, into *feudal*, to be holden of himself by knights' service; and by this means made the property of their estates depend on their alle-

See *Wright's*
Tenure.

giance to him: and hence it is, that all lands are said to be holden mediately or immediately from the crown.

(a) In *Edward the Third's* time, when the *modus tenendi parliamentum* is supposed to have been written, they thought the usual subsistence of a knight could not be less than 20*l.* per annum, that of a baron 400 marks, and that of an earl 400*l.* But Seld. (tit. *Hon.*) is of opinion, that there was no certain number of knights' fees necessary to make a baron or earl, but that they consisted of so many knights fees as were contained in the charter. || Though this MS., called *Modus tenendi parliamentum*, has been frequently referred to by Lord Coke as a genuine piece of antiquity, yet its authority has been long since fully disproved by Mr. Selden and Mr. Prynne; the former supposing it to have been an imposture of the time of *Edward 3.* and the latter making it an invention as late as the 31 *Henry 6.* But, later than the time of *Edward 3.* it cannot well be; for it would not then have been entered (as part of it is) in *Arundel's Register* for a piece of real antiquity, without any suspicion of its forgery. || ((b) The feudal peerage was originally territorial; not attached to the person, but to the possession of the feudal estate. "The first form of the creation of an earl," according to the author of the *Essays on British Antiquities*, quoted by Sir *J. Dalrymple* in his *Essay on Feudal Property*, c. 8., "was that of a grant of an office over a county. When, by the multiplication of earls, the earldoms were become more numerous than the counties, the form was to erect a particular estate into an earldom or county, which was all that was necessary to bestow upon the proprietor the territorial dignity. Afterwards, when the notion of personal honour crept in, certain solemnities were used at the creation of a peer, such as girding him with a sword, covering his head with a cap of honour and circle of gold, all of them marks of personal respect. And now, both in *England* and *Scotland*, the notion of territorial dignity being quite worn out, an earl's patent is so framed, as to import a mere personal dignity, without relation either to office or to land." || The title of *Arundel* would seem to be territorial, and hath indeed been declared twice by parliament to be real and local, as in *Rot. Parl.* vol. 4. 441—448., and in the preamble of a private act of 3 *Car. 1.* c. 20. And so would the baronies of *Berkeley* and *Abergavenny* seem to be: indeed these three dignities have been considered as so inseparably united to certain estates, that they have gone to an heir-male, when entitled to those estates under an entail, in preference to an heir general. Cruise on *Dignities*, 52—67. Byst. 12 *Car. 2.* c. 24. § 11., it is declared, that nothing in that act "shall infringe or hurt any title of honour, feudal or other, by which any person had or might have a right to sit in the lords' house of parliament, as to his or their title of honour, or sitting in parliament, and the privileges belonging to them as peers." — In the case of the barony of *Fitzwalter*, which was heard before the privy council in 1669, the counsel for one of the claimants affirmed, that the same was a barony by tenure, which was denied by the counsel on the other side, who offered to argue upon it. "Upon which both parties being ordered to withdraw, and the nature of a barony by tenure being discussed, it was found to have been discontinued for many ages, and not in being, and so not fit to be revived, or to admit any pretence or right of succession thereupon. And the pretence of a barony by tenure being declared, for weighty reasons, not to be insisted on, the counsel were called in," &c. See too *Madox's Baron. Angl.* ||

Of the several officers, and the manner of judicature in this court, vide *Madox, c. 2, 3.*

Also, *William the Conqueror* erected a new court, called *curia* or *aula regis*, composed of his principal officers of state; to which, when any matter of moment was in agitation, as levying a new war, raising an escuage, &c., were called most of the barons, and chief persons who held *in capite*, and they transacted all business civil and criminal, and also that relating to the revenue, and were the great court-baron of the kingdom, where every thing done therein was said to be done *per concilium*

lium regni. It was in the election of the king to summon which of his attendants he pleased to this court; and such attendance being deemed a burthen in former days, the barons were seldom called, especially when they rose to that grandeur as to make such a concourse formidable to the king.

In this great assembly of parliament, it seems plain, that in the first reigns after the conquest, the commons of *England* were no part, and therefore the tenants in ancient demesne, who used to maintain the king's table, and also those who held by burgage tenure, as by certain rent, setting out ships in the navy, &c., according to the nature of their patents, were wont, upon any extraordinary expedition, besides the duties of their tenure, to grant an aid to the king, which was demanded of them by the justices itinerant, and which, if they refused to pay, the king, at the end of the expedition, might, with the advice and consent of his council, tallage them to a tenth of all their estate, but not to more; for none could be taxed at pleasure but vills, and those who held by base tenure.

Madox, 491, where there is a notable record of the city of *London's* being tallaged, and also decimated for non-payment; and upon such decimation they were obliged to swear to the value of their goods. *Vide* Hiley, 516.

The great controversy, with respect to the original and antiquity of parliaments, relates chiefly to the power and first formation of a house of commons after the conquest. (a) Some have asserted that they have been always part of the ancient constitution, and that the commons of *England*, by their representatives, have always composed a part of that august assembly; (b) others hold, that the house of commons was formed 49 H. 3. when the king had given a total overthrow, at the battle of *Fewsham*, to *Symon Mountfort*, Earl of *Leicester*, and the barons that adhered to him. And to derogate from the power of the commons, and to lay aside parliaments, a notion was propagated in King *Charles* the Second's reign, that they first arose by the art and management of *Symon Mountfort*, to be a balance to the crown and peerage; and that their first institution was the invention of a rebel to serve a particular purpose. (c)

(a) Petit, Sir Robert Atkins's Power and Jurisdiction of Parliaments, 14., and others.

(b) Camden in his *Britannia*, 13., dates the original of the commons, as part of the parliament, and as now elected, from the 49 H. 3., and says, he has it *ex satis*

antiquo scriptore, but does not name his author; and herein he is followed by Pryn, in his plea for the lords, 182., Dugdale in his *Orig. Jur.* 18., Heylin's life of Laud, 91., Brady, in his answer to Petit, 133., &c., Sir Robert Filmer, in his *Freeholder's Grand Inquest*, 18., and others, who think themselves sufficiently supported in this opinion, because the first writ of summons of any knights, citizens, and burgesses, now extant, is not ancienter than 49 H. 3. || There is supposed to be an earlier writ of summons extant; one directed to the sheriff of *Bedfordshire* and *Buckinghamshire*, requiring two knights to be sent for each of those counties. It is found in the close roll of the thirty-eighth of *Henry* the Third, and is set out at length by Dr. Brady, and relied upon by himself and his antagonists to prove their opposite doctrines; but seems to be, as Mr. Luders has ingeniously and satisfactorily shewn, of the highest importance to prove what neither side has collected from it, namely, the gradual and partial introduction of representatives into parliament. Luders's Tracts, 313. (c) Among the close rolls of the twenty-fourth of *Edward* the First, there is a writ of summons to parliament which hath these words: "*Sicut lex justissima, provida circumspectione sacrorum principum stabilita, hortatur, ut quod omnes tangit ab omnibus approbetur, sic, et innuit evidenter, ut communibus periculis per remedia provisiva communiter obviatur.*" Upon which Lord *Lyttelton* observes, that "if the Earl of *Leicester* had been the first who applied this maxim to the constitution of *English* parliaments or great councils, it would have been impossible for *Edward* the First to have grounded it on a law *provida circumspectione sacrorum principum stabilitam*. Nor could he have used that expression, if he himself, or his father had introduced the practice of summoning the commons to those assemblies." Hist. II. 2. 389.— It is well observed by Dr. *Atterbury*, that "had the commons first been called when the king

"was under a force, and in the hands of *Simon Mountfort*; as soon as that force had been removed, and the king at liberty, such a practice, so ill begun, would certainly have been discontinued: whereas we find, on the contrary, that the last eight years of *Henry 3.* and the first seventeen of *Edward 1.* affords us frequent instances of it. And (which deserves our notice) it then grew to be most frequently used and most unalterably fixed, when *Edward 1.* one of the most potent and glorious monarchs that ever swayed the *English* sceptre, was arrived at the utmost pitch of his power and grandeur. So far is that excellent constitution of parliament we at present live under from owing its rise to the weakness of our princes and the encroachments made by rebellious subjects upon their royal authority." Rights, &c. of Convocation, p. 342. There is another passage in the same book to shew, that the commons, properly so called, had an interest in parliament before the 49 *Henry 3.* and that this could not be the era of their first introduction into it, which is too material to be omitted. Had such a change happened all at once in this point of time, which some learned persons, whom for their great skill in our *English* antiquities I honour, have pitched upon, some of our *English* annals would to be sure have taken notice of it, which yet I do not find that any one of them has done. On the contrary, several of them speak of the parliaments preceding this in terms that imply them to have been at least as numerous. For instance, a parliament in the 48 *Henry 3.* is thus described by *Math. of Westminster*: *Marima coadunatur congregatio Londini procerum & ceterorum prelatorum regni, quanta non est visa longo tempore in Angliâ*; and of another in the same year he says, *Magnum celebratum est parliamentum Londini*; the very word that is used in that of 49 *Henry 3.* by the annals of *Waverley*, which *Wykes* passes over with this mention only, *Convocatio non minima procerum Anglicorum*. This was, I know, a very busy and bloody year, and bred much business for the pens of our historians. However, no passage in it could be more considerable than this of the enlargement of our great councils, had it then newly happened, nor would have better deserved to be recorded. When the clause, *Præmunientes*, was first inserted into the bishop's writ, our histories take notice of it; and so they would (some of them at least) of these new writs for the knights, citizens, and burgesses, had they then first issued out. It is true, the same objection lies against fixing the date of this change in any year, if it were necessary to fix it in any, which, I suppose, it is not, the alteration being, as I apprehend, not made all at once by any sudden and violent shock in the government, but introduced leisurely, by easy degrees, according as the exigencies of the times, and the designs of the parties then contending, either for empire or liberty, would allow it, the barons favouring the growth of the commons' interest in parliament, as promising themselves from thence an assistance towards making their stand against the crown; and the king hoping also, by their means, to be the better able to curb his troublesome barons." Rights, &c. of Convocation, p. 337, 338. That the introduction of the commons into parliament was gradual, see Mr. Lader's Tracts, Millar's Historical View of the English Government, v. 2. c. 6. Hurd's Moral and Political Dialogues, v. 2. p. 152, 157—159, 168. ||

Spelm. Gloss.
69. Seld. tit.
Hon. 692.

(2) But at what time they first sat, or were first digested into one house, with the representatives of cities and boroughs, does not well appear. By some opinions, they at first sat with the *barones majores*; and hence my Lord Coke says, that lords and commons at first sat together,

But, as neither of these accounts seems to be the true one, the most probable opinion is, that the house of commons was instituted by the crown, as a balance to the barons, who were grown very opulent and numerous, and, as appears by their wars, very uneasy to the crown; hence we find, that upon the escheat of any barony for want of issue, or by forfeiture, the crown parcelled it out into smaller districts; and this begot the distinction between the *barones majores* and *barones minores*. These *barones minores* held by knights' service, and, being too numerous to be all called to parliament, were allowed to (a) sit by representation. Hence we have the writ to chuse *duos milites gladiis cinctos*. To these were added representatives of cities and ancient boroughs, who being equally concerned with the *barones minores* in all aids and taxes, it was reasonable they should share with them in those matters. And this policy was set on foot as a matter of the greatest service to the crown, both for the balancing of the peerage, and more conveniently taxing of the people.

and made one house of parliament. 4 Inst. 2. Selden does not determine the point, but say that it was attempted, 17 John, to bring in the *barones minores*, as appears by the great charter

charter granted by him at *Runny Mead*. Seld. tit. Hon. 704. But the more received opinion is, that it was accomplished in the victorious reign of *Henry 3.*, who, instead of grasping at the liberties of his people upon his conquests, confirmed the great charter, and established a house of commons, as a balance to the peerage, which they never would have permitted before he had vanquished them. Camden Britt. 13. Dugd. Orig. Jur. 18. Brady's answer to Petit. 133. It is plain, that that wise prince *E. 1.* went into this policy, and that in his reign we find a parliamentary peerage, or house of lords established, as also a house of commons, consisting of knights, citizens, and burgesses.

As one of the principal reasons for establishing a house of commons was for the more convenient taxing (a) of the people, hence we find the true reason why all taxations began in that house, and why the commons would never suffer it afterwards to be altered; and the reason is, that being at first instructed by their principals, whom they represented, to give what each man thought he could bear; to vary from these instructions, or to suffer the superior peerage to alter it, would, as they rightly judged, be the highest breach of trust in them. "¶ It is the law "and custom of parliament," says Lord Coke, "that when any "new device is moved on the king's behalf in parliament for his "aid, or the like, the commons may answer that they tendered "the king's estate, and are ready to aid the same, only in this "new device they dare not agree without conference with their "countries.¶

¶ 4 Inst. 14.
(a) The granting of money came in time to be so much considered as the object of summoning the commons to parliament, that King Edward 3. thought it proper to insert a clause in one of the commons' writs, to assure them that that

parliament was not called in order to a supply — *Et scire vos volumus quod dictum parlamentum non ad auxilia seu tallagia a populo dicti regni nostri petenda, vel ad alia onera eidem populo imponenda, sed duntaxat pro iustitiâ ipsi populo nostro super dampnis et gravaminibus sibi illatis faciendâ.* Cl. Rot. 21 E. 3. ps. 2. m. 9. dors. — See Fryn. Parliam. Writ. v. 1. p. 53. Dugd. Summ. p. 230.¶

Hence also we find the true reason why the power of judicature was reserved to the lords' house: for the *barones majores*, who constituted this house, were called to the ancient *curia regis*, and sat there in their own right, as *pares curtis* to the king; and as this court had a jurisdiction of (b) determining in the first instance, both in civil and criminal causes, especially in those relating to great persons, and the king's officers of state, as also by way of appeal from the injustice of all other courts; so the lords continued to determine on petitions exhibited by private persons, or those exhibited by the house of commons, called impeachments, and were still the *dernier resort* to correct the errors of inferior judicatures.

Ryley Pla. Par. 74. 156. Hol. Jud. of the Peers, 84.
(b) A nobleman was tried by his peers very anciently, as appears by the Earl of Hereford's case, in the time of William the Conqueror. 2 Inst.

50. — This turns on the principle of the feudal law, *si inter dominum & vassalum lis moveretur pares curiæ sunt iudices*; and therefore the peers, in the time of parliament, were tried by the peers in the house of lords, and, out of parliament, by the justiciar, and, in his absence, by the steward of *England*, who summoned some of his peers upon the trial, and twelve at least were obliged to appear. This summons is set forth 3 Inst. 28. where my Lord Coke says, there must twelve or more appear.

At the first instituting of a house of commons, the representatives of knights, citizens, and burgesses, were only looked upon as trustees to manage the affairs of their principals; (c) and therefore, in former days, it was held reasonable, that they should be recompenced by their principals, for the trouble and expence they were at in managing the trust reposed in them. Hence the fee of every knight of the shire was 4s. *per diem*, and that of a citizen or burgess 2s. *per diem*.

4 Inst. 46.
(c) ¶ And are they other now, their right to sit in parliament arising from a trust conferred by the people, their elec-

(B) Of the Persons of whom it consists.

4 Inst. 1. Right of electing to parliament, 106. 142. 181.

(a) Dyer, 60.

[Lord Hale thinks that the bishops sit in the house of peers by custom and usage, and not from their baronial possessions; a notion which hath been ably controverted by Bishop Warburton in his Alliance be-

tween Church and State, 4th edit. 149. but which receives considerable support from the reasoning and authority of the learned editor of Coke upon Littleton. Co. Litt. 13 Ed. 134. b. n. 1.] (b) Of these in *Fortescue's* time, viz. H. 6. there were 300.; *Fortescue de Land. Leg. Ang. c. 18. s. 4.*; in my Lord *Coke's* time, 493. 4 Inst. 1.; at the time of the Union, 513.; by the 5 Ann, c. 8. for uniting *England and Scotland*, 45 *Scotch* members were added; and by the act of Union of *Great Britain and Ireland*, 39 & 40 Geo. 3. c. 67. 100 *Irish* members were added, which makes the number at this day 658.

Gilb. Exch. 55.

Note; The constitution of the *Saxon* church, and the embodying of the prelates into the temporal govern- &c. will best appear from that excellent treatise usually styled *Bacon of Government*, lib. 1. c. 5. to c. 16. vide *ib.* c. 11. of lands given to bishops, &c. in frankalmoigne; and vide *ib.* c. 47. an account of the introduction of the canon law and ecclesiastical jurisdiction, by W. 1. &c.

THIS august assembly consists of the king's majesty sitting there in his royal political capacity, and of the three estates of the realm, viz. of the lords spiritual, archbishops and bishops, who sit there by succession, in respect of their counties or (a) baronies, parcel of their bishopricks, which they hold also in their politick capacity: and every one of these, when any parliament is to be holden, ought, *ex debito justitiæ*, to have a writ of summons. The lords temporal, as dukes, marquisses, earls, viscounts, and barons, who sit there by reason of their dignities, which they hold by descent or creation; and likewise every one of these, being of full age, and not otherwise disqualified, is to have a writ of summons *ex debito justitiæ*. The third estate is the commons of the realm, whereof there are (b) knights, citizens, and burgesses, who are chosen by force of the king's writ, which issues *ex debito justitiæ*, and none of them ought to be omitted. These represent all the commons of the kingdom, and are trusted for them.

¶ In the *Saxon* times the lords spiritual held by frankalmoigne, but yet made great part of the grand council of the nation, being the most learned persons that in those times of ignorance met to make laws and regulations. But *William* the Conqueror turned the frankalmoigne tenures of the bishops, and some of the great abbots, into baronies; and from thenceforward they were obliged to send persons to the wars, or were assessed to the escuage, and were obliged to attend in parliament; and then their attendance was complained of as a burthen. And this begat the grand quarrel in *Henry* the Second's time, between the king and *Thomas Becket*; for the statutes of *Clarendon* required such attendance, which confirmed the escuage on them. For this they made many subtle exceptions, as that the court took cognizance of treasons and felonies; whereas the clergy, by the canon of *Toledo*, were forbid to give judgment in blood, *His, qui in sacris ordinibus constituti sunt, in judiciis sanguinis adjudicare non licet*. Therefore, to obviate this objection, the constitutions of *Clarendon* permitted them to withdraw in cases of blood. Notwithstanding this concession, they still objected against the 11th article of this statute, which says, that *Archiepiscopi, episcopi, & universæ personæ regni, qui de rege tenent in capite, habent possessiones suas de domino rege sicut baroniam, & sicut barones ceteri, debent interesse judiciis curiæ regis cum baronibus, quousque perveniatur in judicio ad diminutionem membrorum*

brorum vel ad mortem. See Pryn of the House of Lords, 221. This article obliged them to do suit in the king's court, and therefore, though they had excepted cases of blood, yet they knew their doing suit in the king's court confirmed their estates as baronies; and they did not care that the munificence of frankalmoigne of the ancient kings should be changed into such tenures. But, notwithstanding the quarrels with *Becket*, the king prevailed that they should continue barons; and as barons (*i. e. suitors*) they sit in the house of lords.

But the inferior clergy, who held by frankalmoigne, were not comprehended within any of the taxes and tallages which were assessed on the king's ancient demesne and burgage tenants; nor in the escuage which was assessed on the king's tenants *per baroniam*, and other tenants by knights' service. But 18 *Edward 1.* the king, being under great difficulties through his wars in *Scotland*, and the kingdom being exhausted by the barons' civil wars, projected the present constitution, *viz.* that the earls and barons should be called (as formerly) and embodied in one house, and that the tenants in burgage should send their representatives; and the tenants by knights' service, and other socage tenants in the county, should send their representatives to parliament, and these were embodied in the other house. He designed to have the clergy as a third estate; and as the bishops were to sit *per baroniam* in the temporal parliament, so they were to sit with the inferior clergy in convocation. And the project and design of the king was, that as the two temporal estates charged the temporalities, and made laws to bind all temporal things within this realm, so this other body should have given taxes to charge the spiritual possessions, and have made canons to bind the ecclesiastical body. To this end was the *premunientes* clause in the summons to the archbishops and bishops as follows; *viz. Premunientes priorem [decanum] & capitulum ecclesie vestre, archidiaconum totumque clerum vestre diocesis, facientes quod iidem prior [decanus] & archidiaconus in propriis personis suis, & dictum capitulum per unum, idemque clerus per duos procuratores idoneos, plenam & sufficientem potestatem ab ipsis capitulo & clero habentes, una vobiscum intersint modis omnibus tractandum & ordinandum & faciendum nobiscum & cum ceteris praelatis & proceribus & aliis qualiter sit hujusmodi periculis & excogitatis Malitiis obviandum. Teste rege apud Wiengemham 30 die Septembris.*

Pryn. 221. 242.

Wake's authority of Christian princes, 364.

This altered the *English* convocation from the foreign synods, which were totally composed of the bishops, who were the pastors of the church; for the clergy were regularly esteemed only their assistants, and therefore the bishops only were collected to compose such foreign synods, to declare what was the doctrine, or should be the discipline of the church.

In the ancient church they had but one pastor to every particular church or diocese, and the other clergy were ambulatory, at the bishop's pleasure, within the diocese; and though, after the council of *Lateran*, the parochial clergy were settled in each

parish, and the bishop only retained a chapter in the cathedral church as assistants to him; yet the bishop was reckoned to be the sole pastor of the church, and they to have the care under him.

Hence, in provincial synods, the bishops only met and were convened by the metropolitan; and each bishop likewise held a diocesan synod with his own clergy, in which he made rules and orders for the regulation of the diocese, provided they were not against the canons of the province.

Edward 1. projected to have made the clergy a third estate dependant on himself; and therefore not only called the bishops, (whom as barons he had a right to summon,) but the rest of the clergy, that he might have their consent to the taxes and assessments made on that body. But the clergy, foreseeing that they were likely to be taxed, pretended they could not meet under a temporal authority to make any laws or canons to govern the church; because their canons were made under the inspiration of heaven, and not by any authority derived from temporal powers. And this dispute was maintained by the archbishops, who were very loth the clergy should be taxed, or should have any interest in making ecclesiastical canons, which formerly were made by their sole authority; for though those canons had been made at *Rome*, yet, if they were not made in a general council, they did not think them binding here, unless they were received by some provincial constitution of the bishops. And though the inferior clergy, by this new scheme of *Edward the First*, were let into the power of making canons; yet they foresaw they were to be taxed, and therefore joined with the bishops in opposing what they thought an innovation. This they did under pretence that their power was totally derived from heaven, and therefore they paid no obedience to the *premunientes* clause; and the archbishops and bishops threatened to excommunicate the king. But he and the temporal estate took it so ill, that they would not bear any part of the publick charge, that they were beforehand with them, and they were all outlawed, and their possessions seized into the hands of the king, which so humbled the clergy, that they at last consented to meet. To take away all pretence, there was a writ, besides the *premunientes* clause, to the archbishop, that he should summons the bishops, deans, archdeacons, colleges, and whole clergy of his province. (a) From hence, therefore, the bishops, deans, archdeacons, colleges and clergy, met by virtue of the archbishop's summons, which being an ecclesiastical authority, they could not object to it, and so the suffragan bishops came to convocation by virtue of the archbishop's summons. The clergy esteemed it to be in their power whether they would obey the king's writ or not; but when he had issued his summons, they could not pretend it was not their duty to come. But the *premunientes* writ was not disused, because it directed the manner in which the clergy were to attend, viz. the deans and archdeacons in person, the chapter by one, and the clergy by two proctors. However, they held, no convocation

(a) The points of difference between these two writs of summons are clearly stated by *Dr. Wake*: 1. The parliamentary writ is sent distinctly to every bishop, immediately from the king; and the bishop is

vocation could meet without the king's writ to the archbishop; because on that writ his summons went out, and it was on the foot of the archbishop's summons they sat as a provincial synod; and the king, by his own writ, prevailed on the archbishop to convene the synod; and he, by his own authority and legantine power from the pope, was confessed to have authority to summon the whole clergy. The *premunientes* clause was inserted in that writ to every bishop, as well as the archbishop, which directed the manner in which the clergy should be chosen; but the writ to the archbishop was only in general to summon his suffragan bishops, deans, and archdeacons, colleges, and all the clergy of his province; and on this writ to the archbishop issued his summons, both to the suffragan bishops, deans, and archdeacons in person, to the chapter by one, and to the clergy by two proctors; so that the summons follows the *premunientes* writ exactly, which was directed to him and to the bishops.

according to the king's command. And sometimes the archbishop, heretofore, summoned them by his own authority. 2. By the parliamentary writ, the bishop and clergy of each diocese are to come to the *place* where the parliament is intended to be opened, and upon the *day* appointed for the assembling of it. By the convocation writ, they are called to the *chapter-house*, at *Paul's*, or to such *other place* as the archbishop appoints; and that oftentimes heretofore on some *other day* than that on which the parliament began. 3. The parliamentary writ summons them to come to parliament, there to treat, &c. with the king, the rest of the prelates and lords, and other inhabitants of the realm, concerning the urgent affairs which are there to be deliberated upon with respect to the king, the realm, and the state of the church of *England*. The convocation writ calls them to consult only among themselves; and that, as they shall be directed by the king, when they come together. 4. By the parliamentary writ, only the deans, archdeacons, and proctors of the clergy are summoned. But the convocation writ, with these, called the regular dignitaries too, *omnes abbates, priores, &c. tam exemptos quam non exemptos*; and so gave many a place in convocation that had nothing to do in the parliament. 5. Lastly, By the parliamentary writ, they were ever to meet at the very precise *time* the parliament did. By the other, they did not only not meet always at the same precise *time*, but very often at such *time* as no parliament was sitting. Which was the case of the most antient convocation writ I have ever met with, of the 9 E. 2. and according to which the convocation sat, *Feb. 17.*; whereas the parliament met the *October* before. Wake's Authority of Princes, &c. 224—226. — The manner of assembling the convocation is described at length in Cowell's Interpreter, tit. *Proctors*.

They met and chose on such summons; for they allowed, as the archbishop might have a temporal authority as well as a spiritual power, so he might have a temporal motive to summon a spiritual synod; but yet, lest it might be thought (of which they were very jealous) that their power was derived from temporal authority, they sometimes met on the archbishop's summons without the king's writ, and in such convocation the king demanded supplies, and by such request owned the spiritual authority of governing; so that the king's writ was reckoned no more by the clergy than one motive for their ceremony (assembly). But, if the archbishop in his summons recited the king's writ, they protested (a) against it; because that was laying his authority upon the king's writ, which the clergy would by no means endure; for they would not consent that the prince had any ecclesiastical power or authority to convene synods; but they allowed the king's writ to be a motive for the archbishop to convene, if he agreed with the king in judgment.

thereby required to summon the clergy of his diocese to go along with him to parliament; whereas the convocation-writ is sent only to the archbishop, and he, by the bishop of *London*, sends to the other bishops of his province to meet him in convocation,

Suarez de legib. lib. 4. c. 13.

(a) This was done in the time of Archbishop *Reynolds*, sub anno 1314. The archbishop having

having inserted the king's writ at length into his own mandate, the clergy, though he called them together by his ecclesiastical authority, yet, being met, entered a remonstrance against it, affirming that it was an injury to their ecclesiastical liberty, and tended to the subversion of it, to have the king at all to meddle with their assembling; and to that purpose they cited a provincial ordinance in the time of archbishop Winchelsea, that no convocation should be held in time coming upon the pretence of any such commands. But archbishop Peckham had not only set forth the king's writ at large in his mandate, anno 1282, but had professed himself, in obeying the king in that matter, to do no more than what he thought he was in duty bound to do. Wake's State of the Church, 10. 12.

See Atterbury's Rights of Convocation, 349—358. Wake's State of the Church, 247—252. 2 Inst. 529. Echard, 316.

Ryley, 462, 463.

3 Inst. 119.
25 E. 3. p. 120.
27 E. 3. c. 1.
Gibson's Appendix.

The judgments in parliament that put the clergy from the king's protection do not appear; but that they were so, is clear from the close roll 22 Edward 1. where it appears that the prelates and whole clergy of the kingdom had granted one half of their benefices and goods, of which a tenth had been before granted to the use of the holy war, and upon this he took the clergy into his protection; from whence the taxation of the clergy was at first set on foot, under pretence of the holy war, and that he taxed them afterwards to his own occasions. According to that, the writ is *juxta taxationem ultimo inde factam*, which no king durst have done, but one that had got reverence amongst the people by his exploits in the holy war. On this concession of the moiety it appears he took them under his protection.

This succeeded so well, that when the pope encroached on the king by collating to ecclesiastical benefices by his own papal provisions, statutes of provisoes and *præmunire*, on appeals to Rome, were made; which passed the better on the clergy, because the statutes recite that these benefices were given to aliens.

But the process of *præmunire* was made use of to put the clergy out of protection, and they used the word *præmunire* in their summons to the king's court, because in the *premunientes* that word had been used, and judgment on this premunition was given in this form, *viz. Considerat' est quod præd E. V. dominus H. extra protection' domini regis ponatur, ac qd' omnia bon' & Catall', terr' & tenement' ipsius E. V. domini H. sunt domino regi forisfact', et præfat. E. V. dominus H. committitur Mar' duran' benepl'ito domini regis, &c. Ent. 435.* Henceforward, instead of making one estate of the kingdom, as the king designed, they composed two ecclesiastical synods, under the summons of each of the archbishops, and being forced into these two back synods before mentioned, they sat and made canons, by which each respective province was bound to give aids and taxes to the king; but the Archbishop of Canterbury's clergy and that of York assembled, each in their own province; and the king gratified the archbishop's vanity, by suffering this new body of convocation to be formed in the nature of a parliament. The archbishop assumed the state of a king; his suffragans sat in the upper house as his peers; the deans, archdeacons, proctor for the chapter, represented the burghers; and the two proctors for the clergy, the knights of the shire; and so this body, instead of being one of the estates, as the king designed, became an ecclesiastical parliament to make laws, and to tax the sessions

sessions of the church; and to cajole the archbishops, the king received not only his own aids, but benevolences were given by the convocation to the archbishops.

At the Reformation, by the act of submission of the clergy, ^{25 H. 8. 19.} these convocations were to be assembled only by the king's writ; whereas, before, they often met on a summons from the archbishop, without his receiving any writ from the king, because they looked on him as having an authority from heaven; and by the statute they could not make any canon without the king's licence, or put them in execution without it.

Hence they began to call the convocation one of the three estates; because they could not meet without the king's writ, or make or execute any canon without the king's licence (as has been already observed); however, not only the *premunientes* clause, but the writ to the clergy continued, because they still apprehended that no canons could be made by temporal authority.

Thus this continued till the 13 C. 2. c. 4. when the clergy gave their last subsidy, when it appeared more advantageous to continue the taxing of them by way of a land-tax and poll-tax, as it was in the rump times; the clergy found this easier than the tenths, which they used to pay in their former way of taxing. From henceforward it passed that they should have a vote for members of parliament, as they had in the rump times, and they were taxed as the laity were. (a)

(a) The first publick act relating to this was an act of parliament passed in 1664-5, by which the clergy, in common with the laity, were charged with a tax given in that act, and were discharged from the payment of two of the subsidies, which they had granted before in convocation. But in this act there is an express saving of the right of the clergy to tax themselves in convocation, if they think fit, which is also inserted in another statute, 22 & 23 C. 2. c. 3. It appears in the following words in 2 Gibs. Cod. 984.; for these subsidy acts are not printed among the statutes at large. "Provided always, that nothing herein contained shall be drawn into example, to the prejudice of the antient rights belonging unto the lords spiritual and temporal, or clergy of this realm; or unto either of the universities; or unto any colleges, schools, alms-houses, or hospitals, or cinque ports." This most important alteration in the state of the kingdom was thus made, "without any law," by the operation of the principle which had obtained in the time of the commonwealth.

In *Ireland*, the parliament depending upon the king, the clergy seemed to have complied with the model of *Edward the First*, in sending proctors to parliament; and the archbishops and mitred abbots sat in the upper house, and the proctors in the lower house. Hence by 36 H. 6. c. 1. it appears, that they made a law that beneficed persons should forfeit their benefices, if they were absent without leave; which sort of regulation was made in *England*, by ecclesiastical authority, before the submission of the clergy in 25 H. 8.

It is to be known that the *premunientes* writ in *Ireland* ^{3 Ed. 4. c. 1.} summoned only the proctors of the clergy, and not the deans, archdeacons, and proctors of the chapters, as in *England*, as appears by an ancient writ in *Richard the Second's* time, wherein the proctors only are summoned; and it is the only writ extant before *Henry the Eighth* on which the clergy were summoned;

so that the parliamentary establishment, in relation to the clergy, differed from that which was established in *England*, for the reason that *Edward* the First projected the representatives of the clergy in proportion to the number of the temporal body; and because there were many corporations that held in burgage-tenure in *England*; therefore the deans, archdeacons, and proctors of chapters, were let in to make an equivalent number; but in *Ireland* there were only representatives of shires; for the boroughs did not arise from burgage-tenures, as in *England*, but from concessions from the king to send members, which were erected in later times, when by securing an interest in such towns, proper representatives to serve the turn of the court were sent to parliament; but the ancient members being only for the shire, the proctors were chosen from the diocese to correspond to them.

(a) || As there is much curious matter in this statute, and as it may not be in every one's hands, I shall set it out at length. "Forasmuch as at every parliament begun and holden within this land, two proctors of every

But by 28 H. 8. c. 12. (a) the proctors of the clergy are excluded from any seat in the lower house of parliament. And sometime they seem to be summoned by the *premunientes* writ, and the writ to the bishop, in the same words as in *England*; all the proctors came to parliament from all parts of the kingdom; so they assembled in the convocation at one synod where the parliament was held, and did not form four synodical meetings in the four distinct provinces, as they did in the two distinct provinces in *England*; and therefore they make one national synod under the primate, and there, by the king's leave, they make canons which bind the whole clergy through the four provinces.

diocese within the same land have been used and accustomed to be summoned and warned to be at the same parliament, which were never by the order of the law, usage, custom, or otherwise, any member or parcel of the whole body of the parliament, nor have had of right any voice or suffrage in the same, but only to be there as counsellors and assistants to the same, and upon such things of learning as should happen in controversy to declare their opinions, much like as the convocation within the realm of *England* is commonly begun and holden by the king's highness' special licence, as his majesty's judges of his said realm of *England*, and divers other substantial and learned men, having groundedly enquired and examined the root and establishment of the same, do clearly determine; and yet by reason of this sufferance, and by the continuance of time, and for that most commonly the said proctors have been made privy to such matters as within this land at any time have been to be enacted and published, and their advices desired and taken to the same, they now of their ambitious minds and presumption, inordinately desiring to have authority, and to intermeddle with every cause or matter without any just ground or cause reasonable to the same, do temerariouly presume, and usurpingly take upon themselves to be parcel of the body, in manner claiming, that, without their assent, nothing can be enacted at any parliament within this land, which, as it is thought, cometh not without the procurement and maintenance of some of their superiours, to the only intent that the said proctors, for the more part, being now their chaplains, and of mean degree, should be the stop and lett that the devilish abuses, and usurped authority and jurisdiction of the bishop of *Rome*, (by some men called the *Pope*,) nor of themselves, should not come to light or knowledge, that some good and godly reformation thereof might be had and provided: Wherefore be it enacted, ordained, and established by authority of this present parliament, that the said proctors, nor any of them so summoned or warned to any parliament begun or holden, or to be begun or holden within this land, is, nor shall be any member, nor parcel of the body of the same parliament, nor shall give nor have any voice, opinion, assent, or agreement to any act, provision, or ordinance to be regarded nor enacted within this land; nor yet their voices, assents, or agreements or opinions, shall not be necessary nor requisite to any such act, provision, or ordinance, but that, by authority aforesaid, every act, ordinance, provision, thing or things made,

made, ordained, or established, or to be made, ordained, or established, at any time in any parliament holden, or to be holden within this land, without the assent, consent, or agreement of the said proctors, or the more part of them, or contrary to the same, is and shall be good and effectual to all intents and purposes according to the tenour, purport, meaning and effect of every such act, provision or ordinance. And by the same authority, the said proctors, nor any of them, shall be accepted, reputed, deemed, or taken from the first day of this present parliament, as parcel or any member of the said parliament, or any other parliament hereafter to be holden within this land, but only as counsellors and assistants to the same: any law, usage, customs, prescription, or any other cause or matter, thing or things, whatsoever it or they be, in any wise to the contrary notwithstanding." Two things, says Dr. Wake, are plain enough from this act. 1. That till this time the proctors did act as real members of parliament: they were made privy to such things as passed there, had their advice desired and taken thereupon; and did in fact, at least, give their voice and suffrage to them. 2. That by this act they were deprived of this privilege, yet so as still to continue to be chosen as they were before, and to be deemed and taken as counsellors and assistants to the parliament, to declare their opinions upon such things of learning as they should be consulted about by the other estates there. The cause of the act was their stiffly opposing whatsoever was to be done in derogation of the pope's jurisdiction, and insisting upon it, that for lack of their concurrence no act could legally be made against it. || State of the Church, 52.

If any member of the convocation, who is proctor, dies, the archbishop issues his mandate to the bishop of the diocese to elect another; and this by virtue of the power inherent in him to summon his suffragan bishops, who being to obey him *in omnib' licitis & honestis*, and the clergy their bishops in like manner, they by that command make an election to supply the place of one of their proctors.

In *Ireland*, when any proctor dies, the mandate issues from the archbishop of the province to the suffragan bishop of the diocese, and not from the primate, unless in his own province; because the synodical authority in each province belongs to the archbishop of that province, though they meet in one body to make a national synod.

During the times of popery, the bishops contended that they were to be tried only by their ordinaries, and therefore would not submit to be tried *per pares*; from hence it is that there is no instance where they were tried by their peers, though they held *per baroniam*; and therefore, after the reformation, when the temporal power prevailed, there being no instance where they had been tried *per pares* in parliament, they were tried by common juries; though there were instances in the times of popery where the bishop, being arraigned for high treason, pleaded he was to be tried by his ordinary; and being over-ruled, was tried by a common jury, because he could not have two dilatory pleas.

Stillling. Jurisd.
of Bps. 367,
368.

Sometimes the lords, and sometimes the commons, were wont to send to the convocation for some of their body, to give them advice in enacting laws touching spiritual matters. Such were those temporal laws in relation to the Lollards and hereticks, which were enacted for the punishment of such hereticks as were cast out of the church on excommunications; but matters purely spiritual they generally transacted before the Reformation. Afterwards they began to receive the assistances of the convocation for the settling of the church; but this only by way of advice; for they have always insisted that their laws, by
their

their own natural force, bind the clergy, as the laws of all Christian princes did in the first ages of the church.||

4 Inst. 4. Although the judges and masters in chancery are summoned to attend the parliament, yet they have no voices; and therefore they sit round the table in order to assist the speaker, or the king, when present, in matters of law.

4 Inst. 266. Nor has the chancellour a voice, unless he is a peer; for anciently he was none of the peers, unless he held *per baroniam*; and now he is none, unless created by patent or summons.

Gilb. Exch. 53. || He is in the nature of a steward in the court-baron of the king; and as in the courts baron and county courts the steward is not judge, but the *pares*; so the speaker in the house of lords is not judge, but the barons only. As steward, the chancellour lays his mace on the table, when it is a house, to shew that the king's steward, who is appointed in his absence to hold the court, is there.||

[By the twenty-second and twenty-third articles of the union, ratified by the act of union, the peerage of *Scotland* are to elect sixteen of their number to sit in the *British* house of lords: and other not elected peers of *Scotland* are to become peers of the united kingdom, and to have all the privileges of such, except a seat in that assembly.

Lords' Journ.
20th Dec.
1711. It was resolved by the house, soon after the union, in the case of the Duke of *Hamilton* and *Brandon*, "that no patent of honour granted to any peer of *Great Britain*, who was a peer of *Scotland* at the time of the union, should entitle him to sit and vote in parliament, or upon the trial of peers."

Lords' Journ.
14th Jan.
1719-20. And the same doctrine was adhered to in the following case: the Duke of *Queensberry's* second son was created Earl of *Solway*, in *Scotland*, when an infant; and afterwards the duke was created Duke of *Dover*, with remainder to such second son, and sat in two parliaments under this creation. But upon his death it was objected, and so resolved by the lords, that the *Scotch* earldom of *Solway* incapacitated the then claimant from taking the dukedom of *Dover* by virtue of such remainder. But these resolutions have been lately over-ruled. The peerage of *Brandon* hath been again claimed, when it was urged, that even supposing the former decisions to stand, still the patent was not void; that the incapacity to sit in parliament was only personal in the then duke, and his heirs in tail-male were entitled to the peerage of *Brandon*, with all its rights. The matter, however, was taken up in a more general view. For the entry in the Lords' Journals is as follows: "After hearing counsel, as well

Printed cases of the lords. "yesterday as this day, upon the petition of *Douglas* Duke of *Hamilton* and *Brandon* to his majesty, praying a writ of summons to parliament by the title of Duke of *Brandon*, the following question was put to the judges: Whether by the twenty-third article of the act of union, which declares all peers of *Scotland* to be peers of *Great Britain*, with all the privileges enjoyed by the peers of *England*, except the right and privilege of sitting in the house of lords, and the

It was moved to put a similar question to the judges in the year 1711, but the motion was negatived.

“privileges depending thereon, the peers of *Scotland* be disabled from receiving, subsequently to the union, a patent of peerage of *Great Britain*, with all the privileges usually incident thereto? The lord chief baron of the court of exchequer delivered the unanimous opinion of the judges present upon the said question, that the peers of *Scotland* are not disabled from receiving, subsequently to the union, a patent of peerage of *Great Britain*, with all the privileges usually incident thereto:” whereupon a report was ordered to be presented to his majesty, certifying that the said Duke of *Brandon* is entitled to his writ of summons.

In consequence of this decision several *Scotch* peers were soon afterwards created peers of *Great Britain*. But in the year 1708-9 the house had come to the following resolution: “That a peer of *Scotland*, claiming to sit in the house of peers by virtue of a patent passed under the great seal of *Great Britain* after the union, and who now sits in the parliament of *Great Britain*, has no right to vote in the election of the sixteen peers, who are to represent the peers of *Scotland* in parliament.” And this resolution standing upon the journals unimpeached, it seemed to be a consequence of it, that the seat of one of the sixteen peers, as a representative peer, became vacant upon his accepting or succeeding to an *in elective* seat: and therefore, upon the Earl of *Abercorn*’s being created a peer of *Great Britain* in the year 1787, the house resolved, “That the Earl of *Abercorn*, who was chosen to be of the number of sixteen peers, who by the treaty of union are to represent the peerage of *Scotland* in parliament, having been created Viscount *Hamilton* by letters patent under the great seal of *Great Britain*, doth thereby cease to sit in this house as a representative of the peerage of *Scotland*.” And about this time the house shewed a strong disposition to adhere to these resolutions. For in the *May* following it was ordered, “That a copy of the resolution of *Jan.* 21. 1708-9, be transmitted by the clerk of the parliaments to the lord clerk registrar of *Scotland*, with injunction to him to conform thereto.” And again in the next year it was resolved, “That it is the opinion of this house that the lord clerk registrar and his deputies, acting at the election of the *Scots* peers, ought to conform to the resolutions of this house, of which they have had notice by order of the house.” In consequence of these orders, the deputies of the lord clerk registrar refused to admit the votes of the Duke of *Queensberry*, Lord *Abercorn*, and other lords in a similar situation, at the following general election in the year 1790. This refusal occasioned an application to the house on behalf of the two noble peers above mentioned, when, after a long investigation and considerable debate, the house was pleased to overrule its former resolutions, and to resolve, “That the votes of the Duke of *Queensberry* and the Earl of *Abercorn*, if duly tendered at the last election for electing sixteen peers of *Scotland*, ought to be counted.” And it was afterwards resolved, “That

Lords’ Journ.
21st Jan.
1708-9.

Lords’ Journ.
14th Feb.
1787. The same resolution was come to at the same time respecting the Duke of *Queensberry*, who was created Baron *Douglas*.
Lords’ Journ.
18th May,
1787. 21st April, 1788.

Lords’ Journ.
23d May,
1793.

6th June, 1793. " That the tender of the votes of the Duke of *Queensberry* and " the Earl of *Abercorn*, by sending to the lord clerk registrar " or his deputies signed lists, together with proper documents " of their having qualified themselves, as by law required, to " vote, was a due and sufficient tender of their votes at the said " election." In pursuance of which resolutions the votes of these noble lords were added to the lists. These resolutions were followed by two protests, the one of which was signed by the Duke of *Leeds* and the Earl of *Kinnoul*, the other by the Earl of *Lauderdale*.—The above resolution of 23d *May* having established, that the accepting or succeeding to an inelective seat, posterior to the union, did not incapacitate a peer of *Scotland* from voting in the election of the representatives of the *Scottish* peerage, the inference which followed from the contrary doctrine was necessarily done away, and the succession to such a seat was determined not to vacate the seat of a representative peer. A motion, therefore, of Earl *Stanhope*, " That an humble " address be presented to his majesty, humbly to request that " his majesty will be graciously pleased to issue his royal proclamation for the election of a peer to represent the peerage " of *Scotland*, in the room of the Lord Viscount *Stormont*, who " since his election has become Earl of *Mansfield* of *Middlesex*, " and has taken his seat in the house accordingly," was, after debate, negatived.

June 1793.

At the above election, in 1790, Sir *James Sinclair* voted by proxy as Earl of *Caithness*, his claim to that dignity not having been allowed, but being then pending. His vote was objected to by the Earls of *Selkirk* and *Hopetown*, who insisted that he had no right to the title he assumed; or, supposing his claim should be admitted, yet as it was not actually allowed at the time of the election, he was not then in a capacity to vote. But the house resolved, " That Sir *James Sinclair* had made " out his claim to the title of Earl of *Caithness*." And that resolution was followed by another, " That the votes given by " the Earl of *Moray*, as proxy for the Earl of *Caithness*, were " good."

4th March,
1793.

6th June, 1793.

By 6 Ann. c. 23. § 3. the peers actually present at the assembly of the peers in *Holyrood House*, in *Edinburgh*, are required, before they vote, to qualify themselves by taking the oaths of allegiance, supremacy, and abjuration, and making and subscribing the declaration against popery. Those who live in *Scotland*, and wish not to vote in person, may qualify in any sheriff's court in *Scotland*; and the sheriff or his deputy is to return the original subscription of the oath and declaration, signed by the peer who took the same, and make a return to the peers so assembled of such peers taking the said oath, and making and subscribing the said oath and declaration: and those peers who reside in *England* at the time of issuing the proclamation for election, may take and subscribe the oaths, and make and subscribe the declaration in the court of chancery, king's bench, common pleas, or exchequer in *England*, which is to be certified

tified by writ (a) to the peers in *Scotland*, at their meeting under the seal of the court where the same were taken and subscribed; and peers who have so qualified may make a proxy, or send a signed list containing the names of sixteen peers of *Scotland* for whom they give their votes. And in case any peer of *Scotland*, who at any time before the issuing of the proclamation for election hath taken the oaths, and subscribed the declaration in *England* or *Scotland*, to be certified as aforesaid, and, if taken in parliament, to be certified under the great seal of *Great Britain*, shall, at the time of issuing such proclamation, be absent in the service of the crown, such peer may make his proxy, or send a signed list.

day and year therein specified, appeared in chancery, in open court, and took and subscribed the oaths and declarations therein mentioned. Lords' Journ. 5th Feb. 1792.—“George the Third, by the grace of God, &c. To our most dear cousins, the peers of *Scotland*, to be assembled and meet at *Holyrood House*, in *Edinburgh*, on *Saturday* the 24th day of *July* next ensuing, by virtue of our proclamation under our great seal of *Great Britain* lately issued, for the election of the sixteen peers of *Scotland* to sit and vote in the house of peers in the parliament of *Great Britain*, to be holden at *Westminster*, on *Tuesday* the 10th day of *August* next ensuing, greeting:—We have inspected a certain record and register in our court of chancery in *England*, made and filed and there remaining, by which it is manifest, that on this fourteenth day of *June*, 1790, *Francis Viscount Dumblane* personally appeared in open court in chancery aforesaid, and then and there took and subscribed the oath of supremacy, and repeated and subscribed the declaration contained and specified in a certain act of parliament, made in the sixth year of the reign of *Queen Anne*, late queen of *Great Britain*, intituled, ‘An act to make further provision for electing sixteen peers of *Scotland* to sit in the house of peers, &c.’ and also took and subscribed the oath of allegiance contained and specified in a certain act of parliament made in the first year of our late great grandfather *George* the First, late king of *Great Britain*, intituled, ‘An act for the further security of his majesty’s person and government, &c.’ and also took and subscribed the oath of abjuration contained and specified in a certain act of parliament made in the sixth year of our reign, intituled, ‘An act for altering the oath of abjuration and the assurance, &c.’ according to the form, direction, and appointment of the acts aforesaid. Witness ourself the 12th day of *June*, in the thirtieth year of our reign.”

(a) The following instrument was determined by the house, after reference to the judges, to be a writ sufficient in law to certify, according to this statute, that *Francis Viscount Dumblane*, on the

The above act provides, that such peers of *Scotland* as are also peers of *England*, shall sign their proxies and lists by the title of their peerages in *Scotland*; and that no peer shall be capable of having more than two proxies at one time. It also enacts, that no peer shall come to the meeting with more attendants than he is allowed by the acts then in force in *Scotland* to take with him to the courts of justice; and that any peer who shall presume to propose, debate, or treat of any other matter, except the election, shall incur the penalties of a *premunire*.]

¶ By § 12. of the above act, those who are elected the sixteen peers must be twenty-one years of age complete.

We do not find any legislative enactment

upon this subject respecting other peers. Minors indeed are excluded from sitting as peers of *Great Britain* when they come to their honours by creation or descent; but that is merely by a standing order of the house, made the 22d of *May* 1685. On the 1st of *Oct.* 1667, a writ of summons was issued to the Earl of *Mulgrave*, he being then under age; whereupon the house, by the recommendation of the committee of privileges, referred these two questions to the judges, “Whether a minor may sit in quality of a judge, in any court of justice, by the law of *England*, and give judgment?” “2. Whether a judgment may be excepted against by writ of error, or otherwise, wherein any one that sat as a judge, and gave his judgment, was a minor?” To the first of these questions the lord chief justice reported on the 6th of *November* following, that it was the unanimous opinion of the judges,

"That by the law of *England*, in the ordinary courts of justice, no minor can sit, or give any judgment as a judge." On the 14th of *December* the house ordered the committee of privileges to prepare "a declaration" respecting both the time past and to come, which might prevent the inconvenience of minors sitting in the house. This declaration was reported on the 18th of *December*, "That according to the law of the realm, and the antient constitution of parliament, minors ought not to sit or vote in parliament; and the house agreed to it." The committee then recommended, "That a declaratory bill be prepared to remedy this inconvenience for the future, without any retrospect, and to confirm all that had already passed." The house ordered this latter part of the report to be laid aside. 2 Hats. Prec. 10. Notes.

By the fourth article of the treaty of union of *Great Britain and Ireland*, ratified by the act of union of 39 & 40 G. 3. c. 67. four lords spiritual of *Ireland*, by rotation of sessions, and twenty-eight lords temporal of *Ireland*, elected for life by the peers of *Ireland*, sit and vote on the part of *Ireland* in the house of lords of the parliament of the United kingdom; and one hundred commoners (two for each county of *Ireland*, two for the city of *Dublin*, two for the city of *Cork*, one for the university of *Trinity College*, and one for each of the thirty-one most considerable cities, towns, and boroughs,) sit and vote on the part of *Ireland* in the house of commons of the parliament of the United kingdom.||

(C) Of the Manner of their Summons and assembling.

THE parliament commences by the king's writ or summons, agreeably to that rule which was established before the conquest, *viz.* that all judicature proceeded from the king. *William the Conqueror* seems to have been more jealous of this part of his prerogative than of any other, and from his time this rule has been regularly observed. Anciently (a) some of the peers only were summoned, but when a parliamentary peerage was established, they summoned them all. Hence my Lord *Coke* (b) says, that every lord spiritual and temporal, of full age, ought to have a writ of summons *ex debito justitiæ*.

(a) For according to Spelm. Gloss. 67., Seld. tit. Hon. 692., it would have been difficult

and inconvenient to have summoned them all, being so numerous, as to be at one time about 3000. (b) 4 Inst. 1. — For the form of such summons *vide* Cotton's Records, 3, 4.

Gilb. Exch. 51. Co. Lit. 9. b. 16. b. *Vide* Prynne's Plea for the Lords' House, 147. where this matter is much controverted.

(c) But in all degrees of qua-

lity above a baron, a summons is not sufficient, because there are other ceremonies requisite, which must be performed, unless dispensed with by letters patent; and these being matters of record must be produced. Seld. tit. Hon. 495. 530. Show. P. C. 5. Spelm. Gloss. 142.

|| And

||And although a writ of summons, and a sitting in pursuance thereof, as a peer, operates as a creation of a dignity, descendible to the lineal heirs, or heirs of the body of the person so summoned; yet, the house of lords have determined, that a single writ of summons, issued to a person in the reign of E. 1. did not create an hereditary barony. Barony of Frescheville, Journ. V. 13. 154. Cruise on Dignities, 76.||

The first summons of a peer to parliament differs from an ordinary summons, because in the first summons he is called up by his proper christian and surname, not having the name and title of dignity in him till he has sat (a); but after he has sat, the name of dignity becomes part of this name; but the writ of creation, in all other things, is the same with the ordinary writ that calls him.

Gilb. Exch. 53.
Co. Lit. 16.

[(a) And therefore, till he takes his seat, the blood is not ennobled;

and if issue be joined, whether he were a baron or no, it shall not be tried by a jury, but by record of parliament, which could not appear unless he were of the parliament. *Ibid.* But in the case of nobility by letters patent, the creation is perfect, and the blood is ennobled without sitting; and therefore, in Lord Banbury's case, the Court of King's Bench held, that a peerage, claimed under letters patent, is not triable by the record of parliament, but must be questioned by pleading *non concessit*. Rex v. Knollys, 1 Ld. Raym. 10. ||So, if the person ennobled by letters patent die before he has taken his seat, the dignity will nevertheless descend to his posterity; as was the case of Lord Waldegrave de Cherton in 1 Ja. 2., who dying before he sat in parliament, his eldest son was introduced in his robes, and took his seat. Journ. V. 21. 682. The same in the present reign in the case of Lord Walsingham. || A writ of summons directed to any temporal person who sits in pursuance of it, gives a barony in fee, without words of limitation. 12 Co. 70. Co. Lit. 9. b. Seld. tit. Hon. 746. But letters patent, in which there are no words of limitation, give the grantee a dignity for life only. If the eldest son of a peer, created by letters patent, limiting the succession to the heirs male of his body, be called up by writ of summons to the house of lords by his father's baronial title, the effect of the writ in that case is not to enlarge the course of succession, so as to make a female capable of inheriting, but merely to accelerate the succession of the son to the barony; for the extent of the inheritance still depends on the nature of the father's title to the barony. Case of the claim to the barony of Sidney of Penhurst disallowed. Printed cases of the Lords, June 17. 1782.]

The writ of summons issues out of chancery, and recites, that the king, *de avisamento concilii*, resolving to have a parliament, desires *quod intersitis cum*, &c. each (b) lord of parliament is to have a distinct summons, and such summons is to issue at least (c) forty days before the parliament begins.

4 Inst. 4.

(b) Of the manner of summoning the judges, barons

of the exchequer, king's counsel, and civilians, masters in chancery, who have no voices; and how the writ differs from that to a lord of parliament; *vide* Reg. 261. F. N. B. 229. 4 Inst. 4. (c) ||This is by 7 & 8 W. & M. c. 25. But by the 22d article of the treaty of union with *Scotland*, it is resolved, "that such time shall not be less than fifty days after the "date of the royal proclamation issued for that purpose." From that time to the present, though no positive law has been made on the subject, fifty days have always been allowed between the teste and return of the writs of summons.||

Also, a writ of summons must be directed to every sheriff of every county in *England* and *Wales*, for the choice and election of knights, citizens, and burgesses, within each of their respective counties.

4 Inst. 6. 10.
Co. Lit. 109. b.
[Upon a general election, the writ of summons

issues in consequence of a warrant from the lord chancellor to the clerk of the crown in chancery; but, if a vacancy happens during the sitting of parliament, or by the death of a member, or his becoming a peer, in the time of a recess, then, in consequence of a warrant from the speaker; in the former of which cases, the speaker acts by order of the house; in the latter, under the regulations and restrictions of stat. 24 G. 3. c. 26.]

4 Inst. 6.

So, a writ of summons must issue out to the lord warden of the *Cinque Ports*, for the election of the barons for the same, who in law are burgesses.

4 Inst. 10.

[See the form of the writ, 1 Dougl. 448. Heywood on Elect. 1.]

The substance of those writs ought to continue in their original essence, without any alteration or addition, unless it be by act of parliament; for, if original writs at the common law can receive no alteration or addition but by act of parliament, *a fortiori* the writs for the summons of the high court of parliament can receive no addition or alteration but by act of parliament.

Elsynge, 28, 29.

[It doth not appear by the first record of summons now extant, *an. 49 H. 3.* by what warrant the lord chancellour caused the writs of summons to be made. The king was then a prisoner to *Montfort*. But surely none but the king can summon the parliament (a). And this is the reason that *Henry 4.* having taken his liege lord King *Richard 2.* prisoner on the 20th day of *August, an. 23.* caused the writs of summons for the parliament, wherein he obtained the crown, to bear date the 19th day of the same month, and the warrant to be *per ipsum regem et concilium*, and himself to be summoned by the name of *Henry Duke of Lancaster*.

(a) Though it be very clear that no parliament can be legally assembled but by the authority of the crown, yet there are two

instances of a parliament being called and sitting, and being acknowledged as such without being originally summoned by writs issued by order of the king. The first was that of the convention parliament, which met on the 25th of *April 1660*, and sat till the 29th of *December* in that year, and was then dissolved. This parliament was summoned by writs issued under the direction of an ordinance passed on the 16th of *March 1659*, by the remainder of the house of commons that had been called by *Charles the First*, on the 3d of *November 1640*. The ordinance was entitled, "A bill for dissolving the parliament begun and holden " at *Westminster* on the 3d of *November 1640*, and for the calling and holding a parliament " at *Westminster* on the 25th day of *April 1660*." It was, however, thought advisable afterwards, when the legal government was re-established, to pass an act of parliament to remove all disputes concerning the assembling and sitting of this parliament; and it was accordingly declared and enacted by 12 Car. 2. c. 1. " That the parliament begun and holden at *Westminster*, on the 3d of *November 1640*, is fully dissolved and determined, and that the lords " and commons now sitting at *Westminster*, in this present parliament, are the two houses " of parliament, to all intents, constructions, and purposes whatsoever, notwithstanding any " want of the king's writ of summons, or any other defect." But, notwithstanding this express declaration by act of parliament, it appears that doubts were still entertained whether the parliament of 1640 was legally dissolved. For, on the 24th of *May 1661*, the judges were ordered to attend the house of lords, to give their opinion upon this question; and on the 6th of *June*, the judges having attended, and having given an unanimous opinion, " That " the said parliament, begun on the 3d of *November 1640*, is now determined," the lords ordered the attorney-general to prepare a particular bill for declaring this to be the law; and a clause for this purpose was inserted in an act which passed in the 13th of Cha. 2. c. 1. entitled, " An act for the safety and preservation of his majesty's person and government " against treasonable and seditious practices and attempts," 2 Hats. Prec. 280. It is remarkable, that such a provision should be inserted in a *temporary* law. The other instance of a parliament summoned by writs not issued by the king's authority, is the convention parliament, which met on the 22d of *January 1688*, and which was elected by virtue of letters written by the Prince of *Orange*, in consequence of the address of the lords spiritual and temporal, and of those members of the house of commons that had served in any of the parliaments during the reign of *Charles the Second*, who, together with the aldermen and several of the common council of *London*, had assembled at *St. James's*, on the 26th of *December*, at the desire of the Prince of *Orange*. These letters were directed to the lords spiritual and temporal, and to the several counties, universities, cities, boroughs, and cinque ports, for calling a convention to meet on the 22d of *January*. After settling the crown on the Prince and Princess of *Orange*, an act was immediately passed, as in the former instance, for removing

moving and preventing all questions and disputes concerning the assembling and sitting of this present parliament, by which "this convention is declared to be the two houses of parliament to all intents and purposes whatsoever, notwithstanding any want of writ of summons or other defect; and that this act, and all other acts to which the royal assent shall be given, before the next prorogation, shall be understood, taken, and adjudged in law to commence upon the 13th day of *February*, on which day their majesties, at the request and by the advice of the lords and commons, did accept the crown and royal dignity of the King and Queen of *England, France, and Ireland*, and the dominions and territories thereunto belonging." Notwithstanding this statute, it was thought advisable, on the meeting of the next parliament, elected by virtue of writs issued by King *William* and Queen *Mary*, to pass another act, "For recognizing their majesties, and for avoiding all questions touching the acts made in the parliament assembled at *Westminster*, the 13th of *February* 1688." This act, the 2d of W. & M. st. 1. c. 1. enacts, "That all and singular the acts made in the said parliament, were and are laws and statutes of this kingdom." See, in the *Lords' Journal* of the 5th of *April* 1690, a very curious protest on the subject of this bill, touching the validity of the last parliament, and the objection which had been made to the want of writs of summons. 2 Hats. Prec. 281-2.

The warrant hath been divers; sometime *per breve de privato sigillo*; but most commonly *per ipsum regem*, or *per ipsum regem et concilium*. *Id. ibid.*

If the king hath been absent out of the land, and a *custos* appointed (as the manner is), the writ bears *teste* by the *custos*, and the warrant is *per ipsum regem, et dominum custodem, et concilium*, prout an. 13 E. 3. *Teste* Edwardo duce Cornubiæ, &c. *custode Angliæ*. *Per ipsum regem, et dominum custodem, et concilium*. An. 20 E. 3. *consimile*. An. 9 H. 5. *Teste* Johanne duce Bedford, *custode Angliæ*. *Per ipsum regem et concilium*. An. 9 H. 6. The king being in Paris, *teste* Humfrido duce Glocestriæ, *custode Angliæ*. *Per breve de privato sigillo*. But, if the king be within the land, though within age, and a protector appointed him, he alone is *testis* to the writ, and the warrant is *per ipsum regem*, prout an. 1 H. 6.; and sometimes *per ipsum regem et concilium*.]

At the (a) return of the writ, the parliament cannot begin but by the royal presence of the king, either in person or by representation: by representation two ways; either by a guardian of *England*, by letters patent under the great seal, when the king is in *remotis* out of the realm; or by commission under the great seal of *England*, to certain lords of parliament, representing the person of the king, he being within the realm, in respect of some infirmity. 4 Inst. 6. (a) May be prorogued at the day of the return for certain urgent causes. 4 Inst. 7. [After the general election in the year 1790, the parliament was prorogued twice before it met. Com. Journ. 26th Nov. 1790; and the first parliament in this reign was prorogued by four writs of prorogation. *Id.* 3d Nov. 1761.]

Every lord spiritual and temporal, and every knight, citizen, and burgess, shall upon summons come to the parliament, except he can reasonably and honestly excuse himself, or he shall be amerced, &c.; that is, respectively a lord by the lords, and one of the commons by the commons. 4 Inst. 43. 5 R. 2. st. 2. c. 4. By 6 H. 8. c. 16. that for departing without licence, every knight, citizen, and burgess, shall lose his wages: also, it is such an offence, that the lords may fine one of their body; so, of the house of commons. 4 Inst. 44. || It was customary in former times, if the parliament was not quite full at the first meeting, to adjourn for a day or two till the absent members came in; and by the records it appears, that the lords sometimes, and the commons frequently, were called by name the first day of the parliament's

liament's sitting, and such of them as were absent without just cause were both blamed and fined. Prynne's Preface to Cott. Abr. of the Records in the Tower. And the attendance of members is enforced at present by *calls of the house*, and sometimes by the punishment of those who disobey them.||

4 Inst. 44.

|| Lord Coke says, "if the king by his writ calleth any knight or esquire to be a lord of the parliament, he cannot refuse to serve the king there *in communi illo concilio*, for the good of his country." And in Lord Abergavenny's case the judges

12 Co. 70.

1 P. Wms. 592.

appear to have been of that opinion. But Lord Cowper was of opinion, that the king could not create a subject a peer of the realm against his will; because it would be then in the power of the king to ruin any one whose estate and circumstances might not be sufficient for the honour. He also held, that a minor might, when of age, waive a peerage granted to him during his minority. But Lord Trevor maintained the contrary, and, in conformity with Lord Coke, held, that the king had a right to the services of his subjects in any situation he thought proper; and instanced in the case of the crown's having the power to compel a subject to be a sheriff, and to fine him for refusing to serve. He observed, that in Lord Abergavenny's case it was admitted that the king might fine a person whom he thought proper to summon to the house of peers, it being there said, that a person might choose to submit to a fine. And if it were allowed that the king might fine for not accepting the honour, and not appearing upon the writ, he might fine, *toties quoties*, where there was a refusal, and, consequently, might compel the subject to accept the honour. And that it was not to be presumed that the king would grant a peerage to any one to his prejudice or wrong, any more than that he would make an ill use of his power of pardoning; all which are suppositions contrary to the principles upon which the constitution is framed, which depends upon the honour and justice of the crown.

Glanv. 101.

8 Comm.

Journ. 250.

626. 631. 635.

640. But the

abandonment

of a seat by a

person chosen

is in fact re-

cognised by the

provisions of

28 G. 3. c. 52.

2 and 4.

It is laid down in *Glanville*, as to the house of commons, that "no man, being lawfully chosen, can refuse the place; for the country and commonwealth have such an interest in every man, that when, by lawful election, he is appointed to the public service, he cannot by any unwillingness or refusal of his own, make himself incapable; for that were to prefer the will or contentment of a private man, before the desire and satisfaction of the whole country, and a ready way to put by the sufficientest men, who are commonly those who least endeavour to obtain the place."||

[By the 5th of Eliz. c. 1. § 16. all members, before they come into the parliament house, are to take the oath of supremacy before the lord steward for the time being, or his deputy or deputies, for that time to be appointed.

By the 7th of Ja. 1. c. 6. § 8. the oath of allegiance is, in like manner, ordered to be taken by members before they come into the house.

By the 30th of C. 2. st. 2. every member is to take the oath of

of allegiance and supremacy, and make and subscribe the declaration against transubstantiation, between the hours of nine in the morning and four in the afternoon; a peer, at the table in the middle of the house of peers, and whilst a full house of peers is there, with their speaker in his place; and a member of the house of commons, at the table in the middle of that house, whilst a full house is duly sitting, with the speaker in the chair.

By the 13th of W. 3. c. 6. § 10. every member is to take the oath of abjuration "at the table," in the same manner, and between the same hours, as he takes the oaths of allegiance and supremacy by the 30th of C. 2.

At the beginning of the parliament which met in the year 1780,

there was some debate in the house of lords, whether any lord might, notwithstanding the limitation of time expressed in this and the preceding act, be admitted to take the oaths, and sign the declaration *after four o'clock*; and the lords determined that he might.—The house of commons, by their uniform practice, have always determined differently. Nor does this determination of the lords seem to be consistent with an order of their lordships, "That lords who come to take the oaths be present for that purpose at the first sitting of the house, otherwise to withdraw from the debates for that day." 2 Hats. Prec. 82.

By the 33d of G. 2. c. 20. every member (except as is therein excepted) is, before he presumes to vote in the house of commons, to take the oath of his being qualified, and to deliver in his qualification at the table.]

Notwithstanding all these laws which are introductory to a member's

taking his seat in the house, a person when returned is, though he should not have taken his seat, to all intents, a member, except as to the right of voting, and is entitled to the same privileges as any other member of the house; insomuch, that upon the 13th of April 1719, the house determined, "That Sir Joseph Jekyll was capable of being chosen of a committee of secrecy, though he had not been sworn at the clerk's table." 2 Hats. Prec. 83. note.

(D) Of Elections: And herein,

1. Of the Electors, and their Qualifications.

AS the right and qualifications of electors depend for the most part on several acts of parliament, it will be necessary to point out those statutes, as the surest rule to direct us in our inquiries herein. But here it may be proper to observe, (a) that the right and qualification of voters in cities, towns, and boroughs, depend on their charters, and such customs as have prevailed in them time immemorial.

(a) Hob. 14.
12 Co. 120.

Also it may be necessary to observe, that for the better ascertaining in general the right of voting, and for the greater security of returning officers, by the 2 Geo. 2. c. 24. it is enacted, "That such votes shall be deemed legal, which have been so declared by the last determination in the house of commons; which last determination concerning any county, shire, city, borough, cinque port, or place, shall be final to all intents and purposes."

Extended to Scotland by 16 G. 2. c. 11. [This act is repealed by 28 G. 3. c. 52. § 31. so far as relates to determinations subsequent to that act.

As the chief excellency of our constitution consists in our being (a) bound only by those laws to which we ourselves consent; and as such consent cannot be given by every individual in

(a) That it is one of the greatest privileges which 2

British subject person, but must be by representation, it therefore highly concerns the whole community that elections be (b) free, and that (c) every person claiming a right to vote be duly qualified, free from corruption, or any undue influence whatsoever.

an action on the case will lie at common law. Salk. 19. 6 Mod. 45. Ld. Raym. 938. 3 Salk. 17. 8 State Tr. 89. Holt 524. *per Holt* Ch. Just.; and accordingly adjudged in the house of lords, in the case of Ashby and White. (b) By the common law all elections ought to be free; and by several statutes it is declared, that elections of members of parliament ought to be free, particularly by the 1 W. & M. sess. 2. c. 2. (c) In many cases multitudes are bound by acts of parliament, who are not parties to the elections of knights, citizens, and burgesses; as all those that have no freehold, or have freehold in ancient demesne; and all women having freehold or no freehold, and men within age of twenty-one years, &c. 4 Inst. 4, 5.

This and the subsequent acts as to residence are repealed by

14 G. 3. c. 58.

¶ By 1 H. 5. c. 1. *the knights and esquires and others which shall be choosers of the knights of the shires, shall be resident within the same shires the day of the date of the writ of summons of parliament.*

By 8 H. 6. c. 7. *the knights of the shires shall be chosen in every county of the realm by people dwelling and resident within the same counties, whercof every one of them shall have freehold to the value of 40s. by the year, at the least, above all charges; which is explained in a subsequent statute of 10 H. 6. c. 2. to mean freehold to that value within the county, where any such chooser will meddle of any such election.* And the reason why this was done is set forth in the preamble: "Whereas the elections of knights of shires to come to the parliament of our lord the king, in many counties of the realm of England, have now of late been made by very great, outrageous, and excessive numbers of people dwelling within the same counties of the realm of England, of which most part was of people of small substance and of no value, whereof every of them pretended a voice equivalent, as to such elections to be made, with the most worthy knights and esquires dwelling within the same, whereby manslaughter, riots, batteries, and divisions among the gentlemen and other people of the same counties shall very likely rise and be, unless convenient and due remedy be provided in this behalf: our lord the king, considering the premises, hath provided, ordained, and established by authority of this present parliament," &c.

The act of 8 H. 6. c. 7. empowers the sheriff to examine the voters upon oath as to the clear value, and the subsequent acts of 7 & 8 W. 3. 10 Ann. and 18 G. 2. prescribe the form of the oath to be administered to them.

2 Luders, 467.

It having been determined by two committees of the house of commons that the interest of a mortgage is a charge, which, if it reduces the value under 40s. takes away the vote; and a similar decision having been made by the court of king's bench upon a qualification under the game act of 23 Car. 2. c. 25., but there having been an intermediate decision of a committee, wherein the contrary was holden, and the opinions of lawyers upon the

Wetherell v. Hall, *Id.* 588. Cald. 230.

the subject being divided, the legislature has made a declaration upon it in stat. 28 G. 3. c. 36. § 6. and 9. and requires the estate to be of the *clear yearly value of 40s. over and above the interest of any money secured by mortgage upon it, and also over and above all rents and outgoings payable out of or in respect of the said estate, other than parliamentary, publick or parochial taxes* (a) ||

(a) Considering, says Mr. *Luders*, the doubt and contradiction in which the point had been involved by the opinions of individuals and the decisions in the election courts, the clause has not that formality which might have been expected (from former instances) in a declaratory law made upon a difficult legal question. The subject is introduced indirectly into the act, and as if the law had been taken for granted. 2 *Luders*, 468.

[No person shall vote in right of any freehold granted to him fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to re-convey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And every person who shall prepare or execute such conveyance, or who shall give his vote under it, shall forfeit 40*l*.

10 Ann. c. 23.
The st. 13 G. 2.
c. 20. extends
the regulations
for the preven-
tion of fraudu-
lent convey-
ances for elec-
tion purposes
of themselves.

to cities and towns which are counties of themselves.

No person shall vote in respect of an annuity or rent-charge, unless registered with the clerk of the peace twelve calendar months before the election.

2 G. 3. c. 24.

In mortgaged or trust estates, the person in possession, under the above-mentioned restrictions, shall have the vote.

7 & 8 W. 3.
c. 25. § 7.

Only one person shall be admitted to vote for any one house or tenement, in order to prevent the splitting of freeholds; and conveyances for that purpose, among which, by a later statute, (b) are included devises by will, shall be void.

out an actual assignment of it by metes and bounds. 28 G. 3. c. 36. § 34. (b)

Ibid. But a
husband may
vote for his
wife's right of
dower, with-
out an actual
assignment of
it by metes and
bounds. 53 G. 3. c. 49.

No estate shall qualify a voter, unless it hath been assessed to the land-tax six months before the election, either in the name of the voter or of his tenant; but if he has acquired it by marriage, descent, or other operation of law, within twelve calendar months before the election, in that case, it must have been assessed to the land-tax within two years before the election, either in the name of the predecessor, or person through whom the voter derives his title, or in the name of the tenant of such person. || Annuities or fee-farm rents (duly registered) issuing out of the messuages, lands, &c. rated and assessed, are not within the act.

30 G. 3. c. 35.

Where the land-tax has been redeemed, the freeholder shall be entitled to vote upon proof of such redemption, without any registry of a memorial or certificate thereof. ||

42 G. 3. c. 116.
51 G. 3. c. 99.

No tenant by copy of court-roll shall be permitted to vote as a freeholder.

31 G. 2. c. 14.

No freeman of any city or borough (other than such as claim by birth, marriage, or servitude) shall be entitled to vote therein, unless

3 G. 3. c. 15.
This act, which
is called the

Durham Act, unless he hath been admitted to his freedom twelve calendar months before.
 was occasioned by, and seems confined to, the admission of *honorary* freemen only.

26 G. 3. c. roo. In boroughs where the householders or inhabitants of any description claim to elect, no person shall have a right to vote as such inhabitant, unless he hath actually been resident in the borough six months previous to the day on which he tenders his vote.
 In burgage-tenure boroughs, no length of possession is required from the voters. 1 Dougl. 224.

(a) 7 & 8 W. 3. c. 25. § 8. Persons under twenty-one years of age (a), or persons convicted of perjury or subornation of perjury (b), or employed in managing and collecting the duties of excise, customs, stamps, salt, windows, or houses, or the revenue of the post-office, are incapable of voting at any election. (c)
 28 G. 3. c. 36. (b) 2 G. 2. c. 24. § 6. (c) 22 G. 3. c. 41. But this last act does not extend to freehold offices granted by letters patent, nor to commissioners of the land-tax, or persons acting under them.

2 G. 2. c. 24. Persons lawfully convicted of voting or with-holding their votes in consequence of a bribe, provided they are served with process within two years after the commission of the offence, are for ever disqualified to vote.
 § 7. 9 Geo. 2. c. 3. § 8. By § 8. of the act of 2 G. 2. if the offender discover any other person offending against the act, so that such person be there-upon convicted, he thereby procures an indemnification for himself. But the discovery of an offender already indemnified, it hath been adjudged, will not avail him. Lord Portchester v. Petrie, E. 23 G. 3. B. R.

In general, it seems, that persons receiving alms are disqualified to vote. But by 18 G. 3. c. 29. § 25. parish relief given to the family of any militia-man, during the time of actual service, will not deprive him of his right to vote.

R. Nem. Con. No peer hath a right to vote at any election, nor shall any lord-lieutenant of a county concern himself therein. And by statute 2 W. & M. sess. 1. c. 7. the lord warden of the cinque ports shall not recommend any members there.
 14. Dec. 1699. R. Nem. Con. Feb. 1700. R. 24 Oct. 1702.

5 & 6 W. & M. No officer of the excise, customs, stamps, salt duties, house or window duties, nor any person employed in the post office, shall be capable of voting at any election.
 c. 7. 20. 12 & 13 W. 3. c. 10. 22 G. 3. c. 41.

¶ No justice, receiver, or constable appointed under the police act of 51 G. 3. c. 119. shall, during the time of holding his office, or within six months after quitting it, be capable of voting at any election for the counties of *Middlesex* or *Surry*, the city of *Westminster*, or borough of *Southwark*.¶

For the qualifications of electors in *Scotland* see 6 Ann. c. 6. 9 Ann. c. 5. 12 Ann. st. 1. c. 5. 7 G. 2. c. 16. 16 G. 2. c. 11. For elections for *Chester*, see 34 & 35 H. 8. c. 13. *Wales*, 35 H. 8. c. 11. *Durham*, 25 C. 2. c. 9. *London*, 11 G. 1. c. 18. *New Shoreham*, 11 G. 3. c. 55. *Coventry*, 21 G. 3. c. 54. *Cricklade*, 28 G. 3. c. 36. § 41.]

2. Of the Elected, and their Qualifications.

A knight banneret, or any other under the degree of a baron, 4 Inst. 46, 47. may be elected knight, citizen, or burgess.

An alien, though made a denizen, cannot sit in parliament; Molloy, 382. for to have a power of making laws, it is necessary that he 4 Inst. 47. should be totally received into the society, which he cannot be without the consent of parliament.

¶ According to Lord Coke, an alien naturalized is eligible; but 4 Inst. 47. by 12 & 13 W. 3. c. 2. commonly called "the Act of Succession," it is provided, "That, after the accession of the house of Hanover, no person born out of the king's dominions, except of English parents, (although he be naturalized,) shall be capable of being a member of either house of parliament." And by 1 G. 1. st. 2. c. 4. "No bill for naturalization shall be exhibited without such a prohibitory clause."

Sheriffs are not eligible within their own counties; but a 4 Inst. 47. sheriff of one county may be elected in another. || Hale's Parl. tit. Parliament, 114. Com. Dig. tit. Parliament,

(D.9.) 1 Bl. Comm. 175. Case of Abington, 1 Dougl. Elect. 419. Case of Southampton, 4 Dougl. Elect. 87.—See further 4 Inst. 48. Br. Abr. tit. Parliament 7. Cromp. Jur. 3. 16. Sir Simon D'Ewe's Journ. 38. 436. 624. Rushw. Coll. Vol. 1. 684. Towns. Coll. 185.—The old writ for the election of knights of shires says expressly: "*Notumus quod tu nec aliquis alius vic' dicti reg. nostri aliquoliter sit electus.*"

One under the age of twenty-one years is not (a) eligible; 4 Inst. 47. neither can any lord of parliament sit there until he be of the full age of twenty-one years. (a) By the 7 & 8 W. 3. c. 25. § 8. no person

hereafter shall be capable of being elected a member to serve in parliament, who is not of the age of twenty-one years; and every election or return of any person under that age, is hereby declared to be null and void; and if any such minor, hereafter chosen, shall presume to sit or vote in parliament, he shall incur such penalties and forfeitures as if he had presumed to sit and vote in parliament without being chosen and returned. [This law may be thought to be rather defective, for it remains to be inquired what penalty is here ascertained, and what tribunal is to judge and pronounce sentence. 1 Wooddes. 46.]

None of the (b) judges of the king's bench, common pleas, or barons of the (c) exchequer, that have judicial places, can be chosen knight, citizen, or burgess of parliament; but any that have judicial places in the court of wards, court of dutchy, or other courts ecclesiastical or civil, are eligible. 4 Inst. 47. Whitel. on Gov. 370. (b) Because they sit in the lords' house. 1 Bl. Comm.

169. (c) [So, by 7 G. 2. c. 16. § 16. none of the judges in Scotland can be elected. Thorp, a baron of the exchequer, was speaker to the commons, Ann. 31 H. 6. 3 Com. Dig. tit. Parliament (D.9.) 4 Inst. 47.]

None of the (d) clergy can be elected knight, citizen, or burgess of parliament, because they are of another body, viz. the convocation. ¶ But this reason for their exclusion has long since ceased; they no longer tax themselves, and the convocation, having become insignificant to the crown for that purpose, is now convened only to be separated. Being embodied, as it were, with the laity, subject to parliamentary taxation, and entitled to vote in county elections in respect of their ecclesiastical freeholds; the right of the clergy to a seat in the commons' house would seem to follow as of course. But still doubts had arisen somewhere 4 Inst. 37. Moor, 783. Bl. Com. 169. (d) Though of the inferior order. Com. Dig. tit. Parliament, (D.9.) cites 4 Inst. 47. ¶ See the case of Newport, 2 Lud. 269. and particu-

larly the notes, in which a great deal of valuable information upon this subject is collected, by Mr. *Luders*.

where respecting their *eligibility*, and these doubts it was *expedient* to remove; and this was done by shewing that they were well founded, by passing an act declaring the clergy to be *ineligible*. It is entitled, "An act to remove doubts respecting the eligibility of persons in holy orders to sit in the house of commons," and is as follows:

41 G. 3. c. 63.

"Whereas it is expedient to remove doubts which have arisen respecting the eligibility of persons in holy orders to sit in the house of commons, and also to make effectual provision for excluding them from sitting therein; be it therefore declared and enacted, that no person having been ordained to the office of priest or deacon, or being a minister of the church of *Scotland*, is or shall be capable of being elected to serve in parliament as a member of the house of commons.

§ 2. "That if any person, having been ordained to the office of priest or deacon, or being a minister of the church of *Scotland*, shall hereafter be elected to serve in parliament as aforesaid, such election and return shall be void; and that if any person, being elected to serve in parliament as a member of the house of commons, shall, after his election, be ordained to the office of priest or deacon, or become a minister of the church of *Scotland*, then and in such case the seat of such person shall immediately become void; and if any such person shall, in any of the aforesaid cases, presume to sit or vote as a member of the house of commons, he shall forfeit the sum of five hundred pounds for every day in which he shall sit or vote in the said house, to any person or persons who shall sue for the same in any of his majesty's courts at *Westminster*; and the money so forfeited shall be recovered by the person or persons so suing, with full costs of suit, in any of the said courts, by any action of debt, bill, plaint, or information, in which no *essoign*, privilege, protection, or wager of law, or more than one *imparlance*, shall be allowed; and every person against whom any such penalty or forfeiture shall be recovered by virtue of this act, shall be from thenceforth incapable of taking, holding, or enjoying any benefice, living, or promotion ecclesiastical, and of taking, holding, or enjoying any office of honour or profit under his majesty, his heirs or successors: provided always, that nothing in this act contained shall extend, or be construed to extend, to make void any election of a person to serve as a member of the house of commons, which election shall have taken place before the passing of this act.

§ 3. "Provided also, that no person shall be liable to any forfeiture or penalty inflicted by this act, unless a prosecution shall be commenced within twelve calendar months after such penalty or forfeiture shall be incurred.

§ 4. "That proof of the celebration of divine service, according to the rites of the church of *England*, or of the church of *Scotland*, in any church or chapel consecrated or set apart for publick worship, shall be deemed and taken to be *primâ facie*.

"evidence

“ evidence of the fact of such person having been ordained to
 “ the office of a priest or deacon, or of his being a minister
 “ of the church of *Scotland*, within the intent and meaning of
 “ this act.||

A person attainted of treason, or felony, &c. is not eligible; 4 Inst. 48.
 for he ought, according to the writ, to be *magis idoneus, dis-* Whitel. 09
cretus & sufficiens. Gov. 370.

[So, *temp.* H. 7. Persons outlawed for treason could not Bac. H. 7. 13.
 come into parliament till their attainders were reversed. Com. Dig. tit.
 Parliament,
 (D. 9.)

Nor persons outlawed after, or before judgment, in a civil Ruled by all
 action. the justices.

Com. Dig. *ubi supr.* || Mr. *Hatsell* questions this. See too Mr. Fitzherbert's case, D'Ewes's
 Journ. 479—481. 514—518.|| 1 And. 293.

Nor persons taken in execution upon a judgment.] Moor, 57. Com.
 Dig. *ubi supr.*

The king cannot grant a charter of exemption to any man to 4 Inst. 49.
 be freed from election of (a) knight, citizen, or burgess of the (a) Nor can the
 parliament, because the elections of them ought to be free, and king grant a
 his attendance is for the service of the whole realm, and for the charter of ex-
 benefit of the king and his people, and the whole common-emption to a
 wealth hath an interest therein. lord of parlia-
 ment, to dis-
 charge him

from his attendance in the lords' house. *Ibid.*

By the 8 H. 6. c. 7. it is enacted, “ That they who have the 8 H. 6. c. 7.
 “ greatest number of voices that may expend 40s. by the year, (b) As the
 “ and above, shall be returned (b) knights of the shire, &c. and writ for elec-
 “ that they which shall be chosen, shall be dwelling and (c) re-tion of knights,
 “ sident within the same counties.” &c. was *duos*
milites gladiis
cinctos, &c., it required an act of parliament, viz. 23 H. 6. c. 15., that such notable esquires,
 gentlemen of birth, as are able to be knights, might be eligible. 4 Inst. 10. (c) The like is
 enacted by 1 H. 5. c. 1. as to knights, citizens, and burgesses; but these regulations || *having*
been found, by long usage, to be unnecessary, and being become obsolete — such is the language
 of the legislature! — are repealed by 14 G. 3. c. 58. See the case of Denzell Onslow v.
 Rapley, as reported in a little tract of Lord *Somers*, first published in 1681, and reprinted
 in the 4to. edition of his *State Tracts*, Vol. 1. p. 374. See also Mr. *Douglas's* note (D.) to
 the case of New Radnor, in his *History of Election Cases*, Vol. 1. p. 341., and Burgh's *Politi-*
cal Disquisitions, Vol. 1. p. 291.||

[But now every knight of a shire shall have a clear estate of 9 Ann. c. 5.
 freehold or copyhold in *England, Wales, or Ireland* to the value 41 G. 3. c. 101.
 of 600l. *per annum*, and every citizen and burgess to the value § 23.
 of 300l. (d); except the eldest sons of peers (e), and of persons (d) Or mort-
 qualified to be knights of shires, and except the members for the gage, if the
 two universities, and the member for *Trinity College* in *Dublin*. mortgagee has
 been in pos-
 session seven
 years before
 his election.
 Of this qualification the member must make oath, and give in || (e) The eldest
 the particulars in writing at the time of taking his seat (f); or, sons of peeresses
 upon refusal, the return is void. are within this ex-
 ception. And the 45 members for *North Britain* are out of the act, which is confined to
England and Wales; and the 33 G. 2. c. 20. which was made to render it more effectual,
 expressly

expressly excepts the members for *Scotland*. But the act of union with *Ireland* of 39 & 40 G. 3. c. 67. subjects the *Irish* members to these laws. (f) 33 G. 2. c. 20. A bill to have a conveyance of a qualification given by a father to his son to enable him to sit in parliament, the purpose being answered, was dismissed by Lord *Kenyon* with costs. 6 Ves. 747.]]

(g) 5 & 6 W.
& M. c. 7.

(h) 11 & 12
W. 3. c. 2. 12 &
13 W. 3. c. 10.
6 Ann. c. 7.

15 G. 2. c. 22.

(i) [The acceptance of an office of that kind was considered as a disability at common law; for upon Sir *George Somers'* departure in an official character to *Virginia*, in the time of *James I.* the commons declared his seat vacant, because, by accepting a colonial office, he was rendered incapable to execute his trust. Comm. Journ. Vol. 1. 392, 393.—In 1774 Mr. *Maitland* was elected for the burghs of *North Berwick*, &c., upon which a petition was presented against the election, stating that he was ineligible from his holding the office of clerk of the pipe in the exchequer, which was alleged to be a new office created since the 25th of Oct. 1705. But it was determined, that though the particular office under the name of the *Clerk of the Pipe* did not exist at the time of the union, yet because the functions of that office had been always executed in *Scotland*, though by an officer under another name, this was not a new office within the meaning and spirit of the act of Queen *Anne*, and that therefore Mr. *Maitland* was eligible. 2 Hats. Pr. 56. 2 Dougl. Elect. 423. In June 1785, upon the third reading of the bill "for better examining and auditing the publick accounts," a doubt was suggested by Mr. *For*, whether the commissioners, who were to be appointed under the authority of that bill, would come within the meaning of these words of the statute, as holding a new office, and by that be disqualified from being eligible for sitting in the house of commons; or, whether they would be considered as executing only the old office of auditor of the imprest, from which the then present auditors were removed by that bill. Mr. *Pitt*, chancellor of the exchequer, seemed to think from some words in the bill, that it was a new office, and therefore no clause was necessary specifically to exclude these commissioners from the house, and the speaker was of the same opinion. But upon considering Mr. *Maitland's* case, and it being intended that these commissioners should not be eligible, a clause was inserted, declaring directly, that they should be incapable of being elected, or sitting as members.] (k) 6 Ann. c. 7.

(l) 22 G. 3. c. 45. See *Curtis v. Perry*, 6 Ves. 739.

No persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury (g), nor any of the officers following (h), viz. commissioners of prizes, transports, sick and wounded, wine licences, navy, and victualling; commissioners of the revenue in *Ireland*; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations (i) and their deputies; officers of *Minorca* or *Gibraltar*; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hawkers and pedlars, nor any persons that hold any new office under the crown created since 1705 (k), are capable of being elected or sitting as members. Nor shall any contractor (l) with the officers of government, or with any other person for the service of the publick, be capable of being elected, or of sitting in the house, as long as he holds any such contract, or derives any benefit from it.

Comm. Journ. Vol. 1. 392, 393.—In 1774 Mr. *Maitland* was elected for the burghs of *North Berwick*, &c., upon which a petition was presented against the election, stating that he was ineligible from his holding the office of clerk of the pipe in the exchequer, which was alleged to be a new office created since the 25th of Oct. 1705. But it was determined, that though the particular office under the name of the *Clerk of the Pipe* did not exist at the time of the union, yet because the functions of that office had been always executed in *Scotland*, though by an officer under another name, this was not a new office within the meaning and spirit of the act of Queen *Anne*, and that therefore Mr. *Maitland* was eligible. 2 Hats. Pr. 56. 2 Dougl. Elect. 423. In June 1785, upon the third reading of the bill "for better examining and auditing the publick accounts," a doubt was suggested by Mr. *For*, whether the commissioners, who were to be appointed under the authority of that bill, would come within the meaning of these words of the statute, as holding a new office, and by that be disqualified from being eligible for sitting in the house of commons; or, whether they would be considered as executing only the old office of auditor of the imprest, from which the then present auditors were removed by that bill. Mr. *Pitt*, chancellor of the exchequer, seemed to think from some words in the bill, that it was a new office, and therefore no clause was necessary specifically to exclude these commissioners from the house, and the speaker was of the same opinion. But upon considering Mr. *Maitland's* case, and it being intended that these commissioners should not be eligible, a clause was inserted, declaring directly, that they should be incapable of being elected, or sitting as members.] (k) 6 Ann. c. 7. (l) 22 G. 3. c. 45. See *Curtis v. Perry*, 6 Ves. 739.

41 G. 3. c. 52.
§ 4.

¶ Nor shall any person holding the like offices, and placed in the like situations in *Ireland*, be capable of being elected, or of sitting as members of the house of commons of any parliament of the United kingdom.

§ 1.

All persons who were disabled from sitting in the house of commons of any parliament of *Great Britain* are disabled from sitting in the parliament of the United kingdom.

§ 2.

All persons who were disabled from being elected and sitting in the house of commons of any parliament in *Ireland*, are disabled

abled from being elected and sitting for any place in *Ireland* in the parliament of the United kingdom.

No person holding a place in *Ireland* created since the passing § 5. of the *Irish* act of 33 G. 3. c. 42. is capable of being elected and sitting in any parliament of the United kingdom.||

No person having a pension under the crown during pleasure, 6 Ann. c. 7. or for any term of years, is capable of being elected. 1 G. 1. c. 56.

If any member accepts an office of profit from the crown, except an officer (a) in the army or navy accepting a new commission, his seat is void; but such member, provided the office were prior to 1705, is capable of being re-elected. 6 Ann. c. 7 (a) [When Admiral *Boscawen* was appointed general of marines

In 1759, there was a doubt whether, the marines being to serve at land as well as at sea, and being regimented, he, being only a sea-officer, would not vacate his seat by accepting the appointment; that part of it which concerned the land-service being to him, a mere naval officer, a new appointment, and not a promotion in the navy. But, upon consideration, and consulting with the law-officers of the crown, and after inspecting the several documents and acts relating to the matter, it was determined, though with much doubt, that he should not vacate his seat. 2 Hats. Pr. 58. It is provided by 18 G. 3. c. 59. § 4. and 33 G. 3. c. 36. that the seats of members shall not be vacated by the acceptance of a commission in any corps of fencible men in *Scotland*, or in any corps to be raised in *Great Britain*, in which the officers shall not be entitled to half-pay and rank in the army after their actual service.]

|| If any member accepts an office of profit from the crown, or by the nomination or appointment, or by any other appointment, subject to the approbation of the lord lieutenant, lord deputy, lords justices, or other chief governor or governors of *Ireland*, his seat becomes void, but (if not incapacitated by any thing before contained in the act) he may be elected again for the same or any other place.|| 41 G. 3. c. 52. § 9.

No registrar (for registering memorials of deeds, &c.) within the west or east riding in the county of *York*, or his deputy, is capable of being elected. 2 & 3 Ann. c. 4. § 22. 6 Ann. c. 35. § 32.

|| No justice of the peace appointed under the police act of 51 G. 3. c. 119. is capable, during the continuance of such appointment, of being elected or of sitting as a member of the house of commons.||

No candidate shall, after the *teste* of the writ or summons to parliament, or after the *teste*, or the issuing out, or ordering of the writ of election upon the calling or summoning of any parliament, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons or to the place in general, in order to his being elected, upon pain of being incapable, upon such election, of serving for that place in parliament. 7 & 8 W. 3. c. 4. The treating not only vacates that election, but incapacitates the candidate from being re-elected, and sitting upon a second return. 3 Lud. 162. || A contract to pay for provisions furnished in breach of this act cannot be enforced. *Ribbans v. Cricket*, 1 Bos. & Pull. 264.||

|| If any person or persons shall, either by himself, herself, or themselves, or by any other person or persons for or on his, her, or their behalf, give or cause to be given, directly or indirectly, or promise or agree to give any sum of money, gift, or reward to any person or persons upon any engagement, contract, or agreement, that such person or persons to whom, to whose

whose use, or on whose behalf such gift or promise shall be made, shall by himself, herself, or themselves, or by any other person or persons whatsoever at his, her, or their solicitation, request, or command, procure or endeavour to procure the return of any person to serve in parliament for any county, stewarty, city, &c.; every person so returned and so having given, or so having promised to give, or knowing of and consenting to such gifts or promises upon any such engagement, contract, or agreement, shall be incapacitated to serve in that parliament for such county, stewarty, &c. and shall be deemed and taken to be no member, and enacted to be as if he had never been returned or elected a member in parliament.

And by § 3. the same disability is incurred if the seat be obtained by giving or promising to give for that purpose any office, place, or employment.

52 G. 3. c. 144.

A member of the house of commons, against whom a commission of bankrupt is awarded, and who is found and declared a bankrupt under it, is incapable of sitting and voting for twelve calendar months, unless within that period the commission be superseded, or the creditors proving their debts be satisfied to the full amount of them: and if within that time neither the commission be superseded, nor the debts paid, then upon notice thereof immediately after the expiration of it by the major part of the commissioners of bankrupt to the speaker, the election of such member is void, and a writ issues for the election of another member. ||

2 Hats. Pr. 68.

At a general election, while the writs are executing together in all parts of the kingdom, it has been usual for the same person to be

[A person elected and returned a member of the house of commons is not eligible for any other place, unless by the acceptance of an office, or some other act, he vacates his seat. One reason, among others, assigned for this is, that though a member is elected by the freeholders of a county, or the electors of a particular borough, he becomes, when elected, the representative of the whole commonalty of *Great Britain*, and is therefore already the legal representative of the county or borough whose seat is at that time vacant. (a)]

electd for two

or more different places, and, when the house meets, for such person to make his election for which place he will serve. But, when a person is elected, and the indenture of return is executed, and actually *returned* into the crown office, from that instant he becomes in law a member of the house of commons, and is not eligible for any other place. See Lord Althorpe's case, *March 1782.* (a) || This is certainly a very bold use of the synecdoche. The true principle would seem to be, that no man can serve two masters. ||

Comm. Journ.

3d Dec. 1708.

This point was

discussed with considerable ingenuity and ability in the house of lords on an appeal from a decree of the court of session. The question arose upon the claim of Lord *Daer*, eldest son of the Earl of *Selkirk*, to be enrolled a freeholder of the stewarty of *Kirkcudbright*, at the *Michaelmas* court in 1791. It was objected, (and it was the sole objection, for his lordship was admitted to be in every other respect qualified,) that his lordship, being the eldest son of a peer of the realm, was incapable of being enrolled. The freeholders, however, admitted his claim; but, upon an appeal to the court of session, the objection was sustained, and his lordship's name was directed to be expunged from the roll; and that decree was affirmed in the house of lords. *Lord Daer v. Johnstone and others.* Printed cases of the lords, 26th March 1793.

¶ A peer of *Ireland* is not thereby disqualified from being elected to serve, if he shall so think fit, for any county, city, or burgh of *Great Britain*, in the house of commons of the United Kingdom, unless he shall have been previously elected one of the representative peers of *Ireland* to sit in the house of the United Kingdom; but so long as such peer of *Ireland* continues to be a member of the house of commons, he is not entitled to the privilege of pceage, nor capable of being elected to serve as a peer on the part of *Ireland*, or of voting at any such election; and he is liable to be sued, indicted, proceeded against, and tried as a commoner for any offence with which he may be charged.]]

39 & 40 G. 3.
c. 67.

[Ambassadors, and ministers employed abroad, are eligible. The commissaries appointed in 1714 to treat with the commissaries of France; and the commissioners appointed in 1778 to treat with the Americans, were considered as falling within this description.]

General Carpenter's case,
July 7th, 1715.

The clerk of the parliaments has been elected, and admitted to sit as a member of the house of commons.]

Mr. Rose's case, June,
1788.

3. Of the Duty of Returning Officers, and the Remedies against them.

[We have seen above, that the writ of summons issues from the clerk of the crown in chancery, in consequence of a warrant from the lord chancellor, or speaker of the house of commons, according as the election is general or not. Within three days (a) after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs within his county, commanding them to elect their members: and these officers are to proceed to election within eight days (b) from the receipt of the precept, (the day of which receipt they are to indorse on the back of the precept, in the presence of the party from whom they respectively receive it,) giving four days' notice of the same; and to return the persons chosen, together with the precept, to the (c) sheriff.

23 H. 6. c. 14.
7 & 8 W. 3.
c. 25. 12 Ann.
Sess. 1. c. 15.
(a) The officer of the cinque ports has six days, by 10 & 11 W. 3. c. 7.
(b) In *New Shoreham*, the election must be within twelve days, with eight days notice thereof.

11 G. 3. c. 55. So of Cricklade, 25 G. 3. c. 31. and Aylesbury, 44 G. 3. c. 60. (c) The notice must be given within the hours of 8 o'clock in the forenoon and 4 in the afternoon, from the 25th of *October* to the 25th of *March* inclusive, and within the hours of 8 in the forenoon and 6 in the afternoon, from the 25th of *March* to the 25th of *October* inclusive, and not otherwise. St. 33 G. 3. c. 64.

With respect to county elections, the sheriff, having indorsed on the writ the day on which he received it, shall, within two days after the receipt thereof, cause proclamation to be made at the place (d) where the ensuing election ought by law to be holden, of a special county court to be there holden for the purpose of such election only, on any day, *Sunday* excepted, not later from the day of making such proclamation than the sixteenth day, nor sooner than the tenth day.

25 G. 3. c. 84.
§ 4. (d) The sheriff cannot alter the place without the consent of all the candidates. See an express act of parliament, 20 G. 3.

c. 1. for holding the election for *Hampshire* at *New Alresford*. So, for adjourning the poll from *Winchester*, to *Newport* in the *Isle of Wight*. 7 & 8 W. 3. c. 25. 25 G. 3. c. 84. § 16.

Upon the day fixed for the election, the returning officer is first to take an oath against bribery, and for the due execution of his office. The candidates must, if required by each other, or by two electors, swear to their qualification; and the electors, both in counties and boroughs, to theirs; and the latter are also compellable to take the oaths of allegiance, supremacy, and abjuration, and the oath against bribery and corruption.

34 G. 3. c. 73. And to prevent delays, the returning officer is required, at the request of any of the candidates, made in writing under his hand, to appoint commissioners to administer the oaths of allegiance, supremacy, and abjuration, who are to deliver a certificate to the party to whom the oaths have been administered, of his having taken them, upon the production of which he is permitted to poll in like manner as if he had taken the oaths before the returning officer.

25 G. 3. c. 84. § 5. All electors for cities and boroughs are likewise to swear to their name, addition, or profession, and place of abode; and also, like freeholders in counties, that they believe they are of the age of twenty-one, and that they have not been polled before at the election.

§ 1. If a poll is demanded at any election for any county or place in *England* or *Wales*, it shall commence either on that day, or at the farthest upon the next, and shall be continued from day to day (*Sundays* excepted) till it be finished; and it shall be kept open seven hours at the least each day, between eight in the morning and eight at night; but, if it should be continued till the fifteenth day, then the returning officer shall close the poll at or before three in the afternoon, and shall immediately, or on the next day, publicly declare the names of the persons who have a majority of voices; and he shall forthwith make a return accordingly, unless a scrutiny is demanded by any candidate, or by two or more of the electors, and he shall deem it necessary to grant the same, in which case he is to proceed thereupon, but so as that, in all cases of a general election, if he has the return of the writ, he shall cause a return of the members to be filed in the crown-office on or before the day on which the writ is returnable. If he is a returning officer acting under a precept, he shall make a return of the precept at least six days before the day of the return of the writ; but, if it is not a general election, then, in case of a scrutiny, a return of the member shall be made within thirty days after the close of the poll. Upon a scrutiny, the returning officer cannot compel any witness to be sworn, though the statute gives him a power of administering an oath to those who *consent* to take it. And where there are objections to votes on each side, he shall decide alternately on them.

7 & 8 W. 3. c. 7. The scrutiny being finished, the sheriff must make a return
 12 Ann. 1 Sess. of the persons who have a majority on the revised poll within
 c. 15. 25 G. 3. the time limited by law. And the persons so returned are the
 c. 84. § 14. sitting members until the house of commons, upon petition, shall
 Double da- images may be adjudge the return to be false and illegal. For a false return,

the sheriff, by the old statutes of H. 6. forfeits 100*l.* and the returning officer in boroughs 40*l.*; and they are besides liable to an action at the suit of the party grieved, in which double damages shall be recovered. And they are also liable to such an action for wilfully neglecting, delaying, or refusing to return the person whom the house of commons shall adjudge to be the legal representative. And for any offences against the act of 25 G. 3. c. 84. they are punishable by information or indictment.

recovered for any false return, though there have been no determination of the house of commons relative to the right of election for the place in question.

Wynne v. Middleton, 1 Wils. 125. — By stat. 7 & 8 W. 3. c. 7. the sheriff was liable to a penalty of 500*l.* for not making a return, at the return of the writ, if it were a general election, or within fourteen days, if an occasional vacancy. Any person bribing the returning officer forfeits 300*l.* 7 & 8 W. 3. c. 7.

When the election is over, the returning officer is bound, under a penalty of 500*l.* to deliver forthwith a copy of the poll to any person desiring it, and paying a reasonable charge for writing it. And the sheriff must, within twenty days after a county election, deliver upon oath to the clerk of the peace all the poll books of such election, without any embezzlement or alteration; and where there are more than one clerk of the peace, the original poll books to one of the clerks, and attested copies to the rest, to be kept among the records of the county.

7 & 8 W. 3. c. 25. § 6. 10 Ann. c. 23. § 5. The check polls, as well as the original books, must be lodged with the clerk of the peace. Rex v. Davies, 2 Str. 1048.

If a person having a right to vote is hindered by the presiding officer, an action on the case lies at common law.

Ashby v. White, 2 Ld. Raym. 938.

1 Salk. 19. 6 Mod. 45. 8 State Tr. 89. 1 Br. P. C. 45. But the obstruction must be wilful and malicious. Drewe v. Colton, Lent assizes for Cornwall, cor. Wilson J. 2 Lud. 245. 1 East, 563. notes. S. C. Sargent v. Millward, 2 Lud. 248.

must be wilful

Whether it lies at common law for a false, or double return.

2 Lev. 114. 2 Vent. 370.

3 Lev. 29. 2 Salk. 502. 1 Wils. 127.

The returning officer, it seems, is not to judge of the disability of candidates.

1 Comm. Journ. 511.

513. 515. 880. 11 Comm. Journ. 201.

|| But with respect to his duty in deciding upon the qualifications or disqualifications of electors, great doubts have been entertained. It has been contended on the one side, that he is merely ministerial (*a*) with respect to the admission or rejection of votes, and that whenever votes are legally tendered, and the persons proposing to vote are willing to take such oaths as may be legally required of them, he cannot, upon any grounds, reject them. On the other hand, it has been urged (*b*), that he has the power to receive or reject votes tendered at the poll, according to their legality or illegality, of which he is to judge.

1 Roe, Elect. 468.

(*a*) This has been inferred from the limited powers of a returning officer, who has no authority to administer an oath, (for

general purposes, according to the case of Bristol, 26th Dec. 1680. 9 Journ. 684.) or to examine evidence. It has been contended also, that from several statutory regulations imposing the freeholder's oath, and from the penalty upon persons voting as freeholders, not having such freehold as is described in the oath, it is clear that the legislature intended to make that the only test of qualification at county elections; and that there does not appear to be any reason to suppose that the nature of the duty of a returning officer

in this respect is different at any other elections. See the arguments in the *Middlesex* case, 2 Peckw. 15. See also the cases of *Berkshire*, 22d Dec. 1690. 10 Journ. 520. *Cambridgeshire*, 12th Jan. 1693. 11 Journ. 92. See also the cases of *Hertfordshire* and *Surry*, 16th Jan. 1695. 11 Journ. 393, 394. wherein it was holden, that evidence ought not to have been admitted to disqualify an elector as no freeholder, who swore himself at the election to be a freeholder. See also *Old Sarum*, 11th Dec. 1706. 15 Journ. 60. *Com. Dig. tit. Viscount* (C. 4.) *Bull. N. P.* 64. and *Heyw. Co. El.* 33. 472. where this doctrine is supported, and the cases are collected. (b) It has been said, that if he has no such power, the freedom of election cannot be insured, inasmuch as any persons who are willing to take the oaths required, although in truth not entitled to vote, cannot be excluded: that the statute of 2 G. 2. c. 24. in requiring the returning officer to return such persons as shall, to the best of his judgment, have the majority of legal votes, evidently contemplates a judicial character in him, and that the very essence of a scrutiny depends upon the same doctrine. See the arguments in the *Middlesex* case, 2 Peckw. 13. See also 1 *Comm.* 343. where Mr. Justice *Blackstone* mentions the duty in question as one of the *judicial* duties of the sheriff; and the case of *Bedfordshire*, 28th June 1715, wherein it was resolved, that the counsel for the petitioner should be admitted to give parol evidence as to a person's being no freeholder, who swore himself to be so at the election, 18 Journ. 190.; and the case of *Yorkshire*, 26th Feb. 1735, where a resolution passed to the same effect, after reference to several former entries on the journals. 22 Journ. 593, 594.

By 9 Ann. c. 20. § 8. reciting, that in divers counties, boroughs, towns corporate, and cinque ports, where the mayor, bailiff, or other officer or officers, to whom it belongs to preside at the election, and make return of any member to serve in parliament, the same person hath been re-elected into such office for several years successively, which hath been found inconvenient; it is enacted and declared, that no person or persons who shall be in such annual office for one whole year, shall be capable to be chosen into the same office for the year immediately ensuing; and where any such annual officer or officers is or are to continue for a year, and until some other person or persons shall be chosen and sworn into such office, if any such officer or officers shall voluntarily and unlawfully obstruct and prevent the choosing another person or persons to succeed into such office at the time appointed for making another choice, shall forfeit 100*l.* for every such offence, &c.

Rex v. Richardson, 9 East, 469.

In the construction of this statute, it hath been holden to be confined to *corporate* officers; and that therefore where the portreeve of a borough, who was the returning officer, was elected at a prescriptive court-leet, he was not within it.

Spilsbury v. Micklethwaite, 1 Taunt. 146.

If the freedom of election is violated by any riotous and tumultuous proceedings, the sheriff may order the offenders to be taken into custody, and carried before a magistrate.||

(E) Of the Method of passing Bills.

4 Inst. 25. Hob. 111. Fortesc. Laud. c. 18. Dyer, 92.

(a) Difference between an ordinance and an act of parliament is, that an ordinance wanteth the threefold consent, and is only ordained by one or two of them. 4 Inst. 25. [See Co. Lit. 159. b. n. 2. 13th ed.]

AN act of parliament must have the consent of the lords and commons, and the royal assent of the king; and (a) whatsoever passeth in parliament by this threefold consent, hath the force of an act of parliament.

between an ordinance and an act of parliament is, that an ordinance wanteth the threefold consent, and is only ordained by one or two of them. 4 Inst. 25. [See Co. Lit. 159. b. n. 2. 13th ed.]

[The form of giving the royal assent to bills has been for a considerable time past by the clerk of the house of lords, either the king present, or in the presence of commissioners authorized by him. There have been instances (a) of bills being passed by letters patent. In the statute of the 33d of Henry the Eighth, c. 21. (b) intituled, "Queen Catherine and her complices attainted of high treason," it is declared, § 3. "That the king's royal assent, by his letters patent under the great seal, and signed with his hand, and declared and notified in his absence to the lords spiritual and temporal, and to the commons assembled together in the high house, is and ever was of as good strength and force as though the king's person had been there personally present, and had assented openly and publickly to the same." And in § 4. it is enacted, "That this royal assent, and all other royal assents hereafter to be so given by the kings of this realm, and notified as is aforesaid, shall be taken and reputed good and effectual to all intents and purposes without doubt or ambiguity, any custom or use to the contrary notwithstanding."]

(a) Lords' Journ.
22 March 1620.
11 July 1625.
(b) Rast. Stat.
tit. Parliament,
§ 18.

¶ One of the grounds alleged for the reversal of the attainder of the Duke of Norfolk in the reign of Henry the Eighth was, that the king had *not signed* the letters patent for giving the royal assent to the act with his own hand, but that his stamp had been set to them by one *William Clerk*. And the question of the validity of the act upon this ground was brought and argued before all the judges at *Serjeants' Inn*, by the persons who had purchased the lands of the attainted duke; but it does not appear that the judges gave any opinion upon it.]]

3 Parl. Hist.
298. Dyer, 93.
It would seem that they considered it as valid, for a special act was passed in the first year of Queen Mary for reversing the attainder,

and by that act, as it is given by *Burnet* in his History of the Reformation, Vol. 2. p. 257. it is declared, that the law was and ever hath been, that the royal assent should be given, either by the king being present, or, in his absence, by a commission under the great seal, signed with his hand, and publickly notified to the lords and commons. And among other reasons for declaring the act of attainder to be null and void by the common law of the land, it is stated, that King Henry the Eighth died the next night after the commission was given for passing the bill, and that it did not appear that he had given his assent to it; that the commission was not signed by the king's hand, but only by his stamp, and that that was put to the nether end and not to the upper part of the bill, which shewed it was done in disorder; and that it did not appear that those commissioned for it had given the royal assent to it.

All the commissions and letters patent for giving the royal assent to bills agreed upon by both houses, recite, "Whereas we have seen and perfectly understood an act (a) agreed upon by you (b), our loving subjects, the lords spiritual and temporal, and the commons in this our present parliament assembled, and indorsed by you, as hath been accustomed," &c. &c. This recital, saith Mr. *Hatsell*, which shews the necessity of the bill being communicated to the king, after it has been agreed upon by both houses, clearly explains, what might otherwise have been matter of doubt, "Why the commissioners, who in several instances had been, by a prior commission, authorised not only to begin and hold the parliament, but to do every thing which for us, and by us, shall be there to be done, could

2 Hats. Pre.
323.

(a) Qu. a bill.
(b) "It is not only lawful," saith my Lord *Clarendon*, "for the privy council, but their duty, to give faithfully and freely their advice to the king upon all matters concluded in par-

liament, to which his royal assent is necessary, as well as upon any other subject whatsoever. Nay, a privy counsellor, as such, is bound to dissuade the king from consenting to that which is prejudicial to the crown; at least to make that prejudice manifest to him, though, as a private person, he could wish the matter consented to. And therefore, by the constitution of the kingdom, and the constant practice of former times, all bills, after they had passed both houses, were delivered by the clerk of the parliament to the clerk of the crown, and by him brought to the attorney-general, who presented the same to the king in council; and having read them, declared what alterations were made by those bills to former laws; and what benefit or detriment, in profit or jurisdiction, would accrue thereby to the crown; and then, upon a full and free debate by his counsellors, the king resolved accordingly upon such bills as were to be enacted into laws, and respited the other that he thought not fit to consent to. As this hath been the known practice, so the reason is very visible, that the royal assent being a distinct and essential part towards the making a law, there should be as much care taken to inform the understanding and conscience of the king upon those occasions, as theirs who prepare the same for his royal assent." History of the Rebellion, Vol. i. book 3. p. 157. Note, The prerogative of the crown to withhold the royal assent has not been exercised since the 11th of March 1707, when Queen Anne refused her assent to "a bill for settling the militia of that part of Great Britain called Scotland."

2 Hats. Prec.
320.

When a bill has passed both houses, it is not necessary that it should be sent back to the commons before it receives the royal assent, unless it be a bill of supply, for this the commons claim a right of presenting by their speaker.

2 Hats. Prec.
221.

On the 7th of March 1785, a commission was made out and passed the great seal, for giving the royal assent to several bills agreed upon by both houses; but, by some mistake, the malt bill, which had passed both houses, and the agreement to which by the lords had been communicated to the commons, was left out. As soon as this was discovered, from the list of bills ready for the royal assent, which is always sent to the speaker, notice of the error was given to the lords, and a desire expressed that it might be rectified by issuing a new commission, and not executing the commission which was then ready. Accordingly, no proceedings were had upon the first commission, but another commission, in which the malt-bill was included, was prepared, and passed the great seal, and the bills named in it received the royal assent the next day, the 8th of March.

2 Hats. Prec.
337-8. 3 Hats.
Prec. 24. 63.
In a bill which
passed in 1663,
intituled, "An

Bills for a general pardon; for the reversal of attainders or outlawries, and for restitution in blood; for granting honours and precedency, originate with the crown, and must be formally recommended by the king before they can be taken into consideration. So, of bills of supply, and all bills for the applica-
tion

tion of publick money. But, though recommended immediately from the crown, these bills must afterwards receive the royal assent in the same manner with other bills.]

Lord *Lucas* on the marriage of the said earl with the daughter of the said Lord *Lucas*, there is a clause (which, as no particular mention of it appears in the Lords' Journal, was probably inserted whilst the bill was before the committee) that has no reference to the title of the bill; and though it relates to honours and dignities, does not appear to have had the consent of the crown till the bill was offered for the royal assent. The clause recites, "That *Charles 2.* having by letters patent created the Countess of *Kent* Baroness *Lucas*, to her and her heirs male, and for want of such issue, to the heirs of her body; and if at any time after her death, and default of issue male, there shall be more persons than one co-heirs, that then the said honour shall not be in suspence or extinguished, but shall go to such of the co-heirs as by course of descent would be entitled to other entire inheritances, as offices of honour or publick trust;" the clause proceeds to enact, "That the said declarative clause in the said letters patent shall be and is hereby ratified and confirmed; and that the said barony, honour, and title, from time to time, &c. &c." repeating the words of the letters patent. By this uncommon limitation, perhaps the only one of its kind, the barony of *Lucas*, upon the death of the Marchioness *Grey*, widow of *Philip* second Earl of *Hardwicke*, in 1797, devolved upon her ladyship's eldest daughter *Amabella* Viscountess *Polwarth*, who accordingly assumed the title of Baroness *Lucas*. The Marchioness *Grey* was daughter of *Amabel* Countess of *Breadalbane*, the eldest daughter of *Henry*, thirteenth Earl and first Duke of *Kent*.

|| In general, each house has a right to originate and pass such bills as it thinks proper, except that the lords have in several instances claimed the exclusive right, that bills for restitution of honours, or in blood, should commence with them; and the commons have on their part asserted, and, it should seem, invariably preserved, the exclusive exercise of the right, "that bills of supply, imposing burthens on the people, should be the grant of the commons; and that the lords should have no other voice than, as one branch of the legislature, by their assent, to give the authority of a law to the levying of those aids and taxes, which the commons should think wise and fitting to impose." Other bills, of what nature soever, whether relating to the parliament itself, or to either house separately, may have their commencement indifferently in either house.]

Anciently, the manner of proceeding in bills was much different from what it is at this day; for, formerly, the bill was in nature of a petition, and these petitions were entered upon the lords' rolls, and upon these rolls the royal assent was likewise entered; and upon this, as a ground-work, the judges used, at the end of the parliament, to draw up the act of parliament into the form of the statute, which was afterwards entered upon the rolls called the *statute rolls*; which were different from those called the *lords' rolls*, or the *rolls of parliament*: upon these *statute rolls*, neither the bill, nor petition from the commons, nor the answer of the lords, nor the royal assent, were entered, but only the statute, as it was drawn up and penned by the judges; and this was the method till about *Henry* the Fifth's time. In his time it was desired that the acts of parliament might be drawn up and penned by the judges before the end of parliament; and this was by reason of a complaint then made, that the statutes were not equally and fairly drawn up and

Act for settling the lands of the Earl of

Kent and the

Lord *Lucas*,"

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and first Duke of *Kent*.

3 Hats. Prec.

62, 63.

4 Inst. 25, 26

Goodal, 286.

Dyer, 131.

8 Co. 1.

worded. After the parliament was dissolved or prorogued, in Henry the Sixth's time, the former method was altered, and then bills *continentes formam actus parliamenti* were first used to be brought into the house. The bills (before they were brought into the house) were ready drawn, in the form of an act of parliament, and not in the form of a petition, as before; upon which bills it was written by the commons, *Soit baile al seigneurs*; and by the lords, *Soit bayle al roye*; and by the king, *Le roy le veut* (a); all this was written upon the bill, and the bill, thus indorsed, was to remain with the clerk of the parliament, and he was to enter the bill thus drawn at first, in the form of an act of parliament, or statute, upon the statute rolls, without entering the answer of the king, lords, or commons upon the statute rolls, and then issued out writs to the sheriffs, with transcripts of the statute rolls, viz. of the bill drawn at first in the form of a statute, and without the answer of the king, lords, and

(a) See Observations on Stat. 35. Note (s).

(b) They were commonly to the bill, to (b) proclaim the statute. anciently proclaimed by the sheriff, but, upon the invention of printing, this method was discontinued; so that at this time every body is obliged to take notice of an act of parliament at his peril. 4 Inst. 26.

4 Inst. 34.

In the lords' house, the lords give their voices from the *puisne lord seriatim*, by the word of *content*, or *non content*.

4 Inst. 35.

The commons give their voices upon the question by *yea* or *no*; and if it be doubtful, and neither party yield, two are appointed to number them; one for the *yeas*, another for the *noes*; the *yeas* going out, and the *noes* sitting; and thereof report is made to the house. At a committee, though it be of the whole house, the *yeas* go on one side of the house, and the *noes* on the other, whereby it will easily appear which is the greater number.

4 Inst. 12.

[(c) But not when they sit to exercise judgment.

Stand. Ord.

House of

Lords, 11th

June 1689, and

15th March

1697. 8vo.

edit. 1748.

(d) They are

now made by

the king's licence.

Els. c. 5.]

To the passing of a bill, the assent of the knights, citizens, and burgesses must be in person, but the lords may give their votes by proxy (c). And the reason hereof is, that the barons did always sit in parliament in their own right, as part of the *pares curtis* of the king; and therefore, as they were allowed to serve by proxy in the wars, so they had leave to make their proxies in parliament (d); but the commons coming only as representing the *barores minores*, and the socage tenants in the county, and the citizens and burgesses as representing the men of their cities and boroughs, they could not constitute proxies, because they themselves were but proxies and representatives of others, according to that maxim of law, *delegata potestas non potest delegari*.

1 Wooddes. 41.

Els. c. 5. Ord.

25 Feb. 1625.

ibid. (e) Ord.

11th Feb. 1694.

ibid.

[Proxies from a spiritual lord are to be made to a spiritual lord; and from a temperal lord to a temporal lord; and no lord can receive more than two proxies: and a lord voting in a question must vote as proxy, if proxies are called for. (e)]

Els. c. 5. A lord shall not have above

It hath been made a question, if a proxy be given to two or more lords, and they differ, whose voice shall stand; which is said

said to have been resolved by the Earl of *Manchester*, lord president of the council, in favour of him who is first named in the delegation, and present. But according to Lord *Coke*, if three are proxies of the same lord, and all present, and one is content that a bill pass, and the other two are not content, this is no voice.

The mere presence of the lord in the house, though he neither argue, consent, nor speak any thing, seemeth to be a revocation of his proxy.

A lord may be summoned with a clause that he do not make a proxy.]

two proxies.
By order 2 Car.
Rushw. 269.
4 Inst. 12, 13.

4 Inst. 13.

Seld. 3 Vol.
2 P. 1476.

(F) *Of the Continuance, Adjournment, Prorogation, and Dissolution of the Parliament.*

THE parliament can neither begin nor end without the king's presence, either in person, or by (a) representation.

4 Inst. 48.
(a) *Vide* 33 H. 8.
c. 25.

The passing of any bill or bills, by giving the royal assent thereunto, or the giving of any judgment in parliament, doth not (b) make a session, but the session doth continue until it be prorogued or dissolved.

4 Inst. 27.
(b) That the courts of justice are to take notice of the

commencement of parliaments, and also of prorogations and sessions. Lev. 296. Raym. 191. Hetl. 119. Dyer, 203.

When a parliament is called, and doth sit, and is dissolved without any act of parliament passed, or judgment given, it is (c) no session of parliament, but a convention.

4 Inst. 38.
(c) The statute of *jeofails*, made in *Oz-*

ford, 16 & 17 Car. 2. c. 8. was to continue and be in force for three years, and from thence to the end of the next session of parliament; but because the parliament convened next after the expiration of the three years was prorogued without passing any act, the court held it no session, at least not such a session as was intended to determine the aforesaid act. Raym. 187. Lev. 442. 2 Keb. 529.

The diversity between a prorogation and an adjournment, or continuance of the parliament, is, that by the prorogation in open court there is a session, and then such bills as passed in either house, or by both houses, and had no royal assent to them, must at the next assembly begin again, &c.; for every several session of parliament is, in law, a several parliament; but, if it be only adjourned or continued, then there is no session, and, consequently, all things continue still in the same state they were in before the adjournment or continuance.

4 Inst. 27.
Raym. 120.
|| The first notice we have of a prorogation is in the 8 H. 4. This, which continued longer than any preceding parliament, viz. almost a

whole year, was three times prorogued. Parl. Hist. Vol. 2. p. 107. Henry the Sixth's reign was the first in which prorogations began to be made for any length of time, and they were but little used till that of Henry the Eighth.—The prerogative of the crown in the proroguing of parliament would seem to be under no restrictions; but the time, in tenderness of the persons of members, has generally not exceeded forty days. Upon a late occasion there was such an excess *per incuriam*; but it was corrected as soon as discovered. By proclamation of 19th Oct. 1815, the parliament, which then stood prorogued to the 2d Nov. was further prorogued to the 1st Feb. following, then to meet for dispatch of business. But, by proclamation of 31st Oct. 1815, the proclamation of 19th Oct. was discharged and recalled, and the parliament was prorogued to 17th Jan. following; and afterwards, by proclamation of 27th Nov. 1815, the parliament which so stood prorogued to 27th Jan. was further prorogued to 1st Feb. then to sit for the dispatch of business.||

4 Inst. 28.

(d) Both houses must be prorogued together and dissolved together, for one cannot subsist without the other. Sir Robert Atkins's Argument, 51. [It is not a prorogation of the house of lords or commons, but of the parliament. 1 Bl. Comm. 187.]

2 Hats. Pr. tit. King.

2 Hats. Pr. 309, 310.

The house of commons is, to many purposes, a (*d*) distinct court, and therefore is not prorogued or adjourned by the prorogation or adjournment of the lords' house; but the speaker, upon signification of the king's pleasure, by the assent of the house of commons, doth say, this court doth prorogue, or adjourn itself; and then it is prorogued or adjourned, and not before; but, when it is dissolved, the house of commons are sent for up to the higher house, and there the lord chancellor or keeper, by the king's commandment, dissolves the parliament; and then it is dissolved, and not before.

[There seems to be no doubt but that it is the privilege of both houses to adjourn themselves. The king may signify his desire, and has frequently done so, that the parliament should adjourn itself; but he has no authority to adjourn it, and it is in the wisdom and prudence of either house to comply with his requisition or not, as they see fitting.]

A prorogation of the parliament is either by the king's command, and in his presence, signified by the lord chancellor, or speaker of the house of lords, to both houses; or by writ under the great seal directed to the lords and commons; or by commissioners appointed by a special commission for that purpose. The first is the usual mode of proceeding, where the parliament is prorogued at the close of the session. But there seems to be no instance where the parliament has been prorogued by writ, except upon the meeting of a new parliament after a general election, and before a speaker of the house of commons is elected. Upon this occasion, when the members of the house of commons come to the place appointed for administering to them the oaths by the lord keeper or his deputies, "on their being informed, that the parliament is to be prorogued by writ directed to the lords and commons, they go directly without going into the house of commons, or expecting any message from the lords, to the house of peers, where the writ for proroguing the parliament is read." This is the form of the entry in the journal of the house of commons, without expressing by whom, or upon what authority, this information to the commons is conveyed. The proroguing by commissioners, specially appointed for that purpose, is the usual form, when the parliament meets from time to time during the recess.

Formerly the parliament, when prorogued or adjourned, could not be convened before the expiration of the time to which they stood prorogued or adjourned. But by the 26 G. 3. c. 107.

(a) This constitutional safeguard was first given by 16 G. 3. c. 3. but that statute was only temporary, viz. for five years, and was suffered to expire, so that the country was deprived of it for three years.

§ 95, 96, 97. (a) his majesty is empowered to call out the militia, and summon parliament upon fourteen days' notice, in all cases of actual invasion, or upon imminent danger thereof, and in all cases of rebellion and insurrection; which notice, by 37 G. 3. c. 127. is declared to be sufficient in any case. And by 39 & 40 G. 3. c. 14. the like power is given to the crown in cases of adjournment.

The

The more ancient form of dissolving parliament was, by the king's command, signified to both houses, in the presence of the sovereign, in the house of lords, by the lord chancellor, or speaker of that house. Where the king was not present in person, a commission was issued under the great seal, appointing certain lords therein named to be commissioners for the purpose of executing the royal authority upon this occasion. The later practice, and that which hath been followed without interruption ever since the Revolution, hath been, that the parliament is prorogued to a certain day, and then a proclamation issues, discharging the members of both houses from their attendance on that day, and dissolving the parliament.

With respect to the calling and holding of parliaments, the prerogative of the crown, by the ancient laws of the realm, was under no particular restraint. But by 4 E. 3. and 34 E. 3. it is declared, "That parliaments shall be holden every year once, "or more often, if need be." The like had been previously directed by an ordinance of 5 E. 2.]

¶ But these statutes, no provision having been made in case of failure, and no precise mode pointed out for their execution, had been dispensed with at pleasure. It had indeed been made a question, according to *Burnet*, whether the supposition, *if need be, si mestier soit*, fell upon the whole act, or only upon the words, *or more often, ou plus*; whether parliaments were to be holden even once in the year, unless there was a necessity for it, of which necessity the crown of course was to judge. To supply these defects, and to remove all doubts, an act was passed in 16 Car. 1. by which it was enacted, that the said laws and statutes should be duly observed: that if a parliament were not summoned and assembled before the 3d of *Sept.* in every third year, then a parliament should assemble and be held on the second *Monday* in *Nov.* following: that if the chancellor, who was first bound under severe penalties, should fail to issue writs before that time, any twelve or more of the peers should meet at the usual place, at the old palace of *Westminster*, with power to exert this authority: that in default of the peers, the sheriffs, mayors, bailiffs, &c. should cause elections to be made; and in their default, the voters themselves should proceed to the election of members in the same manner as if writs of summons had been duly issued: and that no parliament thereafter should be dissolved, prorogued, or adjourned, without their consent, within fifty days after their meeting.

By 16 Car. 2. c. 1. this statute is repealed, as being in derogation of the just rights and prerogative of the crown; and, in lieu of all the securities it had provided, a general clause only is passed, by which, after reciting that "because by the ancient laws and statutes of this realm, made in the reign of King *Edward* the Third, parliaments are to be held (a) very often," it is declared and enacted, "that hereafter the sitting and holding of parliaments shall not be intermitted or discontinued above three years at the most; but that within three years after the determination of every parliament, or, if there be

"occasion,

2 Hats. Pr. 360.
Hist. Own Times, V. ii. p. 51.

Parl. Hist. V. ix. 181.
Rushw. Coll. V. iv. 189.
Scob. Coll. of Acts and Ordinances. Ann. 16 Car. 1. c. 1.

The king, in his speech to the parliament, openly demanded the repeal of this act, and went so far as to declare, "that notwithstanding the law, he never would allow

any parliament to be assembled in the method prescribed by that statute." The houses took no notice of this claim of a dispensing power in its largest extent and in the most important concerns of the constitution, but tamely acquiesced in the demand. (a) The preamble cautiously avoids reciting the very words of the statutes; it would have been awkward to have been exact and particular, as the clause granted only a third part of what those laws had already given. (b) The word "frequent" is oddly introduced here; one does not well understand how "there may be a *frequent* calling, assembling, and holding of parliaments *once* in three years."

By 1 W. & M. sess. 2. c. 2. it is declared, "that for redress of all grievances, and for the amending, strengthening, and preserving of our laws, parliaments ought to be held frequently."

By 6 W. & M. c. 2. a parliament shall be holden once in three years at the least.

By § 2. within three years at the farthest from and after the determination of every parliament, legal writs under the great seal shall be issued by directions of the crown for the calling, assembling, and holding another new parliament.

This is the first triennial act, for this is the first act which limits the duration of parliament to three years.

The acts of Car. 1. and Car. 2. are improperly so called, for their sole object was to guard against the intermission of parliaments for a longer time than three years. This bill originated with the lords, and passed both houses in the year 1693, but King William then rejected it. It had been thought by those who drew up the CLAIM OF RIGHTS at the time of the Revolution, that they had so expressed themselves as sufficiently to secure the frequent calling of parliaments, the word *parliament*, as they supposed, comprehending all the sessions from one election to another, and that it was unnecessary to insert the word *new* before parliaments. But it was soon found that a session of parliament was a *parliament*, and that therefore the claim of *frequent parliaments* was satisfied by *frequent sessions*; and it was this interpretation which produced this act. See Sir Wm. Wyndham's speech in the debate on the repeal of the septennial act in 1734.

The 1 G. 1. st. 2. c. 38. after reciting the last clause of the act of 6 W. & M. proceeds; "And whereas it hath been found by experience that the said clause hath proved very grievous and burthensome, by occasioning much greater and more continued expences in order to elections of members to serve in parliament, and more violent and lasting heats and animosities among the subjects of this realm than were ever known before the said clause was enacted; and the said provision, if it should continue, may probably at this juncture, when a restless and popish faction are endeavouring to renew the rebellion within this kingdom, and an invasion from abroad, be destructive to the peace and security of the government;" and then enacts, "that this present parliament, and all parliaments that shall at any time hereafter be called, assembled, or held, shall and may respectively have continuance for seven years, and no longer, to be accounted from the day on which by the writ of summons this present parliament hath been,"

“ or any future parliament shall be appointed to meet, unless
 “ this present, or any such parliament hereafter to be called,
 “ shall be sooner dissolved by his majesty, his heirs or suc-
 “ cessors.”

The duration of the *Irish* parliament was limited by the *Irish* statute of 7 G. 3. c. 3. to eight years.||

[By 6 Ann. c. 7. § 4. it is provided, that thenceforth no parliament shall be determined or dissolved by the death or demise of her majesty, her heirs or successors, but that such parliament shall continue, and is empowered and required, if sitting at the time of such demise, immediately to proceed to act, notwithstanding such death or demise, for and during the term of six months, unless it shall be sooner prorogued or dissolved; and if such parliament shall be prorogued (a), then it shall meet and sit upon the day to which it shall be prorogued, and continue for the residue of the six months, unless sooner prorogued or dissolved. And by § 6. in case there is no parliament in being at the time of the demise of the crown, that hath met and sat, then the last preceding parliament shall immediately convene and sit at *Westminster*, and be a parliament to continue as if it had never been dissolved.

(a) That is, by the successor.

But this clause is repealed by the 37th of G. 3. c. 127. by which it is enacted, that in case of the demise of the crown subsequent to the dissolution or expiration of a parliament, and before the day appointed by the writs of summons for assembling a new parliament, then the last preceding parliament shall immediately convene and sit at *Westminster*, and be a parliament to continue for six months, and no longer, but subject to be sooner prorogued or dissolved by the successor. And in case of the demise of the successor within the six months, and before such parliament shall have been dissolved by him, or after it shall have been so dissolved, and before it hath met in the manner thereby provided, the said last preceding parliament shall immediately convene and sit, and continue to be a parliament for six months longer, to be computed from such last-mentioned demise, but subject to be sooner prorogued or dissolved by the successor; and so as often as any such demise shall happen before a new parliament shall have met in manner thereby provided. And in case of the demise of the crown on the day appointed by the writs of summons for calling and assembling a new parliament, or at any time after such day, and before such new parliament shall have met and sat, such new parliament shall, immediately after such demise, convene and sit at *Westminster*, and be a parliament, to continue for six months and no longer, but subject to be prorogued or dissolved by the successor.]

(G) Of the Jurisdiction of the House of Lords.

THE lords' house is the highest court of justice in this kingdom, and the jurisdiction it exercises at this day with respect to impeachments, the trial of its own members, writs of error, and appeals, is deduced chiefly from the jurisdiction and power of the king's ancient court, or *aula regis*, established at the conquest.

This court, established by the conqueror, consisted not only of the principal officers of state, but also of such as held *per baroniam*, whom the king had a right to summon, as holding immediately from himself, to do suit in his court, and to hear causes; these were the *pares curtis* to the king. And hence this court was considered as the great court-baron of the kingdom, where all petitions against great persons, and the prince's officers, were heard.

Ryley, Pl. Par.
156.

This court had not only an original jurisdiction of determining causes brought before them by petition, but was also the *dernier resort* to correct the errors of inferior judicatures; but as petitions began to multiply, there are several instances where original causes have been referred to inferior courts.

Every suit commenced by petition, containing the grievances certainly and particularly, and process was sent out to bring the defendant in to answer. When these petitions increased, receivers and triers of petitions, who determined what petitions were proper to be received or rejected, were appointed; and afterwards, upon the assembling of the knights, citizens, and burgesses, and their constituting a house of commons, the commons, in matters of great moment, and as they were the grand inquisitors of the whole kingdom, presented their petitions; and as those petitions came stronger from them than from any particular person, so they were never rejected by the lords: and hence the original of impeachments by the house of commons.

[See a clear account of parliamentary impeachments, 2 Wooddes. 596. 620.]

(a) This turns upon a principle of the feudal law, *si inter dominum & vassalum lis moveatur*

pares curiæ sunt iudices: and this, as to treason and felony, is confirmed by the clause in *Magna Charta*, c. 29. *nec super eum ibimus, nec super eum mittimus nisi per legale iudicium parium suorum vel per legem terræ*; but for all other crimes out of parliament, as a *præmunire*, riot, seducing a young lady from her parents in order to debauch her, &c., a peer at this day shall be tried by a jury. 2 Hawk. P. C. c. 44. § 13.

* Now, by stat. 7 W. 3. c. 3. § 11. on the trial of a peer, all the peers are to be summoned.

4 Inst. 21. Vide tit. Error.

As this court was the *dernier resort* to correct the errors of inferior judicatures, so at this day there lies a writ of error of a judgment given in the king's bench before this court, which begins by petition to the king; whereto when the king hath answered

answered *fiat justitia*, then goes out a writ directed to the chief justice of the king's bench, for removing the record *in (a) præsens parlamentum*; and thereupon the roll itself, and a transcript in parchment, is to be brought by the chief justice of the king's bench into the lords' house in parliament; and after the transcript is examined by the court with the record, the chief justice carrieth back the record itself into the king's bench, and then the plaintiff is to assign the errors, and thereupon to have *scire facias* against the adverse party, returnable either in that parliament or the next, and the proceedings thereupon shall be *super tenorem recordi & non super recordum*.

(a) That writ of error may be returnable *ad proximam sessionem parliamenti*, vide Dyer, 375. And so of a *scire fac.* vide Fitz. tit. Error, 58. Rast. Ent. 805. [And that

these, as well as appeals and impeachments by the commons, do not abate by the prorogation or dissolution of the parliament. Sir T. Raym. 483. 2 Lev. 93. Comm. Journ. 23 Dec. 1790. Lords' Journ. 16 May 1791.

Towards the latter end of the reign of King *Charles* the First, the house of lords asserted their jurisdiction of hearing appeals from the chancery, which they do upon a paper petition, without any writ directed from the king; and for this their foundation is, that they are the great court of the king, and that, therefore, as the chancery is derived out of it, a petition will bring the cause and the record before them. This was much controverted (b) by the commons in the reign of *Charles* the Second, but is now pretty well submitted to; because it has been thought too much that the chancellor should bind the whole property of the kingdom without appeal.

Gillb. Hist Ch. 190.

grave's preface to Lord *Hale's* Jurisdiction of the House of Lords, p. cxxxi. cliii. The commons seem to have had the advantage in this controversy; but the true reason for their not pursuing it was, that they saw that the certain consequence of their forcing the lords to abandon their claim of appellant jurisdiction, would have been a return of the same jurisdiction to commissioners appointed by the king, and their judgment would have been conclusive, unless the whole parliament should interpose as the *dernier resort*.||

||(b) A clear account of this controversy will be found in Mr. *Har-*

COURT OF CHANCERY.

TOWARDS the *Norman* period, upon the breaking of the courts into distinct jurisdictions, the chancellor, or keeper of the great seal, retained part of that jurisdiction which he exercised in the great court of the kingdom, called *aula regis*. But, for the better understanding hereof, and of its jurisdiction at this day, we shall consider this court,

(A) As an *Officina Brevium*, out of which all original Writs flow.

(B) As

(B) As an ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag.

(C) As an extraordinary Court, proceeding according to Equity: And herein,

1. *Of its original Jurisdiction.*

2. *What Jurisdiction it exercises at this Day.*

(A) As an *Officina Brevium*, out of which all original Writs flow.

(a) 4 Inst. 80.
Of superseding
such writs,
vide Abr. Eq.
416. and tit.
Writs.

BEFORE the division of the courts, the chancellor put the seal to all patents, commissions, and writs: and hence this court is considered at this day as the great shop of justice, out of which (a) all original writs, which give other courts a jurisdiction, issue, and are made returnable into such courts on a common return-day, and may be sued out at any time, as well in vacation as in term-time, from whence this court is said to be always open.

The reasons of the institution of this *officina brevium* were many.

1st, That it might appear that all power of judicature whatsoever flowed from the king, and therefore there was a summons even to the peers in parliament, that sat *in proprio jure*. So likewise for the lower house of commons. The basis of the same made by writs that issued out of this court, and were returned was into the same office; and so in judicature, there were particular patents that shewed the extent of the commission, and that their power was derived from the crown.

2dly, That the crown might have its proper fines. These were anciently paid to purchase justice from the crown; for persons were not suffered to come into the king's courts, and engage the power of the king to do right to private individuals, without first giving something towards the charges of the court, and the expence of the judicature; inasmuch as in ancient times the king used to summon several of the barons to attend the hearing of such causes; but, afterwards by *magna charta*, by reason of the exorbitancy of officers, and that the crown might not be cheated, these were reduced to fines certain; and the writs were taken out of the court of chancery, returnable in the other courts, that one court might be a check upon the other.

3dly, To keep an uniformity in the law; for whether these writs went out to the sheriff in the nature of a *justicies*, or whether they were returnable before the justices in *eyre*, or justices of the common bench or assise, they were still made in one form,

form, according to the nature of the complaint, which was both a direction to the judge, and a limitation of his authority.

The court of chancery being thus erected to issue process, the chancellor, or lord keeper, who had the government of that court, had the great seal, by authority of which all process was to issue; and from hence Masters were appointed in that court, who made out the forms of the writs, and entered them in a book kept for that purpose, thence called the *Register*; and such writs were precedents for the future, in like cases; and exceptions were taken to writs in the courts to which they were directed, for not agreeing with the *Register*, and divers other informalities.

After the masters in chancery had settled proper writs and commissions, and those things began to be of course, they had proper under-officers, who made out their writs of course, and they only attended on the making out of new writs in extraordinary cases, the ordinary writs being made out by the proper officers. Hence it came to pass that the officer, called the "Clerk of the Crown," made out commissions after the forms of them were settled, as commissions for justices errant and of assizes, general gaol-delivery, *oyer and terminer*, and of the peace, writ of association, *dedimus potestatem* for the taking of oaths, and all general and special pardons; also writs of execution upon a statute-staple, which were annexed to this office in the time of Queen *Mary*, for their continual and chargeable attendance. Other writs that were settled were made out by the *cursitors*, who were formerly clerks to the Masters, but afterwards settled in a distinct office, to make the *brevia de cursu*.

At the first division of the courts, the chancery was very tender in making out writs in cases where there had been formerly no precedents in the ancient *curia regis*, which now are called *actiones nominatæ*, because they thought the ancient foot-steps which were in the former courts of justice were the bounds of their jurisdiction, and indeed of the law; therefore, wherever there was a new case that seemed to require remedy, the original jurisdiction referred them to petition the next parliament: but because this multiplied petitions to parliament, there was a particular law made, which gave the court power in a new case to invent a writ, and this was by the statute of (a) *Westm. 2. c. 24. Et quotiescumque de cætero evenerit in cancellaria quod in uno casu reperitur breve, & in consimili casu cadente sub eodem jure & simili indigente remedio [non reperitur] concordent clerici de cancellaria in brevi faciendo, vel atterminent querentes in proximum parlamentum, & scribant casus in quibus concordare non possunt, & referant eos ad proximum parlamentum, & de consensu jurisperitorum fiat breve, ne contingat de cætero quod curia diu deficiat conquerentibus in justitiâ perquirendâ.* statute were founded actions upon the case upon several trespasses, in which cases there were not found any writs in the *Register*. 2 Inst. 407.

Gilb. Hist.
Chanc. 16.
Dalrymp.
Feud. Law,
304. 8vo. edit.

(a) Upon this statute (which *vide* explained 2 Inst. 405. &c.) was formed the writ of entry in *consimili casu*, relating to land also, upon this

(B) Of the ordinary and limited Court, proceeding according to Law, commonly called the Petty-Bag.

TO understand the nature of this court, we must observe, that in ancient times the chancellor was likewise chaplain to the king, and it was his business, in the time of the *justiciar*, to write the *diplomata*, that is, all charters and commissions from the king; therefore, when the power of the *justiciar* was broken, he obtained the *officina brevium & chartarum regiarum*; from whence all the extraordinary jurisdictions touching the granting of charters, as likewise all inquests of office to entitle the crown, were returned into this office; and the exchequer, in which these things were anciently transacted, became only an ordinary court of revenue, to (a) set leases to the king's farmers, and to get in the king's debts; and therefore the office in the exchequer was only an office of instruction of what lands were in the king in particular counties. But, to vest lands in the crown *de novo*, it was necessary to have an office under the great seal; and so, to grant lands from the crown, unless it were merely farms that were granted for years.

(a) *Vide* 2 Co.
16. Plow. 320.
4 Co. 93.

4 Inst. 80.

Hence, at this day, this court has a jurisdiction to hold plea upon a *scire facias*, to repeal the king's letters patent upon petitions, *monstrans de droit*, traverses of offices, *scire facias* upon recognizances, executions upon statutes, &c. which being registered in this court, the process thereupon issued out of the same, and were returnable there, and entered in the office called the (b) petty-bag; whereas the writs, which were the foundation of the business of the other courts, were put together in the hamper, which gave the distinction to those names, and begat distinct officers in the court.

(b) The proceedings in this court were heretofore in Latin, but were not enrolled in rolls, but remained only in *filaciis*. 4 Inst. 80.

4 Inst. 80.

If in this court the parties descend to issue, the chancellor cannot try it, but is to deliver the record, with his proper hand, into the king's bench, where (c) judgment is to be given. And the reason hereof seems to be, that the chancery, being *officina brevium*, if it could both make writs returnable here, and also try issues, it would encroach too much on other jurisdictions; besides, there was no jury process in the ancient *aula regis*.

(c) That the judgment is to be given in B. R., and that for this purpose both courts are but one. *Vide* All. 16, 17. Cro. Ja. 12. 2 Roll. Abr. 349.—So, if there be a demurrer for part, and issue for part, the whole record may be transmitted into B. R., and the judgment given there. 2 Saund. 23. Lev. 283. Mod. 29.

Galb. ch. 13.

¶ And hence the reason of keeping original and judicial writs distinct from each other. For though the chancellor may give judgment upon such inquisition, and upon a *scire facias*, where a demurrer is joined, yet, such judgment is either to remove the king's hands, or to repeal the patent, upon which no judicial writs need to issue. But as the chancellor may give judgment

on

on a demurrer, so he may in any case where the issue is to be tried otherwise than by a jury, as by the bishop's certificate, &c. ||

An inquisition was taken, and a forfeiture of the office of warden of the *Fleet* found, and the defendant pleaded to issue, and after issue joined, several other persons came in by way of *monstrans de droit*, and pleaded, and a demurrer to them, and the record was carried into *B. R.* by the clerk of the petty-bag, without any order of the court, in order to have the issue tried; and it was resolved, 1st, That though the clerk had committed a fault to the court of chancery, in carrying the record without any order, yet that it was well removed; for that which is done by the proper officer, is done by my lord chancellour, and may be said to be done *propria manu*. 2dly, That though there were an issue and demurrer both, yet the removing of the whole record was proper and well enough, on the (a) authorities cited in the margin, by which it appears that judgment is most properly to be given in *B. R.* both on the issue and the demurrer; otherwise there might be two distinct judgments, and, consequently, distinct executions taken out.

Also, all (b) personal actions, by or against any officer or minister, in respect of his service or attendance, may be determined in this court; but in these no jury process can issue, but the record is to be removed *ut supra*.

Jones, 80.
Lukin, 3.
Abr. Eq. 128.
pl. 8. The
King and
Warden of the
Fleet.

(a) 8 Co. the
Prince's case.
2 Sand. 6. 23.
2 Keb. 621.
Lev. 283.
Sid. 436. Mod.
29. S. C.

4 Inst. 80.
(b) But cannot
hold plea of
land.
2 H. 6. 32.

(C) Of the extraordinary Court, proceeding according to Equity: And herein,

1. Of its original Jurisdiction.

THIS court was (c) newly erected after the division of the courts, and from a very small and inconsiderable beginning, hath (though (d) impugned even from its creation) grown up to that degree, as to swallow up most of the other business of the common law.

53. b. 12 Co. 113. Dr. & Stud. c. 7.—By Lamb. Archaion. 62, when the king's courts ceased to be ambulatory, and became settled in a certain place, then the king committed to his chancellour, together with his great seal, his only legal, absolute, and extraordinary pre-eminence of jurisdiction, &c. And in Lev. 242. it is said to be established by an act of parliament. 36 E. 3. But Q. (d) For which *vide* the petitions of the commons against this new-invented jurisdiction. 3 H. 4. No. 69. 4 H. 4. No. 78. 3 H. 5. No. 46. Roll. Abr. 327.

(c) That like
the other
courts of
Westminster,
it was time out
of mind. 9 E. 4.

That there were some footsteps in the ancient *curia regis* of this jurisdiction, appears from the *English* jurisdiction exercised in the court of exchequer, where, on informations on the king's behalf, articles are administered, to which the party is to answer upon oath; as likewise by impeachments in the house of lords, where articles are exhibited in *English* for the party to answer to.

But notwithstanding this, the establishment of this jurisdiction seems to be owing to the statute of *Westm.* 2. c. 24. above

G g 2

mentioned,

Reg. 25.

(a) || This is not correct; the power given by the statute was not so large; it was to frame a new writ only in *consimili casu cadente sub eodem jure & simili indigente remedio*. The chancel-

mentioned, by which a power was given, in new (a) and extraordinary cases, to invent a new writ: hence it was that *John Waltham*, then bishop of *Salisbury*, and chancellor, as the commons mention in their petition, out of his subtlety, found out and began a novelty against the form of the common law, and that was the invention of the writ of (b) *subpoena*; which writ summoned the party to appear under a pain, to answer to such things as should be objected against him, and a petition was lodged in chancery, containing the articles to which he was obliged to answer; and upon such articles this new-invented writ issued.

lour had an ordinary and an extraordinary jurisdiction. By the ordinary jurisdiction, on every cause of complaint, he issued the writ after examination of the plaintiff, that the subject might not be needlessly disturbed: but, when the case was extraordinary, and it was necessary to have the defendant's own oath, the chancellor, by his extraordinary jurisdiction, had power to send for and examine him upon the several allegations in the plaintiff's petition; and this gave birth to the *English* jurisdiction of the court of chancery. By the ordinary jurisdiction we see, that in the time of E. 1. they began to keep close to the forms of the Register, so that the statute of W. 2. was made to enlarge the ordinary jurisdiction only. For it was then doubted, whether the chancellor could go beyond the settled forms of the writs, because he was obliged to follow the law, and was not entrusted with the power to innovate and make new laws; but this statute only gave power to him to make out new writs, where he found similar cases, and therefore the extraordinary jurisdiction, where there were no like cases, or where the party was to be examined on oath, was left as it was before. Gilb. Ch. 19.—

Though the jurisdiction of the court of chancery is of a complicated nature, and includes in it great variety, yet the whole flows from one spring, viz. the Great Seal, and is admirably traced to it by Mr. *Yorke*, in his argument in the case of *R. v. Hare*, 1 Str. 149. 1st, If it be considered as a court of state, where all public acts of government are sealed and enrolled, that manifestly comes from the Great Seal, which is what gives their legal authority. 2d, If it be considered as an *officina justitiæ* for the issuing of writs; that certainly comes from the Seal, which gives them being. 3d, As a court of equity, it will be found to have taken its rise from the Great Seal; for the chancery being, upon the division of the king's courts, naturally the *officina justitiæ* from which all original writs issued, and where the subject was to come for remedy in all cases, the chancellor was applied to in all cases for proper writs, where the subject wanted a remedy for his right, or redress for a wrong that had been done him. But in the execution of this authority he was confined by the rules of the common law, and could award no writs but such as the common law warranted: therefore, when such a case came before him, as was matter of trust, fraud, or accident, (which are the subjects of an equity jurisdiction,) the chancellor could award no writ proper for the plaintiff's case, because the common law afforded no remedy. Upon this it is not improbable, that the chancellours, who were most commonly churchmen, men of conscience, when they found those cases grow numerous, in order to prevent the suitors from being ruined against right and conscience, and that no man might go away from the king's court without some relief, summoned the parties before them, and partly by their authority, and partly by their admonitions, laid it upon the conscience of the wrong-doer to do right. 4th, If it be considered as a court of common law, as the petty bag is; the principal parts of that jurisdiction are to hold pleas upon writs of *scire facias* on records of this court, upon *monstrans de droit*, and traverses of office found upon writs issued out of this court. These likewise have their being and essence from the Great Seal. And the proceeding in a *scire facias* to repeal letters patent, which my Lord *Coke* says in 4 *Inst.* is the highest point of a chancellor's jurisdiction, is in a particular manner derived from the Great Seal; for the very end of the suit is, and so is the judgment, that they be recalled into the same place from whence they went forth, under the Great Seal, that they may be cancelled, that is, that the great seal may be taken off. In the case of the *Mayor and Burgesses of Liverpool* against the *Chancellor of the County Palatine of Lancaster* in *B. R. Tr. 12 Ann.* there was a *scire facias* to repeal a charter granted to that corporation under the great seal of the county palatine. To this suit a prohibition was moved for, for want of jurisdiction in the court. But it was resolved, that that court had jurisdiction of the cause; and amongst other reasons which were given for that judgment, it was declared, that this authority was incident to the seal of the county palatine; that the complaint of the writ being, that the chancellor had wrongfully put the seal to it, it was proper to be examined in that court where the seal was kept. But there is another matter which fur-

nishes the strongest argument in the world, that all the power of this court flows from the seal; and that is, that the delivery of the seal constitutes that great officer who exercises this jurisdiction, and gives him all his power. By the act of Union with *Scotland*, Art. xxiv. express provision was made for the Great Seal of *Great Britain*; but in the act of Union with *Ireland* no such provision appears as the Great Seal of the United Kingdom; it is spoken of only incidentally in the act, as if it were already in existence, and the last clause gives his majesty a discretionary power of using the Great Seal of *Ireland* in that country, as he had done before the Union. || (b) The *subpæna* seems to have been taken by the court of chancery, in order to oblige a man to answer upon oath as to the truth of the plaintiff's allegations, because it came nearest the common law process, called also a *subpæna*, which issues to bring in witnesses to attest the truth.

By this construction not only a new writ was issued, but a new jurisdiction erected, and this was towards the time of R. 2. occasioned chiefly by the statute of *Mortmain*; for when that statute had restrained the growing riches of the clergy, they found out this invention to avoid it, by giving away lands to trustees for pious uses, and the feoffees of such trust did the duties of such tenure in behalf of the trust; but, if they perverted the trust, the ordinary jurisdiction not reaching a thing that was against the statute of *Mortmain*, the chancellor exerted this extraordinary jurisdiction, and examined them as to the several facts alleged against them.

After the establishment of this court, it was thought reasonable to give damages to such persons as were drawn into it by false suggestions, and therefore by the 7 R. 2. c. 6. reciting, "For as much as people be compelled to come before the king's council, or in the chancery, by writs grounded upon untrue suggestions, *it is enacted*, That the chancellor for the time being, presently after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion, to him who is so troubled unduly," || which, instead of diminishing, increased the power and jurisdiction of the court. ||

The jurisdiction of this court was not only impugned almost at its original creation, but even in the reign of Queen *Elizabeth* it was strongly holden by the judges of the common law courts, that the chancellor could not by his decree sequester the party's lands, that is, could only *agere in personam*, but not *in rem*; and agreeably hereto it was resolved 19 Eliz. in the case of * *Coleston and Gardner*, that if a man killed a sequestrator in the execution of such process, it was no murder.

But these were such bloody and desperate resolutions, and so much against common justice and honesty, which requires, that the decrees of this court, which preserved men from deceit, should not be rendered illusory, that they could not long stand. But this process got the better of those resolutions, on these grounds: 1st, That the extraordinary jurisdiction might punish contempts by the loss of estate, as well as imprisonment of the person, because that liberty being a greater benefit than property, if they had power to commit the person, they might take from him his estate till he had answered his contempt. 2dly, To say that a court should have power to decree about a thing, and

For the construction of this statute, vide 4 Inst. 83.

Cro. Eliz. 651.
Brograve and Watts, 4 Inst. 84.
Roll. Rep. 86. 190. Lit. Rep. 166.
27. H. 8. 15.
* 2 Ch. Cas. 43.

yet should have no jurisdiction *in rem*, is a perfect solecism in

(a) || Where the constitution of the court itself. (a)

the subject in dispute is not within the jurisdiction of the court, it is certainly true that the decree operates merely *in personam*; but, if the lands be within the jurisdiction of the court, and the defendant refuse to perform the decree, as to give the plaintiff possession, the court will enforce its decree by the writ of assistance, which is for such purpose directed to the sheriff. Foul. notes Eq. Tr. 34. Penn v. Ld. Baltimore, 1 Ves. 454. Roberdeau v. Roberdeau, 1 Atk. 543. Scribley v. Hawkie, 3 Atk. 275. Foster v. Vassall, Id. 587.||

(b) As where a person committed to the Fleet for not performing a decree made subsequent, and contrary to a judgment at law, was, by *habeas corpus* out of the

Also, in the reigns of Queen *Elizabeth* and King *James* the First, there are (b) several strong opinions, that a court of equity could not examine or give any redress in a cause after judgment at law, and that suits in equity, to relieve against a judgment at law, are within the statutes, which make it a *præmunire* to appeal to any foreign court, especially if the end thereof be to controvert the very point determined at law, or to seek relief after judgment in a case wherein the law may relieve, as against excessive damages, &c.

king's bench, admitted to bail, and afterwards discharged. Cro. Ja. 341. And to this purpose, *vide* 4 Inst. 36. 91. 3 Inst. 123. Dals. 81. Moor, 836. pl. 1129. 916. pl. 1300. Leon. 241. 2 Leon. 115. 3 Leon. 11. 2 Brownl. 97. Godb. 244. Roll. Rep. 71, 72. 252. 3 Bulst. 118. 120. Lit. Rep. 37. Cro. Ja. 335. 344. March, 54. 83.

Hard. 125.
Mod. 59.
3 Keb. 221.
Lev. 241.
2 Ch. Ca. 97.
Abr. Eq. 130.

But as these opinions tended to render the justice of this court illusory, whose peculiar province is to give remedies in cases not remedial by the ordinary jurisdiction, and to relax and mitigate the rigour of the common law, they seem now to be wholly exploded. And this seems highly reasonable, when it is considered how uncertain and doubtful the law in many cases is before it is determined, and consequently, that before such determination it would be impossible to relax and mitigate the rigour thereof.

2. What Jurisdiction it exercises at this Day.

(c) Three things, says my Lord Coke, are to be adjudged in a court of equity: 1. All covins, frauds, and deceits, for which there is no remedy by the ordinary course of law. 2. Accidents, as when a servant, obligor,

The ancient (c) rule for the jurisdiction of the extraordinary court of chancery, was confined to frauds, accidents, and trusts; and though at this day, by its power in granting injunctions, it curbs the jurisdiction of other courts, and thereby has swallowed up the greatest part of the business of the common law; yet it is still under some of these notions that it exercises a jurisdiction in relieving against forfeitures and penalties, where a compensation can be made, in preventing multiplicity of suits, decreeing a specifick execution of agreements, assisting defective conveyances, &c., but in no case will relieve against an act of parliament, directly against (d) a fundamental rule or maxim of the common law, nor retain a suit where the party appears to have a plain and adequate remedy at law.

of mortgagor, is to pay money on a certain day, and he happens to be robbed in going to pay it. 3. Breaches of trust and confidence. 4 Inst. 84. 10 Mod. 1. See Cases temp. Talb. 40. (d) Therefore, if tenant for life or years levy a fine, or suffer a recovery, equity will not relieve against the forfeiture. Preed. Chan. 570. —Also, upon this foundation, that a court of equity could not relieve against a maxim of the common law, it was formerly holden, that one executor could not compel the other to account. Roll. Rep. 263. —That

one jointenant could not sue his companion. Roll. Abr. 376. — That if an obligee lost his bond, he was without remedy. Roll. Abr. 375. — So, where the lessor entered upon his lessee, and suspended his rent, it was held, that he had no remedy. Latch. 149. — So, where the party became remediless by his own act, as by paying money without an acquittance. Roll. Abr. 374. — So, where one on valuable consideration promised to make a lease, it was held, that the party could not sue on this promise in equity, because he might have an action on the case. Roll. Abr. 380. But these last opinions are now of no weight or authority, as appears by daily experience.

All matters of trust are peculiarly within the jurisdiction of the court of chancery; but, if a trustee does by fraud and combination with the *cestui que trust* endeavour to evade any penal law, under pretence that a trust is only cognizable in equity, and that equity should not assist a (a) penalty, or (b) forfeiture, yet chancery will aid remedial laws, and not suffer its own notions to be made use of to elude any beneficial law.

Abr. Eq. 137.
Vide tit. *Uses and Trusts*.

(a) That a penalty cannot be demanded in equity.

2 Chan. Ca. 81. (b) That all forfeitures must be waived, as in waste, or in a bill for the recovery of tithes. Vern. 60. 2 Vern. 127. Vide Abr. Eq. 40. 127., &c.

[Upon this head the Editor takes leave to refer the Student to the last chapter of the third volume of the *Commentaries*, and to Mr. *Fonblanque's* Notes upon the *Treatise of Equity*, where the principles upon which the court of chancery exercises its equitable jurisdiction are traced in a most masterly manner. A clear and succinct account of the origin of the court of equity in chancery will be found in the third volume of Mr. *Reeves's History of the Law*.]

¶ By 53 G. 3. c. 24. his majesty is empowered to appoint an additional judge assistant to the chancellor, called “the Vice-Chancellor of England,” who hears and determines all such causes and matters as the chancellor may from time to time direct. His decrees are subject to reversal, discharge, or alteration, by the chancellor, and are not to be enrolled until signed by the chancellor. But he has no power to discharge, reverse, or alter any decree or order of the chancellor, unless authorized by him so to do; nor can he meddle with any decree or order of the Master of the Rolls, his rank being below though next after that judge's. He sits for the chancellor when so required by him, and at other times in a separate court; and is removable upon an address of both houses of parliament. The act is entitled, “An act to facilitate the administration of justice;” and the preamble states, that “the number of appeals and writs of error in parliament had of late years greatly increased, and it had become necessary that a larger proportion of time should be allotted for hearing and determining such appeals and writs of error than had usually been allotted for that purpose; and therefore, as well as for the better administration of justice in the several judicial functions belonging to the offices of the lord high chancellor, lord keeper, or lords commissioners for the custody of the great seal of the United Kingdom, it is expedient that another judge should be appointed to assist in the discharge of such judicial functions.”

COURT OF KING'S BENCH.

Maddox, c. 19.
Bract. lib. 3.
c. 7. f. 105.

4 Inst. 70.
2 Inst. 24. Co.
Lit. 71. Dyer,
187. Crompt.
of Courts, 78.
Roll. Abr. 94.

TOWARDS the latter end of the *Norman* period, the *aula regis*, which was before one great court, where the *justiciar* presided, was divided into four distinct courts, *i. e.* the court of Chancery, King's Bench, Common Pleas, and Exchequer.

The court of king's bench retained the greatest similitude with the ancient *curia*, or *aula regis*, and was always ambulatory, and removed with the king wherever he went. Hence the writs returnable into this court are *coram nobis ubicunque fuerimus in Angliâ*; and all records there are stiled *coram rege*, as it is still supposed to have always the king himself in person sitting in it; from whence it obtained the name of the court of King's Bench, and hath always retained a supreme original jurisdiction in all criminal matters; for in these the process both issued, and was returnable into this court; but in trespass it might be made returnable into either the king's bench or common pleas, because the plea was civil as well as criminal.

(A) Of the Jurisdiction of the Court of King's Bench: And herein,

1. *Of its Jurisdiction in Criminal Matters.*
2. *Of its Jurisdiction in Civil Causes.*
3. *Of its Jurisdiction in reforming and keeping Inferior Jurisdictions within their proper Bounds.*

(B) How far its Presence suspends the Power of all other Courts.

(C) Of the Form of its Proceedings.

(A) Of the Jurisdiction of the Court of King's Bench: And herein,

1. *Of its Jurisdiction in Criminal Matters.*

Sid. 168.
2 Hawk. P.C.
c. 3.

THIS court is termed the *custos morum* of all the realm, and by the plenitude of its power, wherever it meets with an offence contrary to the first principles of justice, and of dangerous consequence if not restrained, adapts a proper punishment to it.

It has a peculiar jurisdiction, not only over all capital offences, but also over (a) all other misdemeanours of a publick nature, tending either to a breach of the peace, or to oppression or faction, or any manner of misgovernment; and it is not material whether such offences, being manifestly against the publick good, directly injure any particular person or not.

4 Inst. 71.
11 Co. 98.
2 Hawk. P. C.
ubi supr.
(a) Nor is it necessary to shew a precedent of the

like nature formerly punished here, agreeing in all circumstances with the present. 2 Hawk. P. C. *ubi supr.*

And for the better restraining of such offences, it has a discretionary power of inflicting exemplary punishment on offenders, either by fine, imprisonment, or other infamous punishment, as the nature of the crime, considered in all its circumstances, shall require; and it may make use of any prison which shall seem most proper; and it is said, that no other court can remove or bail persons condemned to imprisonment by this court.

2 Hawk. P. C.
ubi supr.

Also, it hath so sovereign a jurisdiction in all criminal matters, that an act of parliament, appointing that all crimes of a certain denomination shall be tried before certain judges, doth not exclude the jurisdiction of this court, without express negative words; and therefore it hath been resolved, that 33 H. 8. c. 12. which enacts, that all treasons, &c. within the king's house shall be determined before the lord steward of the king's house, &c. doth not restrain this court from proceeding against such offences.

4 Inst. 549.
2 Jones, 53.
2 Hawk. P. C.
ubi supr.

But, where a statute creates a new offence, which was not taken notice of by the common law, and erects a new jurisdiction for the punishment of it, and prescribes a certain method of proceeding, it seems questionable how far this court has an implied jurisdiction in such a case.

Sid. 296.
2 Hawk. P. C.
ubi supr.

Also, this court, by the plenitude of its power, may as well proceed on indictments removed by *certiorari* out of inferior courts, as on those originally commenced here, whether the court below be determined, or still *in esse*, and whether the proceedings be grounded on the common law, or on (b) a statute making a new law concerning an old offence.

Dals. 25.
44 E. 3. 31. b.
Cromp. Jurisdiction, 131.

9 Co. 118. *vide tit. Forcible Entry and Detainer.*—And the statute of Ph. & Ma. against persons taking away females under the age of sixteen years from their guardians. Cro. Car. 465. 2 Inst. 549. 2 Lev. 179. 2 Mod. 128. 2 Jones, 53. 3 Keb. 75. 94. 106. 273.

(a) As the statutes of forcible entries,

But the court of king's bench will not give judgment on a conviction in the inferior court, where the proceedings are removed by *certiorari*, but will allow the party to waive the issue below, and to plead *de novo*, and go to a trial upon an issue joined in *B. R.*

Carth. 6. adjudged in the case of one Baker, who was convicted at Kingston-

upon-Hull for speaking seditious words.

Nor can a record, removed into the king's bench from an inferior court, regularly, be remanded after the term in which it came in; yet, if the court perceives any practice in endeavouring to remove such record, or that it is intended for delay, they

2 Hawk. P. C.
ubi supr. and several authorities there cited.

they may in discretion refuse to receive it, and remand it back before it is filed.

4 Inst. 74.
Raym. 364.

Also, by the construction of the statutes, which gave a trial by *nisi prius*, the king's bench may grant such a trial in cases of treason or felony, as well as in common cases, because for such trial, not the record, but only a transcript is set down.

(a) Extends
not to high
treason.
Raym. 367.

And by the 6 H. 8. c. 6. it is enacted, "That the king's bench have full authority, by discretion, to remand as well the bodies of all (a) felons removed thither, as their indictments, into the counties where the felonies were done; and to command all justices of gaol-delivery, justices of the peace, and all other justices, to proceed thereon after the course of the common law, as the said justices might have done, if the said indictments and prisoners had not been brought into the said king's bench."

(b) 4 Inst. 73.
9 Co. 118. b.
(c) 4 Inst. 73.
(d) 4 Inst. 74.
Vaugh. 157.
Vide tit. Bail.

The judges of this court are the (b) sovereign justices of *oyer* and *terminer*, gaol-delivery, conservators of the peace, &c. as also the (c) sovereign coroners; and therefore, where the sheriff and coroners may receive appeals by bill, *a fortiori* they may. Also, this court may (d) admit persons to bail in all cases according to their discretion.

2. Of its Jurisdiction in Civil Causes.

17 E. 3. 50.
Roll. Abr.
536, 537.
(c) For the
exposition of
this statute,
and what shall
be said a common
plea, vide

At the first division of the courts, the original intention appears plainly to have been to confine the jurisdiction of the court of king's bench to matters merely criminal; and accordingly soon afterwards it was thus enacted by (e) *Magna Charta*, c. 11. (f) *That common pleas shall not follow (g) our court, but be holden in a certain place*: hence it is, that at this day this court cannot determine a mere real action.

2 Inst. 21, 22. Roll. Abr. 536, 537. (f) But these general words bind not the king, for he may bring an action there for a common plea. 2 Inst. 23. 2 Roll. Rep. 290. (g) This extends both to the king's bench and court of exchequer. 2 Inst. 23. 550. But vide 4 Inst. 113.

2 Inst. 23.
4 Inst. 72.
113. & vide
2 Sand. 256.
Show. P.C. 57.

But, notwithstanding common pleas cannot be immediately holden in *Banco Regis*, yet where there is a defect in the court, where by law they may be holden originally, they may be holden in *B. R.* As, if a record come out of the common pleas by writ of error, there they may hold plea to the end; so, where the plea in a writ of right is removed out of the county by a *pone* in *B. R.* So, on a writ of mesne, replevin, &c.

2 Inst. 23.

So, any action *vi & armis*, where the king is to have a fine, as ejectment, trespass, forcible entry, &c. being of a mixed nature, may be commenced in *B. R.*

2 Inst. 23.
4 Inst. 71.
2 Bulst. 123.

Also, any officer or minister of the court, entitled to the privilege thereof, may be there sued by bill in debt, covenant, or other personal action; for the act takes not away the privilege of the court.

4 Inst. 71.
Cro. Car. 330.

And this begat the notion, that if a man was taken up as a trespasser in the king's bench, and there in custody, they might declare against him, in debt, covenant, or account; for this

likewise was a case of privilege, since the common pleas could not procure the prisoners of the king's bench to appear in their court; and therefore it was an exception out of the statute of *Magna Charta*.

(a) By the statute of Gloucester, c. 8., none shall have writs of trespass before justices, unless he swear by his faith that the goods taken away were worth forty shillings.

(a) It was a maxim of the common law *quod placitade*

catallis, debitis, &c. quæ summam 40s. attingunt, vel eam excedunt, secundum legem & consuetudinem Angliæ sine brevi regis placitari non debent. 2 Inst. 312. 6 E. 1. For exposition whereof, vide 2 Inst. 310., &c. put but for example; for so it is in debt, detinue, covenant, &c. 2 Inst. 391. *Secus*, in trespass *vi & armis*, where the king is to have a fine, for a fine cannot be assessed but by a court of record. 2 Inst. 391. F. N. B. 47. 3 Mod. 276.—So, in trespass for taking charters concerning a freehold; for it is a maxim in law, that such pleas shall not be in any court but of record. 2 Inst. 391. F. N. B. 47. Raym. 293. This course of making an affidavit, by experience, was so dangerous and troublesome, that it was forborne, and the defendant left to take such exceptions as the common law gave him. 2 Inst. 391. If upon nonsuit in an inferior court, 16s. is given for costs, by 23 H. 8. c. 15. debt lies for it in B. R., because given by a subsequent statute. Cro. Eliz. 96. Leon. 319. For as the inferior courts, which are not of record, regularly, cannot hold plea of debt, &c. or damage, unless under 40s., so the superior, which are of record, cannot unless above 40s. 2 Inst. 391. [And though the demand, upon the face of the record, exceeds 40s., yet now (for the law formerly was different, *Oulton v. Perry*, 3 Burr. 1592.) the court will, upon motion, stay the proceedings. *Stean v. Holmes*, 2 Bl. Rep. 754. *Kennard v. Jones*, 4 T. Rep. 495. *Wellington v. Arters*, 5 T. Rep. 64.]

3. *Of its Jurisdiction, in reforming and keeping inferior Jurisdictions within their proper Bounds.*

The court of king's bench, as it is the highest court of common law, hath not only power to reverse erroneous judgments for such errors as appear the defect of the understanding, but also to punish all inferior magistrates, and all other officers of justice, for wilful and corrupt abuses of their authority against the obvious principles of natural justice; the instances of which are so numerous, and so (b) various in their kinds, that it seems needless to attempt to insert them.

2 Hawk, P. C. c. 3. Vaugh. 157. Salk. 201. pl. 3.

the sheriff of *Middlesex*, and appointed that watches should be strictly kept in the suburbs, and about the new building, as a thing belonging to the care of this court. Sid. 218.

(b) Where the court of king's bench called

Judgment was given in an action in the sheriff's court of *London*, and afterwards it was removed to the mayor's court by a *levata querela*, within which court there are four attornies, and by exclusive custom no other can be attorney there; and one of the attornies there was assigned to the plaintiff by the recorder; but because the present mayor was concerned in the cause, the said attorney, and all others, refused to act for him: and by *Maynard*, no person can withdraw himself out of the jurisdiction of this court, which hath superintendant power, if an officer refuses to do his duty; and he mentioned a case cited by *Noy*, where the bishop of *Exon* refused to allow chrism, or baptismal oil, to the parishioners of *D.* and a *mandamus* was directed to him out of this court: so, in all cases, as where the ordinary refuses to grant probate of wills, &c. *Wild* was of the same opinion, that if any court refuses to do justice, this court may

Buxton v. Singleton, Hil. 26 Car. 2. 3 Keb. 432. S. C.

may command it; and in this case it will be in the power of the attornies to delay justice; and therefore the court sent for the recorder and informed him of the matter, and declared, that this was good cause to forejudge the attorney, and that it was a dangerous matter to deny justice in such a manner; and mentioned the abbot of *Crowland's* case, 20 E. 4. where the liberties were seized because he had not officers.

(B) How far its Presence suspends the Powers of all other Courts.

H. P. C. 156. 9 Co. 118. 27 Ass. pl. 1. 3 Inst. 27. 2 Hawk. P. C. c. 3. (a) Or without notice. *Per* 4 Inst. 73. || It is provided by 25 G. 3. c. 18. and 32 G. 3. c. 48. that the sessions of gaol-delivery of *Newgate* for the county of *Middlesex*, and the sessions of the peace and *oyer and terminer* before the justices of the peace for that county, shall be continued, notwithstanding the essoign day of a term may happen, and the court of king's bench may sit at *Westminster*, or elsewhere in *Middlesex*, before the business is finally concluded. ||

4 Inst. 73. But, if an indictment in a foreign county be removed before commissioners of *oyer and terminer* into the county where the king's bench sits, they may proceed; for that the king's bench not having the indictment before them cannot proceed for this offence.

4 Inst. 73. (b) That it is best if such commission bear *teste* in term-time. 3 Inst. 27. & *vide* Keilw. 152. Dyer, 286. pl. 45. 2 Hawk. P. C. c. 3.

(C) Of the Form of its Proceedings.

THE civil side in the king's bench commences on a supposition of a trespass committed by the defendant in the county where it resides, and that he is taken up by process of that court, as the sovereign *eyre*, and committed to the marshal, in which case he may be declared against in any civil action whatsoever.

The first process therefore is a bill, either real or feigned, and so called, because its foundation was the Bill of Complaint in court touching the trespass: on this is founded the *latitat*, which supposes that the defendant had escaped, and therefore issues in the king's name, to apprehend the party wherever he may be found; for the king has an universal jurisdiction over all his subjects, and, consequently, may call any of them that fled from the justice of his own court.

All process or writs of appeal, and all process on indictments removed hither by *certiorari* from a (a) foreign county, ought to be returnable *coram nobis ubicunque fuerimus*. * 2 Hawk. P. C. c. 3. (a) But all process upon bills of appeal against one in *custodiâ mareschalli*, ought to be returnable *coram nobis apud Westmonasterium*. 2 Hawk. P. C. c. 3. Of indictments commenced in the king's bench. 2 Hawk. P. C. c. 3. Q. — * And so are proceedings in civil suits, in this court, by original.

Also it hath been resolved, That where the court proceeds on an offence committed in the same county wherein it sits, the process may be made returnable immediately; but that where it proceeds on an offence removed by *certiorari* from another, there must be fifteen days between the *teste* and return of every process. 9 Co. 118. Co. Lit. 134. Lev. 61. Sid. 72. 2 Roll. Abr. 626. 2 Inst. 550.

COURT OF COMMON PLEAS.

TOWARDS the Norman period, the power of the *justiciar* was broken, and the *aula regis*, which was one great court, divided into four distinct courts, as we have them at this day in *Westminster-hall*; the common pleas was established for the determination of (b) pleas merely civil, and was at first ambulatory, and removed by the king wherever he went; but by (c) *Magna Charta*, c. 11. *Communia placita non sequantur (d) curiam nostram, sed teneantur in aliquo certo loco*. Maddox, c. 9. (b) Because the causes between subject and subject were to be there determined, therefore the stile of this court was *placita coram*, &c. or *common pleas*; the word *pleas* anciently signifying the convention of the states in *campis*, viz. *germanice* in *placts*; and because in those conventions of the states all causes were heard, debated, and determined, therefore, by corruption they got the name of *pleas* from the court where they were decided: Hence the court that was particularly erected to hear and determine such and such causes, was called the court of pleas. Duf. 395. (c) That this court was not created by or soon after the making of *Magna Charta*, vide Co. Lit. 71. b. 2 Inst. 22. And for my Lord Coke's opinion of the antiquity of it, see the prefaces to the 8 & 9 Rep. and 8 Co. 145. [See also note 2. 13th edit. Co. Lit. 71. b. and Mad. Hist. Excheq. fol. edit. 63. 539.] (d) Before this act, common pleas might have been held in B. R., and all original writs were returnable there. 2 Inst. 21.

The jurisdiction of this court is founded on (e) original writs issuing out of the chancery, which are the king's mandates for them to proceed on, to determine such and such causes; these writs issue out of chancery, because, when the king's court was but one, the chancellor had the seal; and therefore, when they were divided, he sealed all original writs. By this method the seal was a check on the other courts, to know what cause was there, and likewise, that the (f) fines for having justice in the king's court should be answered incontinently before there were any proceedings. 4 Inst. 99. (e) Bracton lib. 3. f. 105. b. pl. 2. says, *sine warranto jurisdictionem non habent*; and to the same purpose is Fleta, lib. 2. c. 34. f. 85. Britton, 2. b. says, On the

establishment of this court, that they shall plead such common pleas as we shall command them by our writ, so that the proceedings on our writs may be recorded. (f) In Maddox, 293. to 314., there are a variety of instances of fines recorded for having justice in the king's courts. See Anc. Dial. of Excheq. 56.

But

4 Inst. 99.

But this is to be understood when the cause is between common persons; for when an attorney, or any person belonging to the court, is plaintiff, he sues by writ of privilege, and is sued by bill, which is in nature of a petition; both which originally commence in the common pleas, and have no foundation in the chancery.

4 Inst. 99.

(a) But the jurisdiction of each court is so well established, that as at this day the court of king's

bench cannot be authorised to determine a mere real action; so neither can the court of common pleas, to inquire of felony or treason. 2 Hawk. P.C. 2. *Vide tit. Court of King's Bench.*

This court, my Lord *Coke* says, is the lock and key of the common law in common pleas; for herein are real actions, whereupon fines and recoveries pass; as also all other real actions by original writs: also, common pleas mixt or personal, in divers of which the king's bench has a (a) concurrent jurisdiction with this court.

4 Inst. 99.

said to be adjudged by all the judges of *England*, Mich. 7 Ja. 1., and that there

This court, without any writ, may upon a suggestion grant prohibitions, to keep as well temporal as ecclesiastical courts within their (b) bounds and jurisdiction, without any original or plea depending; for the common law, which in these cases is a prohibition of itself, stands instead of an original.

were several precedents to this purpose. (b) All prohibitions for encroaching jurisdiction issue as well out of the common pleas as king's bench. Vaugh. 157. *per* Vaughan, Ch. Just.

Vaugh. 154.

&c. & *vide*

2 Jones, 14.

* So it may by

the *habeas corpus* act, 31 Car.

2. c. 2. So,

by the same

statute, any judge of this court, may in the vacation award an *habeas corpus*.

This court, in term-time, may award a *habeas corpus* by the common law*, for any person committed for any cause under treason or felony, and thereupon discharge him, if it clearly appear by the return, that the commitment was against law, as being made by one who had no jurisdiction of the cause, or for a matter for which, by law, no man ought to be punished.

4 Inst. 100.

This court, upon an adjournment upon a foreign voucher may hold plea likewise upon other foreign pleas, and upon general bastardy, *ne unques accouple in loiale matrimony*, &c. for none but the king's courts, and no inferior court, shall write to the bishop. So likewise, upon ancient demesne pleaded.

COURT OF EXCHEQUER.

- (A) Of the Nature and Antiquity of this Court.
- (B) In what Cases it has a Jurisdiction.
- (C) Of the Manner of its Proceedings.

(A) Of

(A) *Of the Nature and Antiquity of this Court.*

THE court of (a) exchequer is an (b) ancient court of record for all matters relating to the revenue of the crown. 4 Inst. 103.

(a) The common derivation of the word is from the old *French* word *eschequier*, which signifies a *chess-board*, or *chequer-work*; and because a cloth of that kind was laid upon the table upon which the accountants told out the king's money, and set forth their accounts, in the same artificial manner as is done in the cofferer's account at this day, it was called the court of exchequer. Maddox, 109. Spelm. Gloss. tit. *Seacc.* Du Fresne, tit. *Seacc.* Fortesc. on *Monarchy*, the notes there, 117, 118. (b) It was formed from the exchequer in *Normandy*, which was a court of sovereign jurisdiction, and superintended all manner of complaints, by and against the sheriffs and bailiffs who exercised an ordinary jurisdiction, and whose duty it was to gather the duke's rents in each bailiwick, and to account for the same in this great court; and as in the court of *Normandy* the great officers of state sat as judges; so with us, before the division of the courts, the great ministers, as the justiciar, constable, seneschal, chancellor, and treasurers, sat in this court; but the treasurer usually presided, as best acquainted with all matters relating to the revenue. Maddox, 109. *Vide* also for the antiquity of this court, and of its several officers, and their duty. 4 Inst. 103. Sav. 48. 2 Inst. 104, 105. 551.

In the (c) exchequer there are seven courts, 1. The court of pleas. 2. The court of accounts. 3. The court of (d) receipt. 4. The court of exchequer (e) chamber, being the (f) assembly of all the judges of *England*, for matters of law. 5. (g) The court of exchequer-chamber, for errors in the court of exchequer. 6. (h) The court of exchequer-chamber, for errors in the king's bench. 7. (i) The court of equity in the exchequer-chamber. (c) The court of first fruits and tenths, erected *tempore* H. 8. was dissolved by Q. Mary, Parl. 1. sess. 2. c. 10., and the clergy discharged thereof by 2 & 3 Ph. & Ma. c. 4.

But by the first of Eliz. c. 4. the first-fruits and tenths are re-united to the crown, but no court is revived, but the same to be within the rule, survey, and government of the exchequer, &c. 4 Inst. 120. — The court of Augmentations was erected by 33 H. 8. c. 39.; but queen Mary, according to the power given her by the statute 1 Ma. c. 10., by letters patent dated 23d January in the same year, dissolved the same court: and the next day, by other letters patent, united the same to the exchequer, which was utterly void, because she had dissolved the same before. 4 Inst. 118. Moor, 289. But *vide* Plow. 377. 542., and the Banker's case, where, by the opinion of Lord Sommers, the uniting of the court of augmentations to the court of exchequer was not absurd, nor an impracticable thing. (d) This is the true centre, into which all the king's revenue and profit ought to fall. 2 Inst. 197. (e) What causes are to be adjourned thither, and the method there, as to the arguing of them by the judges. 2 Bulst. 146. Lev. 7. (f) 4 Inst. 68. 110. (g) Erected by 31 Ed. 3. c. 12. (h) Erected by 27 Eliz. c. 8. (i) The lord treasurer, chancellor, and barons of the exchequer, are the judges of this court; and their jurisdiction is as large, for matters of equity, as that of the barons in the court of exchequer, for the benefit of the king, by the common law. 4 Inst. 118.

(B) *In what Cases it has a Jurisdiction.*

BY the (k) statute of *Rutland*, made 10 E. 1. "No plea shall be held in the exchequer, unless it specially concern the king or his ministers." (k) It hath been doubted, whether this is an act of parliament, or an ordinance only, made by the king, for the better order of this court. Plow. 209.

4 Inst. 113. — But 2 Inst. 551., it is said, there is a writ in the *register*, under title *Brevia de Statute*, which recites the words of this statute; and in the margin of the writ, *Statut. de Rutland* is quoted; so that without question this statute was made by authority of parliament. And 4 Inst. 113. it is said, it is entered in the parliament rolls, & *vide* 8 Co. 20. — But 4 Inst. 114. it is said, the writ is founded upon the common law and custom of the realm. —

|| Prynne's

||Prynne's Animadversions, 55, 56, 57. give many reasons to prove that this is no statute; and though it is inserted in Runnington's edition of the statutes by Ruffhead, it does not appear in the statutes "Printed by his majesty's command in pursuance of an address of the house of commons."||

||By the *Articuli super Chartas*, (which is the title given to the act in the printed statutes, though no title appears upon the roll,) 28 E. 1. c. 4. "no common pleas shall be henceforth holden in the exchequer, contrary to the form of the great charter."||

38 Ass. 20. The king's (a) farmer may sue one that detains from him part of the possessions that he hath from the king, out of which the farm is to be paid, by which he cannot pay his farm to the king.
Roll. Abr. 538. (a) So, of his debtor *.
2 Inst. 551. — * And by this fiction, the court of pleas hath a concurrent jurisdiction with the common pleas and king's bench in civil suits, (except *real actions* and *quare impedit*.)

4 Inst. 112. The debtor (d) of the king's debtor may sue here by *quo minus*.
(b) That the lessee of the king's lessee is not entitled to the privilege of the court of exchequer. Owen, 38. — [But see the preceding note, and the same fiction is used on the equity side.]

Sav. 134. An information for the queen and party, upon the statute of liverys, 8 E. 4. c. 2. was brought in the exchequer. Though Agard and Cavendish, adjudged. by the express words of the statute it ought to be in the king's bench or common pleas, before justices of the peace, &c. and Cro. Eliz. 326. S. C. *adjoinatur*. Moor, 564. S. C. upon a writ of error in *Cam*. the exchequer is not mentioned; yet it was adjudged it lay in this court, because the queen was party, and there were no negative words; without which (c) this, being a superior court, shall have jurisdiction.
Scacc. reversed as to the informer; for the penalty was given to him only that informed in the courts specially named. 2 And. 127. S. C. reversed accordingly. (c) Flow. Com. 208.

38 Ass. 20. If the king's farmer sues in the exchequer against a person for Roll. Abr. 538. detaining tithes, parcel of the possessions to him leased in farm by the king; though the right of tithes comes in debate between them, yet the court shall not be ousted of jurisdiction.

Lane, 100. If J. S. be parson inpropriate of D. and B. vicar there, and Roll. Abr. 538. the king patron of the vicarage, and there be a debate between S. C. the parson and vicar for tithes; the suit for these tithes ought to be in the exchequer.

Lane, 39. If (d) a copyholder of the king's manor be sued in the ecclesiastical courts for tithes, upon a suggestion in *Scaccario*, that he Roll. Abr. 539. S. C. (d) So, prescribed to pay a certain *modus decimandi*, he shall have a prohibition there, and this *modus* shall be tried there.
of the king's farmer. Lit. Rep. 525.

Lane, 55. If a man be amerced in the king's leet, and upon process out Roll. Abr. 539. of the exchequer the bailiff distrain him for the amercement, and S. C. he bring trespass, he ought to bring this action of trespass in the office of pleas of the exchequer; for the bailiff levied it as an officer of this court.

Bishop v. Warner, Hardr. 193. ||The commissioners of excise fined the plaintiff, being a brewer, according to the new act, in 20*l.* for not paying the duty; and, upon a return made that he had no goods whereof a distress could be taken, they imprisoned him, whereupon he brought

brought an action of false imprisonment in the court of *B. R.* and the defendants prayed that the action might be laid here, because the matter concerns the king's revenue. *Sed non allocatur*, because the fine doth not immediately concern the revenue of excise, but is a penalty imposed for an offence committed in it, and it belongs no more to this court, than other like cases arising upon fines and imprisonment. Otherwise, if it had immediately concerned the king's revenue.

¶ Upon an ejectment brought in the court of common pleas by, the defendant here, the plaintiff moved that the action might be laid here, because his title was under an extent out of this court for debts in aid; to which it was answered, that all those debts were pardoned by the act of General Pardon, and so the extents at an end; and that the leases of those lands under the seal of the exchequer rendering rent were determined also, being only *quamdiu in manibus nostris*; yet the court ordered the parties to prosecute their suit here, because this could not appear but upon examination of the whole matter.

King *Charles* the Second having taken up sums of money of the petitioners, granted to them and their heirs several annuities, chargeable upon the hereditary revenue of excise given to the king by 12 Car. 2. c. 24. It was holden, that the remedy by petition to the barons of this court was the proper remedy.¶

If an erroneous judgment be given in a *formedon* in a copyhold court, where the king is lord, the party against whom the judgment is given may sue, by petition, or bill to the king, in the *exchequer-chamber*, in the nature of a writ of false judgment, for the reversal of this judgment; for as in the court of a common person, the proper suit for reversal thereof is to the lord, by petition; so it is here to the king; and the *exchequer-chamber* is the more proper to sue to the king by petition than the chancery, because it concerns the king's manor.

An action of false imprisonment, or other action, may be brought against the under-sheriff, in the *exchequer*, though the sheriff be the officer of the court, for the court takes notice of the under-sheriff also.

If *A.* holds lands of the king by fealty and rent, and makes a lease thereof for years to *B.* and *C.* pretends a prior lease to him by *A.* though there is a rent issuing out of those lands to the king, yet neither *B.* nor *C.* can sue in this court by any privilege, in respect of the rent; for that the king can have no prejudice or benefit thereby; for whether *B.* or *C.* prevails, the rent must be paid.*

But, if the king extends lands, as the lands of *A.* for the debt of *A.*, and leases the same to *B.* for years, reserving rent, and *C.* pretends that *A.* had nothing in the land, but that he was seised thereof, &c. this is within the privilege of the court; (a) for if *C.* prevails, the king loses his rent.

who detained goods from him, without which he could not answer the king; and *A.* came and claimed the goods as his tithe as parson of *B.*, and thereupon issue was taken for the king triable in the *exchequer*. 4 Inst. 111.

Banks v. Bennet, Hardr. 193. Tr. 13. Car. 2.

On the petition of Hornbee and others. Freem. 331.

Roll. Abr. 539. Lane, 98. S. C. *adjournatur*.

Roll. Abr. 539. Lane, 53. S. C. *Fide tit. Sheriff*.

4 Inst. 118.

* *Sed qu.* If he may not sue here, by using the common fiction?

4 Inst. 118. (a) The king brought debt against a prior alien, and the prior had process against *A.*

4 Inst. 119.

If the king lease to *A.* for years, rendering rent, the king may distrain in all other the lands of *A.* for his rent, yet *A.* hath no privilege for his other lands, to bring them within the jurisdiction of this court.

Hard. 160.

If a man file a cross bill in this court, he need not entitle himself to the jurisdiction of the court, because the cross bill is grounded upon another bill in court.

Hard. 160.

So, if a man be sued in the office of pleas, he may have an *English* bill to be relieved against that suit, without setting forth matters of jurisdiction.

Hard. 176.

Vide infra tit.
Prerogative.
(E. 7.)

If *A.* is outlawed at the suit of *B.* and lands in the possession of *A.* are extended, and *C.* claims title to them, and pleads to the inquisition, if *C.* will bring an ejectment for them, it must be in this court, because the king's revenue is concerned.

Per Parker
C. B. Park.
Rep. 69.

[There cannot be an information upon a seizure to condemn goods by proclamation, but only in the court of exchequer; and the reason is, because, upon all such seizures, every person concerned may have and know a certain place to resort unto for his remedy in this kind.

Bercholt v.
Candy, Bunb.
34, 5.

And the court of exchequer will remove an action brought in another court for the seizure of a ship, though no information is filed in it; but after the information has been tried in it, and a verdict for the defendant, they will not remove an action brought in another for the seizure.

Penny v. Bai-
ley, *id.* 309.

So, an action of trover against an officer for goods seized and condemned, and also a great coat, saddle, &c. was removed upon an affidavit that the goods, &c. were actually condemned, and that the great coat, &c. were thrown in only to give colour.

Berkley v.
Walters, *id.*
306.

But this court would not remove an action for taking ropes and cordage against an officer who had seized two cables, one of which only was foreign, and actually condemned.]

Hard. 193.
(a) Where not
allowed to pro-
secute in
chancery.
2 Vern. 146.

If *A.* hath title to lands under an extent out of the exchequer, for debts in aid, he must bring his ejectment for them in this court, and having brought his ejectment for them in the (a) common pleas, upon motion, he was ordered to prosecute here.

Sav. 22. Hard.
334.

By the 33 H. 8. c. 39. § 57. the court of exchequer has power to discharge all debts and duties due to the king, upon any equity disclosed; and it is by virtue of this act that they discharge recognizances; and it seems by the said act, they may discharge penal laws made before this statute; but all penal laws made after the statute cannot be discharged, but must be compounded. (b)

[(b) By the
privy seal,

1 Geo. 2., which empowers the barons to compound or discharge all forfeitures of recognizances, penalties, fines, issues, amerciaments, and other sums of the nature of recognizances, fines, issues, and amerciaments, whereby the subjects are chargeable to his majesty, the court discharged a penalty fixed by statute, *Rex v. Dibbens, Parker*, 165. So, fines judicially set have been compounded, Nov. 21st, 6 W. & M. cited *ibid.* And now by stat. 4 Geo. 3. c. 10., the barons are empowered to discharge without any *quietus*, recognizances estreated into the exchequer for neglecting to attend as parties or witnesses, or to prosecute indictments in any court of record, or at the assises, &c. upon petition and affidavit on behalf of the persons who may be imprisoned, or be liable to be imprisoned on the forfeiture of such recognizances: but

the act expressly provides that no discharge shall be given on such petitions where any debt is due to the crown, other than by the recognizances so prayed to be discharged; nor in any cases of defrauding the revenue by contraband trade, or assaulting the officers of the customs or excise in the execution of their duty, or any person lawfully assisting them therein.]

¶ This court having a general jurisdiction over every part of the publick revenue, and complete power to interfere in the taking of the publick accounts in every part of their process; it is competent to it to controul the conduct of the commissioners of publick accounts under 25 G. 3. c. 52. there being no provision in that statute to exclude its jurisdiction.]]

Ex parte Durand. Anstr. 743.

(C) Of the Manner of its Proceedings.

IF prohibited goods are seised, and proclamation made according to the course of the court, the owner shall not have them

Sav. 10.

(a) delivered unto him upon security, without putting in (b) a plea, shewing cause why he should have them.

(a) By 13 & 14 Car. 2.

c. 11. no writ

of delivery shall be granted but upon good security, and for goods perishable, or where the informer shall delay the trial. [And even for perishable goods, it is discretionary in the court whether they will grant it or not. Parker v. Ashton, Bunb. 21. Vincent v. De Laar, Parker, 196. What shall be such a delay as shall authorize the awarding of a writ of delivery cannot be certainly stated: indeed, it seems to be generally agreed, that if a seizure be in the vacation, and there be no information filed the term following, if it could have been tried in that term, that this would be a delay to ground a writ of delivery upon. Johnson v. Sowers, Bunb. 30. Where it appeared in an information, that goods seized by the officer of commissioners of excise, were removed from one port to another without a permit, the court granted a writ of delivery, upon giving security, this being an unlawful importation, and therefore not within their jurisdiction. Warwick v. White, *id.* 106.] (b) Upon a bill in equity to discover the value of cordage seized to the king's use, the defendant, in his answer, made title to it as his own; and upon giving security had a writ of delivery, though the king claimed the property as his own goods, and not as goods forfeited. Hard. 191. But it was said, it would have been otherwise if the king's title had appeared by inquisition or other record.

Before the 5 R. 2. so great care was taken of the king's revenue, that no man might sue or plead for the discharge of any debt, account, or demand, in this court, without express command, or letter of the great seal.

4. Inst. 110.

But by 5 R. 2. c. 9. this practice was declared illegal, and ordained, that the barons should have power to hear every answer of every demand in this court; so that every person, &c. may plead, sue, &c. without suing any writ or other commandment.

4 Inst. 110.

In case of an outlawry, it is the course of the exchequer to prefer an information, in nature of a trover and conversion, against him that hath the goods of the party outlawed.

Mod. 90. per Hale, Ch. Just.

¶ The authority of the court in matters of revenue may be exerted in two shapes, either by motion, or petition to the court; or by the more formal method of an information by the attorney-general or a bill against him. In the ordinary application to take off an *insuper* improperly imposed, to remove the hands of the sheriff on an improper levy, and the like, a motion is the proper mode of obtaining the assistance of the court. But, where the nature of the question, or intricacy of the circumstances

Anstr. 743. by Macdonald C. B.

-stances renders it impossible to come at the justice of the case on motion; the more formal mode by bill or information must be resorted to.

Rex v. Ince-
don, 1 Price
369.

The court has upon motion granted a special *distringas* to compel the executor of a publick accountant to account before the commissioners for auditing publick accounts, though no *insuper* was set, nor was the testator put in charge during his life; and though the account in which the *insuper* appeared, was not declared until seven years after his decease.||

COURT OF THE CONSTABLE AND EARL MARSHAL.

Maddox, 27.
Fleta, lib. 2.
c. 31. Spelm.
Gloss.

(a) The name
is of Norman
extraction,
and came from

IN the king's own court, established by William the Conqueror, there were high officers, called the (a) Constable and (b) Marshal, to whom chiefly belonged the consuance of matters of honour, war, and peace; and therefore all foreign facts committed by the king's subjects were referred to them to determine, according to the law of nations and of arms.

their *Comes Stabuli*; there was the like officer in France, called *Le Constable de Franc*, who was the great general of the army, whose power was confined to matters of war only: But it seems the constable of England had a civil as well as a military jurisdiction, especially as to matters transacted in foreign parts: This office was created in William the Conqueror's time, and was anciently hereditary, and went to females: but, being an office of such high power and dignity, it became formidable to the crown; and therefore H. 8. got rid of it, since which there has been no such officer for a constancy, but only one created *pro hac vice*. Vide the notes to Fortes. on Monarchy, 130. 48 E. 3. 3. 13 H. 4. 4, 5. 4 Inst. 127. Dyer, 285. Spelm. Reliqu. 163. (b) Of the several kinds of marshals that were attendants on the king's court, and the nature of their offices, vide Maddox, 31, 32, 33. And that the marshal who was joined with the constable, sat as judge with him, and was called the Earl Marshal, or Marshal of England, vide Fleta, lib. 2. c. 3. Maddox, 33. Show. P.C. 60. Co. Lit. 74. 4 Inst. 123.

But to understand the nature and jurisdiction of this court, at present I shall consider,

- (A) The Manner of holding this Court: And herein, whether it can be holden by Commission, by the Earl Marshal only; and whether it may be prohibited if it exceeds its Jurisdiction.
- (B) In what Cases it has a Jurisdiction.
- (C) The Form and Manner of its Proceedings.

(A) The

(A) The Manner of holding this Court: And herein, whether it can be holden by Commission, by the Earl Marshal only; and whether it may be prohibited if it exceeds its Jurisdiction.

IT seems (a) agreed, that during the lunacy of the earl marshal, this court may be holden before commissioners deputed to exercise his office. (a) So resolved in Parker's case, Lev. 230., and Sid. 353.

S. C. cont. Twisdon, who held such commission illegal, and against the petition of right, 3 Car. 1. But per 2 Hawk. P. C. c. 4., such commissions, founded on the plain necessity of the case, and intended to prevent a failure of justice, as to cases of which no other court hath cognisance, seem not against the purview of the petition, which complains, that commissions had been granted for the trial of certain capital offences, and other outrages, by the martial law, &c.

It has been a matter greatly debated, whether this court can be holden before the lord marshal only, without a constable; and those who are for the negative, ground their opinions chiefly on the statutes, (b) ancient law books, and records, which seem to mention the constable as the only, or at least as the principal judge of this court. (b) To this purpose are 13 H. 4. 46. 37 H. 3. 5. a. S. P. C. 65.

48 E. 3. 3. 37 H. 6. 20. 30 H. 6. 6. 13 H. 4. 5. Rushworth's Coll. vol. 1. 107. 2 Inst. 51. 3 Inst. 123. Co. Lit. 74. b. Crompt. Jur. 82.

But, notwithstanding this, the constant practice, especially since the extinguishment of the hereditary office of constable in Henry the Eighth's time, of holding this court by the earl marshal only, and the general notions of our (c) judges and lawyers, of the legality of such court, seem in a great measure to establish a contrary opinion, and that at this day it may be holden before the earl marshal only. Hob. 121. Roll. Rep. 87. 2 Lev. 134. Show. 153. Sid. 353. Lev. 230. Show. P. C. 60, 61.

(c) That in the reigns of Queen Elizabeth and James the First, the judges assisted in this court, when holden before the earl marshal only. Show. P. C. 60. 4 Inst. 126. — & vide 2 Hawk. P. C. c. 4. That according to the common usage of other courts, which generally may be holden before one judge, in the absence of the rest, it seems a reasonable construction to allow this court to be so holden. [See upon this point a letter written soon after the Revolution by Dr. Plott to Lord Sommers, then attorney-general. Hearn's Disc. of Eminent Antiq. 2d ed. vol. ii. p. 250. Co. Lit. 72. b. note 1. 13th edit.]

But it is agreed, that appeals of capital matters cannot be brought before the marshal alone, because 1 H. 4. c. 14. which shews how such appeals shall be brought, is express, that they shall be tried and determined before the constable and marshal of England. 2 Hawk. P. C. c. 4.

If this court, holden before the earl marshal (d) only, exceeds its jurisdiction, it has been (e) resolved, that it may be prohibited by the common law courts. (d) But if before the constable and marshal, Q.

& vide Show. P. C. 60, 61. || There would seem to be no foundation for this query. The court is invested with the same powers whether holden before the constable and earl marshal, or before the earl marshal only, where it is competent to the earl marshal alone to hold it, and if its excess may be restrained in the one case, it may in the other. || (e) In Oldis's case, Show. P. C. 61. 65. 2 Hawk. P. C. c. 4.

(B) In what Cases it has a Jurisdiction.

|| That this court should not encroach upon the common law courts was generally declared by 8 R. 2. c. 5. but its jurisdiction was particularly marked out only in this act. ||

(a) || Soon after the making of this statute, two privy seals were sued upon it. See *Poutney v. Borney*. 13 H. 4. 4, 5. ||

Vide the several statutes
26 H. 8. c. 13.
35 H. 8. c. 2.
5 & 6 E. 6.
c. 11. and
2 Hawk. P. C.
c. 4. as to its
jurisdiction at

THE jurisdiction of this court is declared by the 13 R. 2. c. 2. by which it is recited, That the commons made grievous complaints that the court of the constable and marshal daily incroached contracts and trespasses, and many other actions at the common law; and *thereupon it is declared*, That to the constable it appertaineth to have comusance of contracts touching deeds of arms, and of war out of the realm, and also of things which touch war within the realm, which cannot be determined nor discussed by the common law; with other usages to the same matters appertaining, which other constables before have reasonably used; joining to the same, that every plaintiff shall declare plainly his matter in his petition, before that any man be sent to answer thereto; and if any will complain that any plea is commenced before the constable and marshal, that might be tried by the common law, he shall have a privy seal (a) to the said constable and marshal, to surcease till it be discussed by the king's counsel, if the matter of right pertain to that court, &c.

And it is further enacted by 1 H. 4. c. 14. That all appeals of things done within the realm shall be tried and determined by the good laws of the realm; and that appeals of things done out of the realm shall be tried and determined before the constable and marshal, and that no appeal be made or pursued in parliament.

this day, with respect to things done beyond sea.

Rushworth's
Coll. Part 2.
vol. 2. 1055.
2 Hawk. P. C.
c. 4.

As the jurisdiction of this court is restrained to things touching war within the realm, it can have no jurisdiction as to a civil matter, and therefore cannot proceed against a person for bare scandalous words, reflecting on the honour and gentility of families.

Lev. 230. Sid.
353. Show.
Rep. 353.
Show. P. C. 58.
4 Mod. 128.

Also, though the marshalling of publick funerals belongs to the heralds, who are the attendants of this court, and no other persons without their licence, can lawfully intermeddle in it, yet it seems to be settled, that this court cannot punish those who shall be guilty of such an incroachment, because it is a proper ground for an action on the case; and by the above statutes, this court has nothing to do with matters which may be determined by the common law.

2 Hawk. P. C.
c. 4.

But by the constant practice, and the general opinion of lawyers, it seems at this day to have a jurisdiction as to disputes concerning precedence and points of honour, and satisfaction therein, and may proceed against persons for falsely assuming the name and arms of honourable persons, &c.

(C) The Form and Manner of its Proceedings.

THIS court is to be governed by its own usages, as far as they go, and in other cases by the civil law; but since it is no court of common law, no condemnation in it causes any forfeiture of lands, or corruption of blood; neither can an error in it be remedied by writ of error, but only by appeal to the king; yet the judges of the common law take notice of its jurisdiction, and give credit to a certificate of its judges.

3 Inst. 125.
2 Hawk. P. C.
c. 4.

It is made a doubt whether the king hath any remedy in this court against an offender, by way of indictment or information by the attorney-general.

Hutton, 3.

OF THE COURT OF THE JUSTICES OF OYER AND TERMINER, AND GAOL- DELIVERY.

JUSTICES of assise, *oyer* and *terminer*, and gaol-delivery, were appointed in the room of the justices in *cyre*, who formerly went their circuits once in seven years, and superseded the power of the sheriff's torn wherever they came, and transacted all manner of civil and criminal business; these were part of the king's court, who exercised their jurisdiction in the several counties of the kingdom, and, by communicating with the king's court, kept an uniformity in the law.

Co. Lit. 293.
4 Inst. 184.
Bacon's Elem.
15, 16.

- (A) Of the Manner of authorizing Commissioners of *Oyer* and *Terminer*, and Gaol-Delivery: And herein of the Determination of their Power.
- (B) Of their Jurisdiction when appointed.
- (C) Of the Form of their Proceedings, and holding their Courts.

(A) Of the Manner of authorizing Commissioners of *Oyer and Terminer*, and Gaol-Delivery: And herein of the Determination of their Power.

Lamb. B. 1.
c. 5. Co. Lit.
114. Lev. 219.
(a) That the king is the proper judge, and may determine to whom, and upon what occasions, such commissions may be granted. 2 Inst. 419.

AS all justice proceeds from the king, so these commissions must receive their authority from the (a) prerogative of the crown; and this the common law requires, and it is also expressly enacted by the 27 H. 8. c. 24.

4 Inst. 162.
Crom. Jur.
131. Plow.
384. 2 Inst.
419. 2 Hayk.
P. C. c. 5. § 30.
(b) Whether such justices may be appointed as well by writ as by commission; and for the

The common (b) form of these commissions is to authorize the commissioners, or three or four of them, of which number such or such a person is to be one, to inquire, by the oaths of twelve men, of all treasons, felonies, and misdemeanours, &c. in such and such place, and to hear and determine the same at such times and places as such commissioners shall appoint, &c. for which purpose the king acquaints them, that he has sent a writ to the sheriffs of such counties, commanding them to return juries before them at such days and places as shall be notified by them, &c.

difference *vide* 2 Hawk. P. C. c. 5. § 2. — That the court of sessions in London does not differ from other commissions of *oyer and terminer*, &c. Vaugh. 140.

And. 296.
2 Hawk. P. C. c. 5. § 2. Reg.
124. F. N. B.
111. H. P. C.
159. 2 Hawk.
P. C. c. 5. § 16.
(c) The king can grant but one patent of association to one commission. 2 Hawk. P. C. c. 5. § 16.
And Q. Whether a commission of association, relating only to a special cause, can associate the persons named in it to those appointed by a general commission. 2 Hawk. P. C. *ubi supra*.

The validity of such commissions must be determined according to their conformity to ancient precedents; and therefore a commission to a corporation, appointing some of its principal members to be justices of gaol-delivery, together with those whom the king shall appoint from time to time, was adjudged void; for such an authority, depending on the precarious appointment of other justices, is not agreeable to the known forms of such commissions. But new commissions of *oyer and terminer* may be added to the former by a writ, or commission of association, which, setting forth the purport of the former commission, adds new commissioners to those appointed by it, provided such new commissioners attend at the times and places appointed by the former; and it is usual to direct another writ to the former justices, commanding them to admit such new justices as their associates; but such writ (c) binds not such justices to admit the new ones, unless they also produce one directed to themselves; and such writ, to the persons associated, is always patent, but that to the others to admit them is close.

Reg. 128.
F. N. B. 111.
2 Hawk. P. C.
c. 5. § 17.

Upon the death of such commissioners, after an indictment taken before them, and process thereupon, a new commission may authorize others to proceed, and a writ shall go to the executors of the first commissioners, to send the records and processes before the new ones.

After

After a writ of association, it is usual to make out a writ of *si non omnes*, which authorizes such a number of the justices appointed by the former commissions to proceed, if all of them cannot conveniently be present. Reg. 124.
F. N. B. 111.
2 Hawk. P. C.
c. 5. § 18.

There are several ancient precedents of special commissions of *oyer* and *terminer*, as those for inquiring and determining some particular enormous violence done to the party who sues it out, &c. But for these
vide 2 Hawk.
P. C. c. 5.
§ 21., &c.

As to the difference between a commission of *oyer* and *terminer* and gaol-delivery, it may be proper to observe, that where the same persons at the same time are both commissioners of *oyer* and also of gaol-delivery, they may proceed by virtue of the one commission, in such cases wherein they have no jurisdiction by the other, and execute both at the same time, and make up their records accordingly. 2 Hawk. P. C.
c. 5. § 21., and
several autho-
rities there
cited.

These commissions may be suspended by the court of king's bench sitting in the same county; but the jurisdiction of the justices is revived of course, when the said court no longer sits there: also, their authority may be suspended by a writ of *superseatas*, which is grantable on proof that their commission was unduly granted; in which case their power may be restored by a writ of *procedendo*; but a commission once (a) determined cannot be revived, nor can the justices be authorized a-new without another commission. 4 Inst. 163.
H. P. C. 162.
[By 25 G. 3.
c. 18., and
32 G. 3. c. 48.,
the justices of
oyer and *ter-
miner*, and
gaol-delivery
of *Newgate*,
for the county
of *Middlesex*,

and the justices of the peace for that county, are empowered to continue and proceed in a session of gaol-delivery of the peace, and of *oyer* and *terminer*, notwithstanding the happening of the essoign day of term, or the sitting of the court of king's bench at *Westminster*, or elsewhere in the county of *Middlesex*.] (x) That such commission may be determined expressly or impliedly, and not for the several ways it may be done, *vide* 2 Hawk. P. C. c. 5. § 4., &c

(B) Of their Jurisdiction when appointed.

JUSTICES of gaol-delivery may, by the (b) common law, proceed on any indictment of felony or trespass found before any (c) other justices, against any person in the gaol, mentioned in their commission, and not determined. H. P. C. 158.
4 Inst. 164.
Bro. Coram.
179. 12 Co. 32.
(b) And by
4 E. 3. c. 2. the justices assigned to, deliver gaols shall have power to deliver the same gaols of those that shall be indicted before the justices of the peace. (c) But justices of *oyer* and *terminer* have regularly no such power. 2 Hawk. P. C. c. 5. § 32.

It seems the better opinion, that justices of gaol-delivery may take indictments against any persons within their commission. Cro. Eliz. 90.
179 And. 111.
2 Hawk. P. C.
c. 6. § 2. H. P. C. 158. 4 Inst. 168.

Also, that they may, by virtue of a general commission, deliver the gaol of persons committed for treason. Vide 2 Hawk.
P. C. c. 6. § 4.

But justices of gaol-delivery have not power to proceed against any, except those who are in actual custody; and therefore they have no more to do with one let to mainprize, than if he were at large. Vide 2 Hawk.
P. C. c. 6. § 5.

2 Hawk. P. C. c. 6. § 6. 8.
(a) Which neither justices of the peace, nor justices of *oyer* and *terminer* can do.
2 Hawk. P. C. c. 5. § 6.

Justices of gaol delivery have not only power to discharge prisoners acquitted before them on a trial, but also (a) all such against whom, on proclamation, no evidence shall appear to indict them: also, justices of gaol-delivery may award execution against prisoners outlawed for felony before justices of peace; and though their commission be in strictness determined after the end of their session, yet may they, after their session, order the reprieve or execution of the persons condemned before them.

That by the common law they may punish those who unduly bail prisoners.

By the 4 E. 3. c. 2. it is enacted, That justices assigned to deliver gaols shall have power to inquire of those in whose ward persons indicted before wardens of the peace shall be, if they make deliverance, or let to mainprize any so indicted which be not mainpernable, and to punish them if they do any thing against this act.

2 Hawk. P. C. c. 5. § 9. 6.

By the 1 and 2 Ph. and M. If any justice of peace of the *quorum*, or coroner, shall offend against that statute, either as to bailing prisoners or taking their examinations, or the information of those that bring them before them, or not putting the same in writing, or not certifying them to the next gaol-delivery, or not putting in writing the evidence to a jury on a coroner's inquest of murder or manslaughter, or not binding over material witnesses, or not certifying such evidence and such recognizances, the justices of gaol-delivery shall, on due proof by examination, set such fine for every such offence as shall seem meet.

By the 4 E. 3. c. 10. Justices of gaol-delivery shall punish sheriffs and gaolers refusing to take felons into their custody from constables and townships, without being paid for such receipt.

(b) But such subsequent justices have no power to award the execution of persons condemned by former justices, and reprieved by them. Dals. 20. Dyer, 165. 2 Hawk. P. C. c. 6. § 19. (c) Extends to subsequent commissioners authorised by a successor, as well as to those authorised by the same king. 7 Co. 31. Dals. 20. (d) Extends not to justices of *oyer* and *terminer*. 12 Co. 33. [See 8 G. 3. c. 15. *infra*. tit. *Felony*, (H).]

By the 1 E. 6. c. 7. Where any persons shall be found guilty of treason or felony, for which judgment of death may ensue, and shall be reprieved to prison (b) without judgment at that time, those persons who shall at any (c) time after be assigned justices (d) to deliver the gaol where such persons shall remain, shall have authority to give judgment of death against such persons, as the same justices before whom they were found guilty might have done, if their commission of gaol-delivery had continued.

(C) Of the Form of their Proceedings and holding their Courts.

2 Hawk. P. C. c. 5. § 14., and several authorities there cited.

IF a commission of *oyer* and *terminer* be awarded to certain persons to inquire, &c. at such a place, they can neither open it at another, nor (e) adjourn it thither, nor give judgment there; and if they do, their proceedings will be *coram non iudice*; yet justices

justices appointed *pro hac vice* may adjourn from one day to another, though their commission have no words to that purpose. (e) That it is most proper to enter their adjournments

in the *present tense*; but by the multitude of precedents the entry of them in the *præter tense* is good. Raym. 115. 2 Hawk. P. C. c. 5. § 15. But an adjournment, of which no entry appears, shall not be intended to have been made. Sid. 348. 2 Keb. 284. 292.

By the 9 E. 3. c. 5. "Justices of assise, gaol-delivery, and of oyer, shall send all their records and processes determined and put in execution, to the *Exchequer* at *Michaelmas* every year once; and the treasurer and chamberlains for the time being, having the sight of the commissions of such justices, shall receive the same records and processes of the said justices under their seals, and keep them in the treasury as the manner is; so that the said justices do first take out the estreats of the said records and processes, to send to the *exchequer* as they were wont before."

By the 6 R. 2. c. 9. "Justices assigned and to be assigned to take assises, and deliver gaols, shall hold their sessions in the principal towns of the counties where the shire courts of the same counties be holden, or hereafter shall be holden."

[By st. 19 G. 3. c. 74. § 70. "Whenever the courts of assise, *nisi prius*, oyer and terminer, or gaol-delivery, for any county at large in *England*, shall be holden in or near any city or town that is also a county of itself, and at the same time with the like or any of the like courts for the said city or town, the lodgings of the judge or judges shall be construed and taken to be situate both within the county at large, and also within the county of such city or town, for the purpose of carrying this act into execution, and of transacting the business of the assises for such county at large, and for the county of such city or town, during the time that such judge or judges shall continue therein for the execution of their several commissions."]

OF THE COURT OF THE JUSTICES OF ASSISE AND NISI PRIUS.

JUSTICES of (a) assise derive their authority from the commission, by which they are empowered to inquire of all disseisins, and to restore such, as have been disseised of their lands or tenements, to the possession of them, by trial at one assises. 4 Inst. 158. Cromp. Jur. 204. (a) Are so called from the writ of assise; but for this *vide tit. Assise*, and 4 Inst. 158. Co. Lit. 155.

2 Inst. 424.
4 Inst. 159.

To these, by writ of *nisi prius*, directed to the judges or commissioners of assise, and clerk of assise, is annexed an authority and jurisdiction of trying such issues as are joined in the courts at *Westminster*, in their proper counties. This method was introduced after the laying aside of the justices itinerant, and was contrived for the ease of the subject, that the jury and witnesses might not be obliged to come out of their proper counties.

4 Inst. 159.

The manner of contriving it was, to direct the *venire, distringas*, or *habeas corpora juratorum*, to return the jury at some day the next term, unless the justices *prius tali die & loco venerint*. There were no issues returned on the *venire* to make them appear at *nisi prius*; yet it was so much a greater difficulty to them to appear afterwards at *Westminster*, which if they did not, the *distringas* issued, that it had its effect to convene them in their proper counties. The writ was contrived to command them to come into court, because it would have been improper for the court to have commanded them to come into any other place; so that their appearance before the justices of assise, is an excuse for their non-appearance in *Bank*; but, if they did not appear at the assise, nor at *Westminster*, then issued a *habeas corpus* and *distringas* to bring them up.

6 Mod. 9.

The day at *nisi prius* and in *Bank* are in consideration of law the same, because the writ of *nisi prius* which gives authority to the judge to try the cause in the county, is instead of the court; and therefore the *postea* certified by him on the day in *Bank* is the same as if the jury had come up to the court, and the trial had been had in open court.

The justices have large jurisdiction, by several statutes, as to all criminal matters, and may punish offences in sheriffs, gaolers, and other officers, &c. which see in 2 Hawk. P. C. c. 7.

OF THE COURT OF SESSIONS OF JUSTICES OF THE PEACE.

Lamb. Book 4.
c. 2. Vide tit.
*Justices of the
Peace.* (a) Pur-
suant to the
statute 34 E. 3. c. 1. which see, tit. *Justices of Peace*, (B).

A COURT of sessions of justices of peace is (a) an assembly of two or more, whereof one is of the *quorum*, at a day and place before appointed by them, in order to inquire of, hear, and determine matters within their jurisdiction.

Lamb. B. 4.
c. 20. (a) That
such precept
can only be
superseded by

Any justices, whereof one is of the *quorum*, may direct their precept (a) under their *teste* to the sheriff, for the (b) summons of such a sessions, thereby commanding him to return a grand jury, and to warn all (c) stewards, constables, and bailiffs of

liberties,

liberties, to be present before them or their fellow justices, at such a day and place, and also to attend there himself, and to proclaim in proper places that such sessions will be holden.

writ out of
chancery.

Lamb. B. 4.

c. 2. Crompt.

Juris. 122. (b) That a sessions may be holden without any summons, as to proceedings on indictments, or on other particular occasions which need no attendance of grand jurors or officers. Lamb. Book. 4. c. 2. 2 Hawk. P. C. c. 8. § 52. 4 Burn. 191. (c) Who are all obliged to attend, on pain of being amerced at the discretion of the justices. 2 Hawk. P. C. c. 8. § 52. As is the keeper of the house of correction, *vide* 7 Ja. 1. c. 4.

Justices of the peace, in their sessions, have no jurisdiction one over the other, according to that rule *inter pares non est potestas*; therefore, they cannot amerce a justice for his non-attendance, nor bind a brother justice to his good behaviour for using such expressions (a) in court, for which, if he were a private person, he might be committed, or bound to his good behaviour.

Lamb. B. 4.

c. 3. Crompt.

122. 2 Hawk.

P. C. c. 8. § 57.

(a) But in

other in-

stances, any

justice of

peace may

require his fellow to find sureties of the peace; for matters of this kind require an immediate remedy. 2 Hawk. P. C. *ubi supra*.

Sessions holden for the general execution of the authority of justices of peace, and which are usually holden in the four quarters of the year, are called general sessions; and a sessions holden on a special occasion, for the execution of some particular branch of the authority of justices of peace, is called a special sessions.

Lamb. B. 4.

c. 19, 20.

2 Salk. 474.

2 Hawk. P. C.

c. 8. § 47.

|| But it seems

by the better

opinion, says

Mr. Serjeant *Hawkins*, that quarter sessions are a species only of general sessions, and that any sessions holden at any other time of the year for the general execution of the authority of justices of peace, which by the statute of 2 H. 5. c. 4. they are authorised to hold oftener than at the times therein specified, if need be, may be properly called general sessions. 2 Hawk. P. C. *ubi supra*. In *Middlesex* there are eight general sessions in every year, *viz.* the general quarter sessions, and four intermediate general sessions.||

[When the justices are once legally convened, they cannot adjourn any matter depending before them, without expressly adjourning the sessions also (b); which adjournment must shew when the original sessions commenced (c). There is indeed no necessity to set out all the particular adjournments (d); though when a warrant is issued for taking any one, it must be shewn that the sessions continued by adjournment till the taking. (e)

(b) 2 Leach's

Hawk. P. C.

c. 8. § 58. n.

Ca. temp.

Hardw. 80.

(c) 2 Str.

832. 865.

(d) Andr. 105.

(e) 2 Lev. 229.

They cannot refer any subject of their inquiry to the determination of the judges of assise, without the consent of the parties (f); for they are bound to make a final judgment themselves. (g)

(f) 4 Burn.

Just. 184.

(g) Ca. temp.

Hardw. 81.

When they proceed upon indictments, as a court of record at common law, their proceedings must contain the formal and regular continuances (h); for the sessions once dropped cannot be resumed. (i)

(h) Ca. temp.

Hardw. 79.

(i) 2 Str. 1263.

The sessions being considered as one day, the justices may alter their judgments during the continuance of it.

2 Salk. 606.

Upon appeals their discretion is co-extensive with that of the two justices, and they need not give the reason upon which their opinion is founded.

1 Burr. 245.

2 Salk. 477.

- (a) Cowp.
369. (b) ³ Burr.
1366.
(c) *Id.* 1460.
(d) 1 Str. 40.
(e) Say Rep.
138.
(f) Cald. 158.

Rex v. The
Justices of
Kent, 14 East,
395.

The sessions may proceed by information on 5 Eliz. for exercising a trade, (a) &c. But they cannot make an original order for late overseers to pay over monies to their successors (b); nor can they make a new scavenger's rate (c), or set aside an assignment of an apprentice bound out by the justices (d), nor have the cognizance over the bailiff of a corporation for not qualifying (e) || Nor can they vary the proportions in which the county rate has usually been assessed on the several parishes.

The justices in sessions have authority to settle the rates of wages, not only of labourers in husbandry, but of any labourers or workmen whatsoever. ||

See further tit. JUSTICES OF PEACE.

OF THE ECCLESIASTICAL COURTS.

Godolph.
Repert.
Canonic. 129
to 133.
5 Co. 1.
Cawdry's case.

THE church, before the conversion of *Constantine*, was a distinct and independent society from the state, and, as such, it was necessary they should have rules and orders among themselves: for the better government of the body of christians, the power of judicature was placed in the bishops, who had by their wisdom and gravity obtained an authority in the church, and who used to send abroad their ministers to propagate the gospel in their several precincts; and therefore they determined all controversies among them, which could not be carried into a heathen court without great scandal to the quiet and peaceable way of living which was the glory of the primitive christians; and this they founded on the direction of St. *Paul* himself, *Dare any of you, having a matter against another, go to law before the unjust, and not before the saints?* After the conversion of the emperors, their zeal for christianity made them allow the bishops the same jurisdiction; but then those bishops, in their sentences, followed the laws of their country: but, when the pope afterwards pretended to infallibility, he would no more conform his decrees to the laws of particular states and kingdoms; and, therefore, those states were under a necessity of exerting their original right and power of judicature: Hence it is truly said, that (g) the spiritual jurisdiction, within these kingdoms, is derived from the king, and that such jurisdiction, when exceeded, is subject to the controul of the king's temporal courts.

But, for the better understanding the jurisdiction allowed the spiritual court at this day, we shall consider,

(A) The

(g) Roll. Abr.
361. Dav. 97.

(A) The several Ecclesiastical Courts which exercise a Jurisdiction : And herein,

1. *Of the Court of Convocation.*
2. *Of the Court of Arches.*
3. *Of the Prerogative Court.*
4. *Of the Court of Audience.*
5. *Of the Court of Faculties.*
6. *Of the Court of Peculiars.*
7. *Of the Consistory Courts.*
8. *Of the Court of the Archdeacon.*
9. *Of the Court of Delegates.*
10. *Of the Court of Commissioners of Review.*

(B) Of appealing from an inferior to a superior Court.

(C) Of citing one out of his own Diocese : And herein of the Boundaries of their Jurisdiction.

(D) In what Cases the Ecclesiastical Courts are allowed to have a Jurisdiction.

(E) How they are to proceed as to those Matters in which they have a Jurisdiction, otherwise will be controuled by the Temporal Courts.

(A) The several Courts which exercise a Jurisdiction :
And herein,

1. *Of the Court of Convocation.*

THE *convocation* is commonly called a national synod, convened by the king's (a) writ, directed to the Archbishops of *Canterbury* and *York*, requiring them to summon every bishop, dean, and archdeacon, a proctor for the chapter, and two proctors for the clergy of each diocese in the province of (b) *Canterbury*; but in *York*, two proctors for each archdeaconry.

(a) That they were always assembled by the king's writ, *vide* 4 Inst. 323. Godolph. Repert. 99.

and the 25 H. 8. c. 19. the act of submission of the clergy, by which it is expressly declared, that they can only assemble by virtue of the king's writ, &c. (b) The Provincial Synod of *Canterbury* consists of twenty-two bishops, twenty-two deans, twenty-four prebendaries, fifty-four archdeacons, and forty-four clerks, representing the diocesan clergy. Godolph. Repert. 98. — The Archbishop of *York*, at the same time and in like manner, holds a convocation of all his province, constantly corresponding, debating and concluding the same matters with the Provincial Synod of *Canterbury*. Godolph. Repert. 98. || This was not the invariable practice. ||

This assembly are to meet at the time and place appointed by the king's writ, and constitute an ecclesiastical parliament, the arch-

4 Inst. 322.

archbishop and his suffragans as his peers sitting together, and composing one house, called the upper house of convocation; the deans, archdeacons, a proctor for the chapter, and two proctors for the clergy, the lower house; in which they chuse a prolocutor in the nature of a speaker of the house of commons.

4 Inst. 322.
(a) That the convocation may declare what opinions are heretical; but whether at this day they have power to convene the heretick, Q. & vide 2 Roll. Abr. 226. Hawk. P. C. c. 2. § 3.

Vide 4 Inst. 323. That this statute is only declaratory of the common law, & vide 12 Co. 72. 2 Roll. Abr. 226. Moor, 783. Vaugh. 327. 2 Vent. 44. 2 Salk. 412.

Also, by 25 H. 8. c. 19. it is enacted, that no canons, constitution, or ordinance, shall be made or put in execution within this realm by authority of the convocation of the clergy, which are contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm: and by this act the court of convocation, as to the making of new canons, is to have the king's licence, as also his royal assent for putting the same in execution, with this proviso, that such canons as were made before that act, which be not contrariant nor repugnant to the king's prerogative, the laws, statutes, or customs of the realm, shall be still used and executed, as they were before the making of the act.

By 8 H. 6. c. 1. the clerks of the convocation, their servants, and families, shall have such privilege in coming, tarrying, and going, as the commons called to parliament.

2. Of the Court of Arches.

4 Inst. 337.
(b) That by agreement, the Archbishop of Canterbury and Bishop of London remit their courts to each other, so that for matters arising within the diocese of London, the suit may be either in the arches or in the consistory court of London. Cro. Car. 339. 456. But whether such composition be good, and out of the statute 23 H. 8. c. 19. which prohibits the citing a person out of his own diocese, vide 13 Co. 4. Lev. 225. Keb. 597. 2 Keb. 265.

4 Inst. 337.
13 Co. 4., &c.
Godolph. Repert. 100.
Dyer, 241.

The jurisdiction of this court extends not only to ecclesiastical causes arising within these 13 parishes, of which it may take consueance in the first instance, but also by way of appeal may examine, affirm, or reverse the sentences and decrees of all inferior ecclesiastical courts within the province of *Canterbury*,

3. Of the Prerogative Court.

4 Inst. 338.
Vide head of

In this court all testaments are to be proved, and all administrations granted, where the party dying within the province of the

the Archbishop of *Canterbury* hath *bona notabilia* in some other diocese than where he died, which regularly is to be to the value of 5*l.* but in the diocese of *London* it is 10*l.* By composition the Archbishop of *York* hath the like court.

The *probate* of every bishop's testament, or granting of administration of his goods, although he hath not goods but within his own jurisdiction, doth belong to the archbishop in each province.

Executors and Administrators.

4 Inst. 335.

4. *Of the Court of Audience.*

This court is kept by the archbishop in his palace, in which are transacted matters of form only, as confirmations of bishops, elections, consecrations, the granting of the guardianship of the spiritualties *sede vacante* of the bishop, admissions and institutions to benefices, dispensing with banns of matrimony, and such like.

4 Inst. 337.
For the original institution of this court, and that it meddles not with contentious matters, *vide* Godolph. Repert. 106.

5. *Of the Court of Faculties.*

This is a court which belongeth to the archbishop, in which his officer, called *Magister ad facultates*, grants dispensations, as to (a) marry, to eat flesh on days prohibited, (and so may every diocesan) to ordain a deacon under age, that the son may succeed the father in a benefice, that one may have two or more benefices incompatible, &c.

4 Inst. 337.
(a) || By the marriage act of 26 G. 2. c. 33. the archbishop's right of granting special licences of marriage is particularly reserved to him. In the original draught of the bill this reservation was omitted. It was afterwards inserted by Lord Chancellor *Hardwicke*.||

This authority was raised and given to the archbishop of *Canterbury* by the statute of 25 H. 8. c. 21. whereby power is given to the said archbishop and his successors, to grant dispensations, faculties, &c. by himself, or his sufficient and substantial commissary or deputy, for any such matter, not being contrary (b) to the laws of God, whereof heretofore such dispensations, faculties, &c. then had been accustomed to be had at the see of *Rome*, or by authority thereof.

4 Inst. 337.
[A faculty may be subscribed, registered, and enrolled by the deputy of the chief clerk of the faculty. *Rex v. Episc. Cestr.* 8 Mod.

364.] (b) || By this clause the archbishop is restrained from granting dispensations of several kinds which the popes usually granted, and in other countries do still grant; as, for marriages within the decrees prohibited; for an alien (as Lord *Hobart* holds) who neither speaks nor understands English to have a benefice, and (before the statute of dissolutions) for an appropriation of a benefice with cure to a nunnery. *Hob.* 148. ||

|| Among the customable dispensations vested in the archbishop of *Canterbury* by this act, is the right of conferring degrees of all kinds, for which faculties had been customarily grantable. This power, as it hath not been abrogated or touched by any succeeding law, so it hath been exercised by the succeeding archbishops as a right vested in their see by no less than parliamentary authority; to which authority, as conveyed by this act, special reference is made in the body of every faculty that is granted upon this head.||

Gibs. tit. III. c. 5.

6. *Of the Court of Peculiars.*

4 Inst. 338.
Godolph.
Repert. 119.
(a) Within
the province
of the Arch-
bishop of
Canterbury
there are 57
peculiars, all

which belong to the archbishop. Godolph. Repert. 119. (b) Salk. 40. 6 Mod. 241. These courts, which exercise an ecclesiastical jurisdiction, and are exempt from and not subject to the controul of the ordinary of the diocese, are called peculiars, and must be either (a) regal, archiepiscopal, episcopal, or archidiaconal; and in every one of these the owner has (b) a power of common right to grant administration, &c. on supposition of an original composition between him and the ordinary of the diocese for that purpose.

[As the persons, entitled to peculiar jurisdiction, have no known or certain registers, or publick place to keep their records in, and wills are therefore liable to be lost: they are ordered by canon 126, once in every year, upon pain of being suspended from the exercise of their jurisdiction, to exhibit into the publick registry of the bishop of the diocese, or of the dean and chapter, under whose jurisdiction the peculiars are, every original testament of every person in that time deceased, and by them proved, or a true copy of every such testament, examined, subscribed, and sealed by the peculiar judge and his notary.

Hob. 186.
(c) The peculiar jurisdiction of an archdeacon is not properly a peculiar, but rather a subordinate jurisdiction. 2 Roll. Rep. 446-8.

If a peculiar be subordinate to the bishop, the cause must be referred to the immediate ordinary, as in the case of an archdeacon (c) or commissary, and not to the archbishop, unless the peculiar have his immediate resort to the archbishop.

Hob. 186.
A peculiar *prima facie* is to be understood of him who hath co-ordinate jurisdiction with the bishop. Per Holt, C. J. 6 Mod. 308. Where one dies possessed of goods in several peculiars within the same diocese, administration shall not be granted by the bishop of the diocese, but by the metropolitan; inasmuch as they are exempt from ordinary jurisdiction. Gibs. 472. Swinb. a. 440.

But, if the peculiar be free by a general exemption from all ordinary jurisdiction (which was common in the case of monasteries by the grants both of kings and popes) then the cause must be remitted to the king, as appeals must also be in such cases; and so it is provided by stat. 25 H. 8. c. 21.]

7. *Of the Consistory Courts.*

4 Inst. 332.
Godolph.
Repert. 83.

The consistory court of each archbishop, and every bishop of every diocese within this realm, is holden before the bishop's chancellor in the cathedral church; or before his commissary, in places of his diocese far remote and distant from the bishop's consistory, so as the chancellor cannot call them to consistory with any conveniency, or without great travel and vexation, for which reason such commissary is called *commissarius foraneus*.

8. *Of the Court of the Archdeacon.*

4 Inst. 339.
Godolph.
Repert. 60.
&c.

This court is holden by the archdeacon, in such places as the archdeacon, either by prescription or composition, hath jurisdiction in spiritual causes within his archdeaconry. He is called *oculus*

oculus episcopi, and exercises an ecclesiastical jurisdiction, either concurrently with the bishop, or exclusively.

9. *Of the Court of Delegates.*

This court is erected by virtue of the king's commission, which issues out of chancery upon an appeal or petition (a) directed to him, complaining of some grievance or injury the party has suffered by the sentence or proceedings of the ecclesiastical court. of a person interested, though not an original party in the cause. Jones v. Bougett, 1 Atk. 298.]

4 Inst. 339.
[(a) Such a commission may be granted at the instance

On such appeal, the king appoints (b) commissioners called (c) Delegates, who are to hear the grievances complained of, and who by force of such delegation have power (d) to reverse or affirm the sentence of the inferior court; and this the king, as is said, may do by virtue of an original jurisdiction, which was always inherent in the crown.

(b) These commissioners may be as well laymen as ecclesiasticks, Comp. Incumb. 56. But by Gibson's

Codex, 1082. they were formerly only ecclesiasticks. (c) The commission being drawn by the clerks in chancery, who were usually civilians; or by the chancellor, who was usually a bishop; they obtained the name of delegates, being a name peculiar to that profession. Comp. Incumb. 57. (d) They have power only to affirm or reverse, but have no jurisdiction in the first instance, as to grant administration, &c. Latch. 85.

And by 25 H. 8. c. 19. *for restraining appeals to Rome*, § 4. it is enacted, "That for lack of justice, at or in any courts of the archbishops of this realm, or in any of the king's dominions, it shall be lawful to the party grieved to appeal to the king's majesty in the king's court of chancery, and that upon every such appeal a commission shall be directed under the great seal to such persons as shall be named by the king's highness, his heirs or successors, like as in cases of appeal from the admiral's court, to hear and definitively determine such appeals and the causes concerning the same. Which commissioners, so by the king's highness, his heirs and successors, to be named or appointed, shall have full power and authority to hear and definitively determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment and sentence, as the said commissioners shall make and decree in and upon any such appeal, shall be good and effectual, and also definitive; and no further appeals to be had or made from the said commissioners for the same."

No appeal lies to them from a local visitor, nor in any case of a temporal nature, nor did it lie from the high commission court, when in being, because they themselves were only delegates acting by immediate commission from the king.

4 Inst. 340.
Moor, 782.

A suit commenced before the delegates does not abate by the death of either of the parties; for the ecclesiastical law is their rule, and by the course of that law there is no abatement of the suit in such case.

Vent. 133.
2 Lev. 6. S. C.
2 Keb. 768.
778. S. C.
Leon. 277-8.

Hetley, 107. Cro. Ja. 483.

If the delegates exceed their authority, or proceed in matters not properly within their consueance, they may be prohibited by the king's temporal courts.

Moor, 462-3.
Latch. 85, 86.
229.

10. *Of the Court of Commissioners of Review.*

But for this
vide 4 Inst. 341.
Moor, 463.
781. Dyer,
273. Lit. Rep.
232.

After a sentence by the delegates the king may grant a commission of review, and such commissioners may reverse the sentence of the delegates; for the king's power is not restrained by the statute 25 H. 8. c. 19. *supra*, which says, that such sentence shall be definitive. Also, the pope after a definitive sentence by the canon law used to grant a commission *ad revidendum*, and such authority as the pope had, claiming as supreme head, doth of right belong to the crown, and is annexed thereto by the statutes of 26 H. 8. c. 1. 1 Eliz. c. 1.

Matthews v.
Warner, 4 Ves.
186. *Ex parte*
Fearon, 5 Ves.
633. Eagleton
v. Kingston,
8 Ves. 438.
Goodwin v.
Giesler, 4 Ves.
211. notes, and
since reported
in Ir. T. R.
371.

¶ The power of the crown to grant a commission of review is unquestionable, though the instances in which it has been exercised have not been very frequent. And the reason is, that the commission does not belong to the subject as of right, but is matter of pure grace and benignity on the part of the crown; not to be withheld, on the one hand, if a sound discretion, due regard being had, not only to the interests of the particular party, but also to the general administration of justice, would induce the crown to grant it; not to be administered, on the other hand, where the general interests of justice do not require it, even though the particular decision may be wrong. But the certificate of Lord Chancellour *Eldon*, in the case of *Eagleton v. Kingston*, so fully states the principles by which the crown is to be governed in the exercise of this important prerogative, that I shall set it forth at length, as I find it in the Report. "The case, "as established on the part of the memorialists, does not," says his lordship, "furnish any such doubt respecting the sentence pronounced by the court of delegates, considered either with reference to the facts, which it can be understood to have decided upon, or with regard to important points of law, which it may be supposed to establish, as makes it expedient, that his majesty should grant such commission of review, as hath been prayed. This commission is prayed of the grace and benignity of the crown. In sound discretion, by which its grace and benignity are guided, has upon obvious grounds of publick expediency usually induced it to withhold commissions of review, unless there are very cogent reasons for believing, that the sentence sought to be reviewed is founded upon error in fact or in law; or, unless the doctrines of law, (a) upon which the sentence is supposed to be founded, are so questionable or important, as to make it clearly fit, that they should be considered in the most solemn manner." His lordship further stated, "that he had not found that the present case furnished such reasons or considerations for granting the commission prayed; and that it was not expedient or due to justice, that a commission should be granted for reviewing the sentence," &c.

3 Ves. 480.

(a) Lord Chancellour *Loughborough* in his certificate in *Matthews v. Warner*, 4 Ves. 210. advising the crown to grant a commission, states, that the points of law, which

arose on the proceedings, appeared to him to be so important to the publick, that it was fit that they should be heard and determined in the most solemn manner.

The

The course of proceeding to obtain a commission of review is by petition (*a*) addressed, not to the king in chancery, but in council, stating briefly the naked case of facts, and the sentence of the court of delegates, and that by such sentence the petitioner thinks himself aggrieved, and praying that his majesty will be graciously pleased to grant a commission of review to re-hear, re-consider, and determine the said cause, directed to such lords spiritual and temporal, judges of the common law, and doctors of the civil law of this realm, as to his majesty in his great wisdom shall seem meet, with the usual clause of *quorum*, &c.

4 Ves. 211.
notes. (*a*) No
costs therefore
can be given,
if the petition
be dismissed.
5 Ves. 646.

An order then issues from the council to the lord chancellor to inquire into the merits of the petition, and to report his opinion to his majesty. In consequence of that order the lord chancellor hears the parties by counsel, including civilians, and makes his report to his majesty, whether it will be reasonable and proper for his majesty to grant a commission of review according to the prayer of the petition. If the report is in favour of the petition, an order issues from the king in council, directing the lord chancellor to cause such commission to be prepared in the usual manner under the great seal. The commission is directed to new delegates, including lords spiritual and temporal, judges of the common law, and doctors of the civil law; and in order to make a final decree or sentence, one at least of each class is directed by the commission to attend.

A commission of review, it seems, has been granted, with a clause permitting new pleas and new proofs; but the memorial should expressly pray such a commission, and should contain allegations and matters upon which that special prayer ought to be addressed to his majesty; and the grounds upon which it could be complied with.¶

Thwaites v.
Smith, A. D.
1746. 8 Ves.
466.

(B) *Of appealing from an inferior to a superior Court.*

EVERY subject has a right to appeal, and every superior court, enabled by law to hear and determine such appeal, is obliged to receive the same, and after such appeal duly made, the inferior court is tied up from proceeding any farther in the cause.

4 Inst. 340.

By 24 H. 8. c. 12. from the archdeacon's court the appeal is to the bishop of the diocese; but, when the cause is commenced before an archdeacon, or any archbishop or his commissary, the appeal must be to the court of arches.

And by the said statute, from the bishop of the diocese, his chancellor, or commissary, the appeal is to the archbishop of either province respectively.

By 25 H. 8. c. 19. the appeal from the prerogative court is to the king in chancery, who appoints delegates by commission to hear and determine the appeal.

(a) But by 24 H. 8. c. 12., is to be to the (a) king in chancery. And it seems by the said statute that an appeal from the arches such appeal is to be to the archbishop; and so is 4 Inst. 341. But *vide* Carth. 169., that an appeal does not lie from the dean of the arches to the archbishop as visitor, because they are one and the same; at least it would be but appealing from the deputy to the principal.

Also, by 25 H. 8. c. 19. appeals from the court of peculiars, or places exempt, which were before to the see of *Rome*, shall be henceforth into the chancery, and shall be there determined before commissioners of delegates under the great seal, &c.

4 Inst. 339.
340.

If the matter concerns the king, the appeal must be to the higher house of convocation of that province.

4 Inst. 339.

By 24 H. 8. c. 12. and 25 H. 8. c. 19. all appeals from a definitive sentence must be within 15 days.

4 Inst. 340.
Vide title
Præmunire.

By 25 H. 8. c. 19. there shall be no appeal to the see of *Rome*, under pain of a *præmunire*.

(C) Of citing one out of his own Diocese: And herein of the Boundaries of their Jurisdiction.

BY 23 H. 8. c. 9. it is enacted, “ That no manner of person
“ shall be from henceforth cited, or summoned, or otherwise
“ called to appear by himself, or herself, or by any procurator,
“ before any ordinary, archdeacon, commissary, official, or any
“ other judge spiritual, out of the diocese or peculiar jurisdiction,
“ where the person which shall be cited, summoned, or other-
“ wise (as is aforesaid) called, shall be inhabiting and dwelling at
“ the time of awarding or going forth of the same citation or
“ summons, except that it shall be for, in, or upon any of the
“ cases or causes hereafter written, that is to say, for any spiri-
“ tual offence or cause, committed or done, or omitted, for-
“ flewed, or neglected to be done, contrary to right or duty, by
“ the bishop, archdeacon, commissary, official, or other person,
“ having spiritual jurisdiction, or being a spiritual judge, or by
“ any other person or persons within the diocese, or other juris-
“ diction whereunto he or she shall be cited, or otherwise law-
“ fully called to appear and answer.

§ 3. “ And except also it shall be by or upon matter or cause of
“ appeal, or for other lawful cause, wherein any party shall find
“ himself or herself grieved or wronged by the ordinary judge,
“ or judges of the diocese or jurisdiction, or by any of his sub-
“ stitutes, officers or ministers, after the matter or cause there
“ first commenced, and begun to be shewed unto the archbishop
“ or bishop, or any other having peculiar jurisdiction, within
“ whose province the diocese or place peculiar is; or in case
“ that the bishop, or other immediate judge or ordinary, dare
“ not, nor will not convent the party to be sued before him;
“ or in case that the bishop of the diocese, or the judge of the
“ place, within whose jurisdiction, or before whom, the suit by
“ this act should be commenced and prosecuted, be party di-
“ rectly

“ rectly or indirectly to the matter or cause of the same suit ; or
 “ in case that any bishop or any inferior judge, having under
 “ him jurisdiction in his own right and title, and by commission,
 “ make request or instance to the archbishop, bishop, or other
 “ superior ordinary or judge, to take, treat, examine, or deter-
 “ mine the matter before him or his substitutes ; and that to be
 “ done in cases only where the law civil, or canon, doth affirm
 “ execution of such request or instance of jurisdiction to be
 “ lawful or tolerable ; upon pain of forfeiture to every person,
 “ by any ordinary, commissary, official, or substitute, by virtue
 “ of his office, or at the suit of any person, to be cited or other-
 “ wise summoned or called, contrary to this act, of double
 “ damages and costs, for the vexation in that behalf sustained,
 “ to be recovered against any such ordinary, commissary, arch-
 “ deacon, official, or other judge, as shall award or make process,
 “ or otherwise attempt or procure to do any thing contrary to
 “ this act, by action of debt or action upon the case, accord-
 “ ing to the course of the common law of this realm in any of
 “ the king’s high courts, or in any other competent temporal
 “ court of record, by original writ of debt, bill, or plaint, in
 “ which action no protection, other than such as shall be made
 “ under the king’s great seal, and signed with his sign manual,
 “ shall be allowed ; neither any wager of law, nor essoin shall
 “ be admitted ; and upon pain of forfeiture for every person so
 “ summoned, cited, or otherwise called, (as is abovesaid) to
 “ answer before any spiritual judge out of the diocese, or other
 “ jurisdiction, where the said person so dwelleth, or is resident, or
 “ abiding, 10*l.* sterling ; the one half thereof to be to the king our
 “ sovereign lord ; and the other half to any person that will sue
 “ for the same in any of the king’s said courts, or in any other
 “ the said temporal courts, by writ, information, &c.

§ 4. “ Provided, that it shall be lawful to every archbishop of
 “ this realm to call, cite, and summon any person or persons
 “ inhabiting or dwelling in any bishop’s diocese within his pro-
 “ vince for causes of heresy, if the bishop or other ordinary
 “ immediate thereunto consent, or if that the same bishop, or
 “ other immediate ordinary or judge, do not his duty in punish-
 “ ment of the same.

§ 5. “ Provided also, that this act shall not extend in any wise
 “ to the prerogative of the most reverend father in God the
 “ Archbishop of *Canterbury*, or any of his successors, of or for
 “ calling any person or persons out of the diocese where he or
 “ they be inhabiting, dwelling, or resident, for (a) probate of
 “ any testament or testaments, any thing in this act contained to
 “ the contrary.

(a) Godb. 2*14*.
 Extends only
 to the probate
 of wills.

§ 7. “ Provided also, that this act be not any way hurtful or
 “ prejudicial to the Archbishop of *York*, nor to his successors, of,
 “ for, or concerning the probate of testaments within his province
 “ and jurisdiction, by reason of any prerogative ; any thing in
 “ this act to the contrary notwithstanding.”

In the construction of this statute the following opinions have been holden, that the Archbishop of *Canterbury* cannot cite a person living in *Essex* into the court of arches holden in *London*, for subtraction of tithes, although *Essex* be within the diocese of *London*; and that this statute, like all other acts of parliament, shall be expounded by the judges of the common law, although they relate to spiritual persons and affairs; and that wherever an act of parliament prohibits the doing of a thing, any court acting contrary may be restrained by prohibition.

13 Co. 4, 5.
&c.

Lev. 96. &
Godh. 191.
2 Brownl. 12.
27. Hard. 421.
Winch Ent.
570. a. Cro.
Car. 97. Roll.
Rep. 329.

If a person inhabiting within one diocese doth subtract and withhold his tithes within another diocese, a suit may be commenced and prosecuted in the court of the bishop, in whose diocese the tithes are so subtracted, and the party so subtracting his tithes may be there cited and summoned, although inhabiting within another diocese.

Carth. 476. Machin and Moulton, S. P. adjudged, for diocese in this statute signifies jurisdiction, and it is the locality of the lands which gives jurisdiction, although the maxim in the civil law is *forum sequitur reum*. 5 Mod. 450. S. C. 2 Salk. 549. S. C.

Vent. 233.
3 Keb. 619.
Cro. Car. 97.
Like point.

So, a suit for a legacy may be in the diocese where the will is proved, although the defendant lives in another diocese, and the citing of him out of such diocese is not within the statute.

Salk. 164.
3 Mod. 211.
S. C. And
there said, that
a prohibition
was granted,
because but a
personal
charge, and
not like the
repairing of
the church,
which is a real
charge upon the land, let the owner live where he will.

So, where *A.*, and others, who lived in the diocese of *Litchfield* and *Coventry*, but occupied lands in the diocese of *Peterborough*, were taxed in the parish where they occupied lands for the new casting of the bells of the church; and, upon refusal to pay, a suit was commenced against them in the diocese of *Peterborough*; it was holden, that occupying lands made them inhabitants, and that the citing of them into the diocese where the lands lay, and in respect to which they were chargeable, was not within the statute; also, that bells were more than a mere ornament, which the inhabitants were bound to repair.

13 Co. 4.
Porter and
Rochester's
case.

(a) On suggestion that the party is sued out of the diocese,

My Lord *Coke* says, that by this statute the archbishop is reduced to a proper diocese, or peculiar jurisdiction, unless it be in five cases; as 1st, In default of the ordinary. 2dly, In case of appeal. 3dly, Or in case the ordinary dares not, or will not, convene the party. 4thly, Or if the ordinary be party to the suit below. 5thly, In case (a) of instance and request by the ordinary.

the court grants a prohibition; but, if it appears upon proof that it was upon request to the archbishop, according to the exception, the prohibition will be stayed. 5 Mod. 71. Godb. 214. Latch. 180. — The party in alleging such request need not shew the matter specially, that it might appear to have been of a spiritual nature, nor that the request was under seal. Cro. Car. 162. — The request may be from a peculiar to the ordinary of the diocese. Cro. Car. 162. — But whether from a peculiar court, or from the archdeacon's court immediately to the archbishop, *vide* Hob. 16. 186. Sid. 90. 5 Mod. 238, 239, 2 Ro. Rep. 446.

12 Co. 76.
Heil. 19. Cro.
Car. 97.

The party who is cited out of his diocese must move for a prohibition before sentence; for by litigating the matter in that court, he submits to the jurisdiction.

But,

But, if upon the face of the libel it appears that the party is an inhabitant at a place out of the diocese, there the libel is *felo de se*, and in such case the sentence makes no alteration. Carth. 34, 35.

Yet in a case where *A.* who in the libel was named of *D.* in *Hampshire*, which is known to be within the diocese of *Winchester*, was cited into the diocese of *London*, though affidavits were offered of that matter, yet being after sentence, the court held, that they could not take any notice within what diocese *D.* in *Hampshire* was, for they could not *ex officio* take notice of the limits of bishopricks, but they should now take it to be within the proper diocese. Carth. 34.

The boundaries of all jurisdictions shall be determined in the king's temporal courts. So, if the question be, whether in such a place there be a peculiar jurisdiction exempt from the ordinary, this shall be determined by the king's temporal courts; for it would be unreasonable that the archbishop, or bishop, should be judge in his own cause; and if they take upon them to determine any of those matters, a prohibition will be granted. 2 Roll. Abr. 291. Several cases to this purpose.

(D) In what Cases the Ecclesiastical Courts are allowed to have Jurisdiction.

THE statute 13 E. 1. called the statute of *Circumspecte agatis*, and 9 E. 2. called *Articuli cleri*, are the most ancient, as well as the principal statutes, which declare in what cases the ecclesiastical courts shall have jurisdiction.

The words of the first are, "The king to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the Bishop of (a) *Norwich* and his clergy, not punishing them if they hold plea in court christian, of such things as be (b) merely spiritual, that is, to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and (c) such like, for the which sometimes corporal penance, and sometimes (d) pecuniary is enjoined, especially if a freeman be convict of such things. *Item*, if prelates do punish for leaving the church-yard unclosed, or for that the church is (e) uncovered, or not conveniently decked; in which cases none other penance can be enjoined but pecuniary. *Item*, If a parson demand of his parishioners (f) oblations or (g) tithes due or accustomed; or if any parson do sue against another parson for tithes greater or smaller, so that the fourth part of the value of the benefice be not demanded. *Item*, If a parson demand mortuaries in places where a mortuary hath been used to be given. *Item*, If a prelate of a church, or patron, (h) demand of a parson a pension due to him; all such demands (i) are to be made in a spiritual court. And for laying (k) violent hands on a clerk. And in cause of defamation, it hath been granted already that it shall be tried in the spiritual court, when money is not demanded; but a thing done (l) for punishment of sin, and likewise for breaking an oath (m). In

(a) The Bishop of *Norwich* is only put for an example, for it extendeth to all the bishops within the realm.
2 Inst. 487.
|| It would seem to have been occasioned by some suit or matter then depending in the king's courts respecting the bishop and clergy of this diocese. It begins in several manuscripts with *Rex talibus Judicibus salutem*; and the words *de negotiotangente*, or, as in some

" all

MSS. *de negotiis laicis* "all cases afore rehearsed, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition." (n) this conjecture. There was a doubt at one time whether this were a statute, it having been suggested that it was made by the prelates themselves. But Lord Coke admits that it is to be found as a statute in the books of the common law; and it is expressly so called in the act of 2 & 3 E. 6. c. 13. § 15. concerning tithes. *Ibid.* || (b) As heresy, schism, holy orders, and such like. 2 Inst. 488. (c) As incest, solicitation of chastity. 2 Inst. 488. (d) Must be intended by way of commutation of penance. (e) This doth not extend to a private chapel which a man has to his own use, nor to the chancel, which is to be repaired by the parson. 2 Inst. 489. (f) || The Cotton MS. which is followed in Runnington's edition of the statutes, is short in this clause. It has only these words: "*Item, si Rector petat decimam majorem vel minorem, dummodo non petatur quarta pars alicujus ecclesie.*" But in MS. Harl. 667. and several other manuscripts, we have these further words: "*Item, si Rector petat versus parochianos oblationes et decimas debitas et consuetas, vel si Rector agat contra Rectorem de decimis majoribus vel minoribus, dummodo non petatur quarta pars valoris.*" || (g) For this *vide* title *Tithes*. (h) || "*Vel advocatus,*" omitted in MS. Cotton. (i) In MS. Cotton, instead of "*petitiones,*" we read "*pensiones.*" || (k) The suit must be *pro salute anime*; and therefore, if the clerk sue in the court christian for damages for the battery, he incurs a *præmunire*, for the ecclesiastical judge ought to proceed only to correct the sin. 2 Inst. 492. — If a clerk be arrested by process of law, he cannot for this sue in the ecclesiastical court. 2 Inst. 492. — If a clergyman be only assaulted, no remedy is to be had in the spiritual court, but in the common law courts. Cro. Eliz. 753. Pryn's case. (l) || *But the suit is prosecuted, sed agatur ad correctionem peccati.* (m) *Et similis pro fidei lesione,* omitted in MS. Cotton. (n) What follows in Runnington's edition is given in the old printed translations as a separate instrument of uncertain date, intituled, "*Articles against the king's prohibitions.*" In Tottell's *Magna Charta*, printed in 1556, this is said to be parcel of the Statute *De Articulis Cleri*, 9 Ed. 11. See that statute, chapters 1, 2, and 3. The MS. Harl. 395. and other manuscripts agree with the old printed copies in giving the statute *Circumspecte agatis* as a separate instrument. MS. Harl. 667. and other manuscripts, unite the two instruments. ||

For the exposition of this statute, *vide* 2 Inst. 599 to 639.

The statute *Articuli cleri*, or 9 E. 2. enumerates several cases in which the spiritual courts shall have jurisdiction; particularly as to tithes, obventions, oblations, mortuaries, redemption of penance, violent laying of hands on clerks, defamation, in which cases the king's prohibition shall be of no force.

(a) Matters testamentary are within the jurisdiction of the spiritual courts by the custom of England, and

Matters testamentary, as the granting of probate of wills, granting of administration, &c., are of ecclesiastical (a) consueance, and in these they may proceed according to the ecclesiastical law, and their sentences shall be presumed just and agreeable to such law, though (b) contrary to the rule and reason of the common law.

not by the ecclesiastical law. Lynwood, 174. *voc. Approbatio*. *Vide* Salk. 37. — Anciently the probate of testaments was in the county courts, Lamb. Saxon Laws, 111. where the bishop and sheriff sat together. Wilkins, 78. Lamb. Saxon Laws, 64. William the Conqueror first separated the ecclesiastical from the civil jurisdiction; yet his charter does not mention matters testamentary, or the probate of wills, to be of ecclesiastical consueance, but only says, that the crimes that were to be prosecuted *pro salute anime* were to be of that consueance. Selden, Eadm. 167. But afterwards the ecclesiastical courts obtained a jurisdiction herein, the clergy having persuaded the people that every disposition of the testator was gratuitous and charitable, and to be disposed of by the executor, for the good of the soul of the party deceased. Selden, Eadm. 168. 9 Co 38. (b) 4 Co. 29. 7 Co. 47.

5 Co. 73. b. 2 Roll. Abr. 313. (c) So, by the custom of London, the

Although the spiritual court hath consueance of the probate of testaments, yet if (c) a court-baron hath had probate of wills time out of mind, and hath always continued that usage, every will within the precincts thereof must be proved there; and if
the

the spiritual courts take upon them to grant the probate of any such will, a prohibition lies.

sons dying in London, belongs to the mayor and aldermen of London; and if any suit be commenced, or proceedings had in the ecclesiastical court, for any matter within such regulation, a prohibition lies. 5 Co. 734. 2 Inst. 249. 660. March, 107.

If the will is proved in the ecclesiastical court, that court has executed its authority, and the (a) executors must sue in the temporal courts to get in the estate of the deceased.

9 Co. 38. Henslow's case. (a) An administrator must sue for the goods of the intestate in the temporal courts, for the ecclesiastical courts cannot try the property of goods. 2 Roll. Abr. 287. Say and Harwood; and a prohibition granted for such a suit.

As the ecclesiastical courts have now the probate of testaments, they, as incident to such jurisdiction, have power to determine all those matters that are necessary to the authenticating of every such testament; therefore, (b) if the seal of the ordinary appears, it cannot be suggested or given in (c) evidence in the common law courts, that the will was forged, or that the testator was *non compos*, or that another person was executor; for of these they had a proper jurisdiction, and the remedy must be by appeal.

(b) Raym. 406, 407. 2 Roll. Abr. 299. Hard. 131. (c) But it may be given in evidence that the seal was forged, or the will repealed, or that there were *bona notabilia*, because that is not in contradiction to the real seal of the courts, but admits the seal and avoids it. Lev. 235, 236. Vaugh. 207. Show. 293. Salk. 36. Comb. 185. Skin. 299. Holt, 305. *Vide infra tit. Executors and Administrators (E).*

Although regularly, where the spiritual courts have consue-
sance of the principal, they shall have consue-
sance of the incidents
and accessaries; yet, if the incident is a matter merely tem-
poral, or if a temporal matter be pleaded in bar of an eccle-
siastical demand, they must proceed in the ecclesiastical court
according to the temporal law; otherwise they will be pro-
hibited.

As, if payment be pleaded in bar of a legacy, and there be but one witness, which the ecclesiastical court will not admit, because their law requires two witnesses; there the temporal courts will prohibit them, because it is a matter temporal, that bars the ecclesiastical demand.

2 Roll. Abr. 291. 297. Hob. 12. 12 Co. 65. Hetley, 87. 2 Inst. 608. Lynwood, 174. Sid. 161. Cro. Eliz. 88. 666. Richardson and Desborow, adjudged. [1 Ventr. 291. S. P. Shatter v. Friend, 1 Show. 158. 172. S. P. Comb. 160. S. C. Holt, 752. S. C. 2 Salk. 547. S. C.] 3 Mod. 283. S. C. 1 Raym. 220. S. C. cited. Carth. 142. S. C. adjudged. — But it is not sufficient ground for a prohibition, to suggest that the spiritual court objected to the credibility of a witness, nor to suggest that the plaintiff had only one witness to prove the fact, unless that he allege that he offered such proof, and it was refused for insufficiency. Carth. 143, 144.

But, if there be only one witness to prove a nuncupative will, and the ecclesiastical court refuse the (d) probate thereof, because to every such will their law requires two witnesses, no prohibition lies; because there is no other way of authenticating such will but in the spiritual court, and this being the principal matter, they had consue-
sance thereof.

they refuse the plea for want of sufficient proof, a prohibition will go, because the revocation is a temporal matter. Yelv. 92. by three judges against two, & *vide* 2 Roll. Abr. 299. Carth. 143. S. C. cited.

For this *vide* tit. *Executors and Administrators*, and there, that in certain cases, the court of Chancery will compel executors to give security, *infra*, tit. *Executors and Administrators*. (A. 6.)

If the spiritual court admit a will, but will not give the probate to the executor, because he cannot give security for a just administration, the temporal courts will grant a *mandamus*; for though they are to determine whether there be a will or not, yet if there be a will, the executor has a temporal right, and they cannot put any terms upon him but what are mentioned in the will.

Skin. 299.

Salk. 36.

(a) But if an executor becomes *non*

If an executor, after probate, becomes (a) a bankrupt, yet the spiritual court cannot revoke the administration; for he is intrusted by the testator who was the proper judge of his fitness and sufficiency.

compos, the spiritual court may commit administration to another, because that is a natural disability. Salk. 36.

(b) Hob. 265.

Cro. Jæ. 279.

364. Cro. Car.

16. 2 Roll.

Abr. 285.

But the jurisdiction of the ecclesiastical courts is confined to wills relating to goods and chattels only; and therefore (b) if a man gives lands to be sold for the payment of debts, and disposes of the money to several persons, that cannot be sued for in the ecclesiastical courts, but only in a court of equity; because that is not a legacy merely of goods and chattels, but it arises originally out of lands and tenements.

Lev. 179.

Sid. 279.

2 Keb. 8. S.C.

But, if a rent be devised out of a term for years, the ecclesiastical courts may hold plea thereof; for the term for years being only a chattel, is testamentary, and, consequently, the rent devised thereout.

Petit v. Smith,

Ld. Raym. 86.

1 P. Wms. 7.

S. C. Comb.

378. S. C.

Com. Rep. 3.

S. C. 5 Mod.

247. S. C.

If a man makes a will, and appoints *A.* and *B.* his executors, to each of whom he gives five pounds, but makes no disposition of the residue of his estate, the ecclesiastical courts cannot compel a distribution of (c) such residue, for they have only a jurisdiction to order a distribution where the party dies intestate.

and a prohibition granted accordingly. (c) Where the courts of equity in such case consider the executors as trustees only, and compel a distribution, *vide* tit. *Executors and Administrators*, and where they have a concurrent jurisdiction with the ecclesiastical courts, *vide* Chan. Ca. 200. 2 Chan. Ca. 85. 95. 2 Vent. 362. 2 Vern. 47. 76. Preced. Chan. 546.

But for this, *vide* tit.

Marriage.

Matrimonial causes, as marriage contracts, consanguinity, divorces, alimony, &c., are within the jurisdiction of the spiritual court.

Vide head of *Tithes*.

Tithes, oblations, mortuaries, and pensions, are of ecclesiastical consuance; but, if to a demand of tithes the party pleads a *modus decimandi*, such custom, like all (d) others, must be determined in the temporal courts; and if the ecclesiastical courts take upon them to determine it, a prohibition will lie.

(d) As, if the churchwardens libel against *J. S.*

for not repairing part of the church wall; wherein he sets forth, that *J. S.* was seised of such a manor, &c. and that the lords thereof, for the time being, were by custom immemorial bound to repair part of the wall *ratione tenuræ*; if this custom be denied, a prohibition will be granted, although after sentence; for on the face of it, it appears that the spiritual court had not jurisdiction. Carth. 33. *Vide* Carth. 151.

But,

But, if *A.* sues for subtraction of tithes in the spiritual court, and the defendant pleads a verbal composition for two years, no prohibition will be granted: and where the ecclesiastical courts refuse a plea of composition for life or years, there is no remedy but by appeal to the arches.

Carth. 70.
Bradshaw and
Swanton, ad-
judged.

The ecclesiastical courts have no jurisdiction to hold plea of a matter of record; thereof, if the parson of a church be outlawed, and the benefit of the outlawry be granted to *J. S.*, who receives the tithes from the parishioners, and afterwards the parson sue the parishioners for tithes, who plead the outlawry and the grant to *J. S.*, a prohibition lies; for the outlawry is a matter of record, of which they have not consuance.

2 Roll. Abr.
307.

The spiritual courts cannot hold plea *pro reformatione morum* in a cause that is criminal and (a) triable at our law; and, therefore, they cannot hold plea *pro reformatione morum* for a legal perjury; but for perjury in their own courts they may punish. for a temporary crime, Dyer, 293. though not after the crime is pardoned. Comp. Incumb. 53.

Lev. 138.
Sid. 217.
Keb. 721.
(a) But they
may deprive
Hob. Searl's case.

So, if the spiritual court proceed against a man for writing a libel, a prohibition lies; for this is an offence indictable at common law.

Comb. 71.

If the goods of a church be stolen, it is sacrilege and robbery, and the churchwardens shall have an (b) appeal of robbery. Also, (c) the offender may be libelled against in the spiritual court *pro salute animæ & reformatione morum*, but not to recover damages.

(b) Bro. Appeal, 31. 45.
37 H. 6. 39.
(c) Welcome
v. Lake, 2 Mod.
328. S. C.
cited arg.

Sid. 281. 2 Keb. 23. Kibly v. Sambroke, Keb. 743. 2 Inst. 492. An action at law lies for a battery on a spiritual person, as also a suit in the spiritual court for irreverence to his character. 6 Mod. 156. || It is no certain rule that a thing triable at common law is not triable in the ecclesiastical court, as, laying violent hands on a clerk, a pension by prescription, &c. *Per Cur* 3 Lev. 17. || *Vide infra*, tit. *Prohibition* (L.)

(E) How they are to proceed, as to those Matters in which they have a Jurisdiction, otherwise will be controuled by the Temporal Courts.

THE ecclesiastical jurisdiction is derived from the common law; but the form of the proceedings, and the coercive power exercised in the ecclesiastical courts, are after the form of the canon or civil law; and, therefore, the judges of the common law will give credit to their proceedings and sentences, in matters in which they have a jurisdiction, and believe them consonant to the law of the holy church, although against the reason of the common law; and if there be a *gravamen*, it must be redressed by appeal.

4 Co. 29. a.
7 Co. 42. b.
Roll. Abr. 530.
2 Roll. Abr.
298, 299.

They may cite the members of a corporation by their christian names and names of baptism, for a duty due from them in their corporate capacity, as a rate for not repairing a church; for they have no *distringas* as at common law, by which they may take their

Skin. 27.

their lands or goods, and therefore must proceed against them in their natural capacity.

A citation may be served on a *Sunday*, or, according to the custom of the ecclesiastical court, it may be fixed to the church-door on a *Sunday*; and this shall not be said to be restrained by the 29 Car. 2. c. 7. which prohibits the serving of any process whatsoever upon a *Sunday*, except in cases of treason, felony, or breach of the peace.

By the 13 Car. 2. c. 12. § 4. it is enacted, "That it shall not be lawful for any archbishop, bishop, vicar general, chancellor, commissary, or any other spiritual or ecclesiastical judge, officer or minister, or any other person, having or exercising spiritual or ecclesiastical jurisdiction, to tender or administer, unto any person whatsoever, the oath usually called the oath *ex officio*, or any other oath, whereby such person, to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to purge him or herself, of any criminal matter or thing, whereby he or she may be liable to any censure or punishment."

For the proceedings *ex officio* before this statute, vide Cro. Eliz. 201. Cro. Car. 291. Moor, 755. pl. 1342. Cro. Ja. 37. Jones, 257. And for the construction of this statute vide Sid. 232.

Mod. 185. 10 Mod. 349. Ld. Raym. 263. 468. 2 Ld. Raym. 767. 2 Mod. 118. Vent. 41.

2 Roll. Abr. 298. Palmer's case.

If a man is proceeded against in the spiritual court for defamation, and the libel charges that he spoke such and such words, *aut in effectu consimilia*, although a declaration at law, in this form, would be naught for uncertainty; yet the libel is good, being according to the course of the ecclesiastical court.

2 Roll. Abr. 292.

(a) But, where an executor

pleaded *plenement administer*, and the plea was refused, a prohibition was moved for, but denied being a matter of ecclesiastical consuance. Sid. 274. Keb. 939. Saunderson's case, § vide Noy, 77. Latch. 114. (b) That there must be an affidavit of such refusal. Skin. 20.

Vent. 252. 6 Mod. 308.

If the spiritual court refuses to give a copy of the libel, a prohibition will be granted *quousque*; but there must be an affidavit that such copy was demanded and refused.

11 Co. 44. a.

4 Inst. 324.

Noy, 17.

(c) They have but two sorts of punishment, penance and costs, which first may be commuted or dispensed with for money. 5 Mod. 70.

The ecclesiastical court can (c) neither fine, imprison, nor amerce; for their jurisdiction being founded on the canon or civil law, their proceedings are only by ecclesiastical censures.

2 Roll. Abr. 302.

If a man be sued in the ecclesiastical court, and the judge take an obligation from him that he will perform the sentence, a prohibition lies; for if it be in a matter within his jurisdiction, there are lawful means of compelling him to perform the sentence.

|| See the act of 53 G. 3. c. 127. for the better regulation of ecclesiastical courts in *England*.||

OF THE COURT OF ADMIRALTY.

THE court of Admiralty is a court for all maritime causes or matters arising upon the high sea, and its jurisdiction is derived from the king, who (a) protects his subjects from pirates, &c., and who has (b) a dominion over all the *British* seas. This jurisdiction he exercises by the (c) lord high admiral, or those lawfully deputed for that purpose.

by many ancient records, and by a series of undeniable evidence brought down through various ages. King *Edgar* is said *Quatuor maria vindicare*; Sir J. Burroughs cites a record in the *Tower*, having for its title "Of the Sovereignty of the *English* Seas, and the Office of Admiral thereon;" *Sovereignty of the British Seas asserted*, p. 7.; and *Edward* 3. in *Rot. Scotiæ* 10. regni sui, calls himself and his predecessors, *Domini Maris Anglicani circumquaque et etiam Defensores*. The extent of this dominion was particularly ascertained by a treaty at *Westminster*, Feb. 9. 1673-4, to be from *Cape Finisterre* to the middle point of the land *Van Staten* in *Norway*. — The duty of the flag, which is a consecutive acknowledgment of this dominion, is as old as the reign of King *John*, since whose time it has been constantly asserted by his successors. This mark of respect indeed had always appeared to foreigners so unquestionably our right, that the first instance of its being inserted as an article in any treaty was in the year 1654. *Treaty of Peace between the Commonwealth of England, and the United Provinces*, Art. 15. The refusal of the *Dutch* admiral to strike the flag in compliance with the signal given by the *English* admiral, was the immediate cause of the commencement of that war; and the *Dutch* admitted that they had ever before paid that respect to the *English* flag, but interpreted it as a deference due only to the monarchy. (b) Though there can be no doubt that the office of admiral is of very high antiquity, there appears no express mention of it before the close of the 13th century, 25 E. 1. nor in our printed law does it occur 'till 8 E. 2. *Rymer's Fædera*, tom. 1. p. 176. *Seld. Notes on Fortescue*, c. 32. In the beginning of the following century we meet with two or more admirals at the same time, who are described as holding jurisdiction over the north and south seas, distinguished by the mouth of the *Thames*. But in 10 R. 2. the office of sole admiral of *England* was conferred for the first time by the king's letters patent on *Richard Fitzalan* junior, Earl of *Arundel* and *Surry*. *Spelman's Glossary*. voc. Admiral. *Fædera*, tom. 2. p. 162. 4 Inst. 75. *Hale's C. L.* 36. Since that time it has been considered as of high dignity, and its authority variously modified and limited, particularly by st. 28 H. 8. and 5 Eliz. c. 5. It is at present exercised by persons stiled, Lords Commissioners for executing the office of Lord High Admiral of *Great Britain* and *Ireland* under the statute of 2 W. and M. sess. 2. c. 2. || (c) By the 2 H. 5. stat. 1. c. 6. the king by letters patent may appoint in every port a conservator of a truce, worth 40*l.* per ann. in land; who by the king's patent, and the admiral's commission, shall inquire of offences against truce and safe conduct, &c. as the admirals have done, &c. saving the determination of the death of a man, and the execution thereupon, to the admiral. The lord warden of the *cinque ports* is also admiral there, and hath the jurisdiction of the Admiralty exempt from the admiralty of *England*; 4 Inst. 223. 2 Jones, 66, 67. — which jurisdiction is saved to him by several acts of parliament, as 2 H. 5. stat. 1. c. 6. 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c. 5. 11 & 12 W. 3. c. 7. 48 G. 3. c. 130. § 18.

[The jurisdiction of the admiralty is twofold, and holden before distinct tribunals: the one, is the ordinary court for deciding in controversies relating to contracts made at sea, and is called the *instance* court: the other determines the right to maritime captures and seizures, and is called the *prize* court. The jurisdiction in both cases is exercised by the same person: he is appointed judge of the admiralty by a commission under the great seal, which enumerates particularly, as well as generally,

Douglass. 613-4.

rally, every object of his jurisdiction, but makes no mention of prize. To constitute *that* authority, or to call it forth, in every war, a commission under the great seal issues to the lord high admiral, to will and require the court of admiralty, and the lieutenant and judge of the said court, his surrogate or surrogates, and they are thereby authorised and required, to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships and goods, that are, or shall be taken; and to hear and determine, according to the course of the admiralty, and the law of nations. And a warrant issues to the judge accordingly.]

For the better bringing together the several cases and resolutions that have been in the temporal courts, relating to the jurisdiction of the court of admiralty, I shall consider,

- (A) To what Places the Jurisdiction of the Admiralty is confined.
- (B) To what Things its Jurisdiction extends: And herein of such Matters as arise, partly on Sea, and partly on Land.
- (C) To what Contracts its Jurisdiction extends: And herein of Contracts made on the Sea.
- (D) To what Crimes and Offences its Jurisdiction extends.
- (E) By what Law it proceeds; and the Form of such Proceedings.

(A) To what Places the Jurisdiction of the Admiralty is confined.

(a) As 4 Inst. 137, 138, 139, 140. 12 Co. 129. Moor, 122. 892. Godb. 261. 2 Sid. 81. Hob. 79. 212. IT is laid down as a general rule in our common law books, that the admiral's jurisdiction is confined to matters arising on the high seas only, (a) and that he cannot take cognisance of contracts, &c. made or done in any river, haven, or creek, within any county; and that all matters arising within these are triable by the common law.

13 Co. 52. 2 Brownl. 10. 37. 2 Bulst. 322. Roll. Rep. 133. But our books seem not to be agreed what shall be counted *altum mare*, or the high sea. By some, it is no part of the sea where one may see what is done on the other side of the water. 4 Inst. 140, 141. 12 Co. 80. Moor, 892. — That what is within the body of the county is no part of the sea. 4 Inst. 140. — That the admiralty court cannot hold plea of a thing done upon the river *Thames*, because within the body of the county. Roll. Abr. 531. Owen, 122. 2 Brownl. 37. S. C. adjudged. Leon. 106. Moor, 916. 2 Roll. Rep. 413. S. P. adjudged. — Nor of a matter arising at Limehouse. Cro. Ja. 514. 2 Roll. Rep. 49. Moor, 891. S. P. adjudged. — But by Owen, 123. such place as is covered with salt water is *altum mare*. — And Roll. Rep. 250. by

by *Coke*, the admiralty court hath conusance of a matter done in a ship riding in a port that is not within the body of a county. — But it seems agreed, that though in a libel in the court of admiralty the fact is laid to be done *super altum mare*; yet it may be surmised that it was done *in corpore com.*, &c. and thereupon a prohibition will be granted, for the surmise is traversable. *Moor*, 891. *Latch*. 11.

But it hath been resolved, That between the high and low water mark, the common law and admiralty have *imperium divisum, scilicet*, the one when it is not, and the other when it is covered with water; and that (a) the soil upon which the sea flows and reflows may be parcel of a manor.

(a) If a man's lands lie to the sea, if they are increased by insensible degrees, they belong to the soil adjoining; but if the sea leaves any shore by a sudden falling off of the water, then such derelict lands belong to the king. *Dyer*, 326. 2 *Roll. Abr.* 170. If a river, as far as there is a flux of the sea, leaves its channel, it belongs to the king; for the *English* sea and channels belong to the king, and he hath the property in the soil, having never distributed them out among his subjects. 2 *Roll. Abr.* 170. — But, if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have, in that case, the property in the soil, being no original part or appendix to the sea, but distributed out as other lands. 2 *Roll. Abr.* 170. — If the sea overflow my land for forty years, and after re-flow, yet I shall have my land again; for the act of nature cannot alter the property. 2 *Roll. Abr.* 1168.

By the 13 R. 2. c. 5. upon complaint of incroachments made by the admirals and their deputies, it is enacted, "That the admirals and their deputies shall not (b) meddle of any thing done within the realm, but only of a thing done upon the sea, according to that which hath been duly used in the time of the noble King *Edward*, grandfather of our lord the king that now is."

awarding execution; for, notwithstanding this statute, the judge of the admiralty may do execution in the body of the county. 13 Co. 52.

By the 15 R. 2. c. 3. upon the like complaint, it is declared, "That of all manners of contracts, pleas, and quarrels, and all other things done or arising within the bodies of the counties as well by land as by water, and also of wreck of the sea, the admiral's court shall have no manner of conusance, power, or jurisdiction, but all such manner of contracts, pleas and contracts, and all other things arising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed, and remedied, by the laws of the land, and not before nor by the admiral, nor his lieutenant in no wise. Nevertheless, (c) of the death of a man, and of a mayhem done in great ships, being and hovering in the main stream of great rivers only beneath the (d) bridges of the same rivers near the sea, and in no other place of the same river, the admiral shall have conusance; and also to arrest ships in great flotes, for the great voyages of the king and the realm; saving to the king all manner of forfeitures and profits thereof coming; and he shall have jurisdiction on such flotes during such voyages only, saving to lords, &c. their liberties and franchises.

took bridges for points, as the Land's End. [The words in the act are, "*paraval les pointz*." In the old abridgment it is *portis*: in the *Nova Statuta* it is *pointz*.]

5 Co. 107.

Sir Henry Constable's case. And. 89. S. C. 3 Inst. 113. S. P.

For the construction of this statute, vide 3 Bulst. 205. (b) This must be intended of holding pleas, and not of

(c) By the resolution of the judges in *Cro. Car.* 297., by the equity of this statute he may redress all annoyances and obstructions in those rivers, which are an impediment to navigation, and may try contracts and injuries done there which concern navigation at sea; but *Q.* (d) In *Owen*, 122. it is said per *Cur.*, That the translator mis-

(a) The action may be brought by one part-owner, for it is grounded merely on a tort. Carth. 295. [Ca. temp. Hardw. 271. 2 Str. 1075.] By the 2 H. 4. c. 11. reciting the 13 R. 2. c. 13. it is enacted, "That he (a) that feeleth himself aggrieved (b) against the form of the said statute, shall have his action by writ grounded upon the case against (c) him that doth so pursue in the court of admiralty, and recover his double damages against the pursuant, and the same person shall incur the pain of 10*l.* to the king for the pursuit so made, if he be attained." (b) If, upon petition to the judge of the admiralty, a ship is stopped in the harbour till caution given not to trade within the limits of the East India Company, this is a prosecution within the statute, though there is no formal plaintiff or defendant; and in many cases the suits there are against the ship itself. Carth. 294. Skin. 361. 4 Mod. 176. Salk. 31. 3 Lev. 353. S. C. between Child and Sands. (c) Though the prosecution be by the command of the king, and in the name of his proctor, yet if it was upon the solicitation and by the procuration of the parties, and they pay the fees, they pursue within the intention of the act. 3 Lev. 353.

Lindo v. Rodney, Dougl. 613.

[The above statutes, it hath been solemnly determined, are intended to check the usurpations of the *Instance* court only, and do not at all relate to the *Prize* court: for the jurisdiction in cases of prize does not depend on the locality, but the nature of the question, which is not governed by the rules of the common law, but by the *jus belli*. Hence, the prize court have exclusive cognizance of all captures made *at land* by the assistance of a fleet.

(B) To what Things its Jurisdiction extends: And herein of such Matters as arise partly on Sea and partly on Land.

5 Co. 107.

2 Inst. 167.

4 Inst. 154.

Palm. 96. Sid.

178. Roll. Abr. for goods wrecked they (e) must be claimed by action at common law.

531. (d) There are four sorts

of shipwrecked goods, viz. *flotsam*, *jetsam*, *ligan*, and *wreck*. *Flotsam* is when the ship is split, and the goods float upon the water between high and low water mark; *jetsam* is when the ship is in danger to be drowned, and for saving the ship the goods are cast into the sea; *ligan*, or *ligan*, is when the heavy goods are cast into the sea with a buoy; that the mariners may know where to retake them; *wreck* is, where goods shipwrecked are cast upon the land; these, when all the crew are drowned, belong to the king, or the lord of the manor, to whom, it is presumed, the king has granted them; but by Westm. 1. c. 4., if a dog or cat (which are put for instances) escape alive, the right owner shall have them again, if he claim them within a year and a day after the seizure. 2 Inst. 167. 5 Co. 106. Bract. lib. 3. f. 120. Molloy, 237. || By an ordonnance of Louis the 14th, the proprietors of shipwrecked goods are permitted to reclaim them within a year and a day, paying the expence of salvage; Ordonn. de la Marine, Art. 29. tit. 9. Liv. 4.: and we are informed, that even after this prescribed time the claimants might recover them. "Le Roi & M. L'Amiral ayant toujours eu la grandeur d'ame d'admettre les reclamations, quoique faites hors du tems prescrit. Valin, Sur L'Ord. de la Marine, loc. cit. By an act of our own country, the 12th Ann. st. 2. c. 18. § 2. goods saved from a vessel stranded on these coasts, if not claimed in twelve months, are to be sold, and the residue of the money arising from the sale, after deducting all charges, together with a fair and just account of the whole, is to be transmitted to the Exchequer, for the benefit of the owner when appearing, who upon affidavit, or other proof of his right thereto, to the satisfaction of one of the barons of the coif of the exchequer, is upon his order to receive the same. But goods so saved (not being wrecked goods, or *jetsam*, *flotsam*, or *ligan*)

lagan) are subject, after salvage and charges paid, to the same customs and duties as other merchandizes regularly imported. 5 G. r. c. 11. § 10. || (e) By the express words of 15 R. 2. they have no consuance of goods wrecked.

And although the admiralty court has jurisdiction of *flotsam*, Sid. 172. Keb. &c. and shall determine what it is by the rules of the civil law, 657.

yet that must be understood where the thing is *super altum mare*; and, therefore, if a ship, which becomes *flotsam* and derelict, comes into the body of a county, they have no jurisdiction.

So, if *flotsam* comes to land, and is taken by one that hath 2 Mod. 294. no title, an action lies at common law, and no proceedings shall be thereon in the admiralty; for it need not be condemned as a prize.

At (a) common law, the king only could erect beacons, 4 Inst. 148. light-houses, and sea-marks; but of later times, by letters patents granted to the lord admiral, he hath power to (b) erect beacons, sea-marks, and signs for the sea. (a) But by 8 Eliz. c. 13. the master, wardens, assistants of

the Trinity house at *Deptford Strond*, had power given them to erect beacons, marks, and sign for the sea, &c. vide 4 Inst. 149. (b) A suit for the profits of the beaconage of a rock in the sea, near — in *Cornwall*, may be in the court of admiralty; Cross and Diggs, Sid. 158. adjudged; and it was said, as the profits of the beacons belonged to the admiral, so the suit for them ought to be in his court, though the rock be the freehold of another, and part of his inheritance.

If the original cause arises upon the sea, and other matters Vent. 173. happen upon the land depending thereupon, yet the trial shall 2 Lev. 25. be in the court of admiralty. Sid. 320.

As, if a man takes a thing upon the sea and brings it to the Roll. Abr. 533. land, and afterwards carries it away, the suit for this shall be in 4 Inst. 130. the admiralty court, for this is a continued act. 12 Co. 97. 12 Mod. 135. Like point

So, if goods are taken piratically out of a ship, and afterwards March, 110. sold upon land, a suit may be commenced in this case in the Cro. Eliz. 685. admiralty court, against the vendee. S. P. adjudged; unless the sale

had been in a market overt: but vide Hob. 78. Roll. Abr. 531, 532. And that in such case the party may have an action of trover and conversion at common law.

So, if a ship be taken by pirates and carried to *Tunis*, and Vent. 308. there sold, it being originally within the jurisdiction of the admiral, it so continues, notwithstanding the sale afterwards upon the land.

But, if the owner of a ship sends her to the *Indies* to merchandize, and the crew commit piracy, by which, according to the Roll. Abr. 532. Roll. Rep. 285. S. C. adjudged. S. C. adjudged. 3 Bulst. 148. admiralty law, the ship becomes forfeited, and the admiral seizes her accordingly; if afterwards the owner takes the sails and tackling out of the ship, lying *infra corpus com.*, no suit for this can be in the admiralty court; for the admiral hath his remedy by [But, if a ship be arrested by process out of the admiralty court for a

matter arising within their jurisdiction, and she be rescued afterwards at land, the cognizance of the rescue belongs to the admiralty jurisdiction. *Rigden v. Hedges*, 1 Ld. Raym. 446. *Per Holt, C. J.*

Roll. Abr. 533.

If a suit be in the admiralty court for making a lighter for the carriage of mud, or the like, within the body of the county upon the *Thames*, and not for navigation, a prohibition lies.

Hard. 183.
Spark and
Stafford, ad-
judged.

If a ship is taken by pirates upon the sea, and the master to redeem the ship contracts with the pirates to pay them 50*l.* and pawns his person for it, and the pirates carry him to the isle of S. and there he pays it with money borrowed, and gives bond for the money, he may sue in the admiralty for the 50*l.* because the original cause arose upon the sea, and what followed was but accessory and consequential.

Lev. 243.
Turner and
Neal, Sid. 367.
S.C. adjudged.

If there be wars with the *Dutch*, and one having letters of marque take an *Ostender* for a *Dutch* ship, and bring it into an haven, and libel against it to have it condemned as a prize, but sentence be given that it was no prize; the *Ostender* may libel in the admiralty against the captain, for the damage the ship received while it lay in the port; for the original taking being at sea, the bringing it into the port, in order to have it condemned, is but a consequence thereof.

Carth. 499.
Rex v. Broom,
Ld. Raym.
271. adjudged;
being fully
debated; and
that the
second libel
was but a con-
tinuance of
the first suit,
and a charge
grounded

If an *English* ship takes a *French* ship richly laden, the *French* being in enmity with us, and such ship is libelled against, and after due notice on the *Exchange*, &c. declared a (a) lawful prize, the king's proctor may exhibit a libel in the admiralty court, to compel the taker (who sent the ship to *Barbadoes*, and converted the lading to his own use) to answer the value of the prize to the king; although it was objected, that by the first sentence the property was vested in the king, and that this second libel was in nature of an action of trover, of which the court of admiralty cannot hold plea.

upon the first sentence by way of execution thereof. Salk. 32. S.C. & vide Carth. 423. (a) That prize or no prize is a matter altogether appropriated to the jurisdiction of the admiralty, and not triable at common law, vide Carth. 475, 476. [And that court having exclusive jurisdiction over all questions of prize; hath the same jurisdiction over all matters that are consequential to it, *Le Caux v. Eden*, Dougl. 594. &c. *Lindo v. Rodney*, id. 591., n. 1. *Livingstone v. McKenzie*, 3 T. Rep. 332. *Smart v. Wolff*, id. 323. or arise incidentally in the construction of acts of parliament or proclamations. *Home v. Earl of Camden*, 1 H. Bl. 476. *contr.* but reversed in K. B. 4 T. Rep. 382. and that reversal affirmed in parliament. Printed Cases of the Lords, June 22d 1795.] || Case of the *Danish* ship *Noysomhed*, 7 Ves. 593. ||

(C) To what Contracts its Jurisdiction extends: And herein of Contracts made on Sea.

4 Inst. 134.
139. 12 Co.
103. Hob. 79.
212. (b) If a

THE court of admiralty hath no jurisdiction as to contracts made at (b) land, whether such contract be made here or in foreign parts.

contract be made upon the sea, which is afterwards sealed upon the land, the court of admiralty cannot hold plea thereof. Hob. 79. 212.

Latch. 11.
per Dod.

If a ship lying at anchor wants victuals, and sends to land to J. S. to bring victuals, and so the contract is made in the ship, the admiralty shall have consuance; *secus*, if the contract is made entirely at land, and the victuals after sent to the ship.

If a contract or obligation be made upon the sea, yet if it be not for a marine cause, the suit upon this contract or obligation shall be at common law, and not in the admiralty court; for if a man makes an obligation for the security of a debt growing before upon the land, or if he makes a promise to pay it, this cannot be sued in the court of admiralty, but at common law.

Hob. 12.
Bridgman's
case. Roll.
Abr. 532. S. C.

If a man contracts with me in *London*, in consideration of 100*l.* to transport certain commodities into *Turkey*; if he does not perform it, I cannot sue him in the court of admiralty, because the contract was here, and nothing done upon the sea.

Roll. Abr. 325.
4 Inst. 139.

If a charter-party be made in *England*, to do certain things in several places upon the sea, though no act is to be done in *England*, but all upon the sea, yet no suit can be in the admiralty court for the non-performance of the agreement; for the contract is the original, (a) without which no cause of suit can be, and this contract is out of their jurisdiction; and where part is triable by the common law, and part by the admiral law, the common law shall be preferred.

Roll. Abr. 532.
533. Roll. Rep.
486. S. C.
4 Inst. 135.
139. 142.
Moor, 450.

make the cause of suit, which is entire; therefore,

(a) Both the
contract and
breach must
concur to
&c. Hob. 212.

In cases of necessity, the master may hypothecate or pledge the ship or goods, and (b) such contract is cognizable in the admiralty court.

Roll. Abr. 530.
Hob. 11.
Moor, 918.

hypothecation is allowed, because no other remedy at common law; but, where *A.* contracted with *B.* for a cable, which he delivered at *Ratcliffe-upon-Thames*, and *B.* sued in the admiralty, a prohibition was granted; though it was insisted, that the want of the cable was occasioned by the stress of weather at sea; for here the contract was at land, and a remedy for the breach at common law; but had the hypothecation been at *Rotterdam*, or in any other foreign part, the remedy had been proper in the admiralty court. Salk. 34. [An hypothecation bond given in the course of a voyage, though it be executed on land, and *under seal*, is cognizable in the admiralty court. *Menetone v. Gibbons*, 3 T. Rep. 267. *Johnson v. Shippen*, 2 Ld. Raym. 982. 1 Salk. 35. S. C. 6 Mod. 79.]

(b) That such

The mariners may sue in the admiralty court for their wages, although the hiring was by the master on land; and this is allowed in favour of navigation, for here they may all join in the same libel: also, by the admiral law they have remedy against the ship and owners, as well as against the master; and it would be a great discouragement to seafaring men, to oblige them to bring separate actions, and those against a master, who may happen to be insolvent.

Winch. 8.
4 Inst. 141.
Vent. 146.
343. 3 Mod.
244, 245.
Salk. 33. pl. 4.
Ld. Raym.
576. 632.
Carth. 518.
2 Ld. Raym.

1044. 12 Mod. 405. [In the case above referred to in Salk. 33. p. 4., Lord *Holt* is made to say, that it was by mere indulgence that mariners were permitted to sue in the admiralty for their wages; that it is against the statute of 15 R. 2. expressly, but that *communis error facit jus*. But the stat. 4 Ann. c. 16. § 17. puts suits for seamen's wages very clearly, though by implication, upon a legal footing, for the words of that section are, "That all suits and actions in the court of admiralty for seamen's wages, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue."]

So, of the other officers under the master, as the (c) mate, (d) purser, boatswain, &c. for though they contract with the master, yet it is on the credit of the ship, &c.

(c) Salk. 33.
pl. 5. 2 Stra.
937. 2 Bar-
nard. K. B.

160. 12 Mod. 440. (d) Raym. 3. 2 Stra. 858. 2 Barnard. K. B. 297. So, a carpenter, Stra. 707. 2 Vent. 181. Salk. 33. pl. 5. Mod. 93.

(a) Roll. Abr. 533. For amending a ship. So, a shipwright may sue in the admiralty court for (a) the building of a ship (b) for navigation upon the sea.

Cro. Car. 296. (b) If a contract be with seamen to go on a voyage, and they, in order thereunto, work in a harbour, and after, the voyage is intercepted through the owner's fault, as, if the ship be arrested for his debt, &c.; the seamen shall sue for their wages for the work done in the harbour, in pursuance of the contract to go on a voyage, in the admiralty, as much as if they had gone the voyage; *secus*, if the retainer of them had been only to do the work in the harbour. 6 Mod. 238. 2 Ld. Raym. 1044. [2 Wils. 264.]

Salk. 31. pl. 1. But, if there is any special agreement, by which the mariners are to receive their wages in any other manner than is usual; or Opy and Addison. if the agreement is under seal, the mariners cannot sue in the [Campion v. Nicholas, admiralty court.

Stra. 405. Day v. Searle, 2 Stra. 968. How v. Nappier, 4 Burr. 19.]

4 Inst. 141. Nor can the master sue in the admiralty court; for his contract Raym. 3. Salk. is on the credit of the owners, and not like that of the mariners, 33. Ld. Raym. which is on the credit of the ship. 576. [Com.

Rep. 74.] Carth. 518. S.P. although the owner was beyond sea, and the ship lay here.

Vent. 32. Ju- If a contract is made at *Malaga*, concerning the lading of a rado and Gregory, Sid. 418. ship, and for breach thereof upon the sea, *viz.* that he would not Lev. 267. S.C. receive forty butts of wine into the ship, according to agreement, there is a libel in a foreign admiralty, and sentence that the wine shall be received into the ship, which is refused; yet there can be no suit in the admiralty here, reciting the former sentence, and charging the defendant with a breach thereof; for though one may libel here upon a sentence in a foreign admiralty, for the execution of it, yet there being no complete sentence in the foreign admiralty, but an award only, that the wine should be received; this suit for breach thereof is in nature of an original suit, which ought not to be, though the breach was at sea, because upon a contract made at land.

Carth. 26. Knight and Berry, adjudged, and prohibition to such a suit granted, though after sentence and appeal to the delegates; & *per Holt*, the part-owners, who are the major part, are not without remedy in such case; for a special action on the case may be framed at the common law. If there are several partners of a ship, and the major part of them are for sending her a voyage to sea, to which the rest disagree; whereupon, according to the common usage in such cases, the greater number suggest in the admiralty court, the disagreement of their partners; and then, according to their usage there, they order certain persons to appraise the ship, who accordingly set a value thereon; and then the major part, who agreed to the voyage, enter into a recognizance, wherein they bind themselves jointly and severally to the disagreeing parties, in a sum proportionable to their shares, according to the value set by the appraisers, to secure the shares in the ship of those who disagree to the voyage, against all adventures; there can be no suit on this agreement or stipulation in the admiralty court; for the contract was made on land, and therefore the temporal courts must have consueance of it.

Hard. 473. S.P., but no resolution. 6 Mod. 162. S.P., but no resolution. [The whole doctrine here advanced hath been overruled, and the right of the admiralty court to compel security in such case as well for the freight, as for the value of the respective shares in the ship, in the event of her being lost, and to do execution upon it, hath been recognized in several subsequent cases. Dimmock v. Chandler, Fitzg. 197. 2 Str.

2 Str. 890. S. C. 1 Barnardist, 415. S. C. Lambert v. Achetree, 1 Ld. Raym. 223. Blacket v. Ansley, *id.* 235. De Grave v. Hedges, 2 Ld. Raym. 1285. Ouston v. Hebden, 1 Wils. 101. Such right had indeed been allowed in preceding cases. Anon. 2 Ch. Ca. 26. Shelly v. Winsor, 1 Vern. 297. Anon. Skin. 230.]

(D) To what Crimes and Offences its Jurisdiction extends.

BY the 28 H. 8. c. 15. it is enacted, "That all treasons, felonies, robberies, murthers, and confederacies to be committed in or upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have, or (a) pretend to have power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged in such shires and places in the realm, as shall be limited by the king's commission or commissions to be directed for the same, in like form and condition, as if any such offence or offences had been committed or done in or upon the land; and such commissions shall be had under the king's great seal, directed to the admiral or admirals, or to his or their lieutenant, deputy or deputies, and to three or four such other substantial persons, as shall be named or appointed by the lord (b) chancellor of England for the time being, from time to time, and as oft as need shall require, to hear and determine such offences after (c) the common course of the laws of this land, used for treasons, felonies, &c. done and committed upon the land within this realm.

See 2 H. H. P. C. 12., &c. 2 Hawk. P. C. c. 25. § 43. How piracy, and offences committed on the sea, were punished before this statute, *vide* 4 Ass. 25. 3 Inst. 115. S. P. C. 10. b. H. P. C. 77. 3 Inst. 112. (a) This must be intended between the high water and low water mark where there is *divi-*

sum imperium at several times. 3 Inst. 113. But if done in such creek or haven where the admiral hath no jurisdiction, the commissioners cannot meddle with it. Owen, 122. Moor, 756. Roll. Rep. 175. H. P. C. 77. (b) Hob. 146. (c) Yet it still remains an offence of a special nature; and therefore the indictment must allege the fact to be done upon the sea, and must have both the words *felonice* and *piratice*; and no offence is punishable by virtue of this act as piracy, which would not have been felony if done on land; consequently, the taking of an enemy's ship by an enemy is not within the statute. 3 Inst. 112. S. P. C. 114. Roll. Rep. 175. — And although the statute ordains, that it shall have the like trial and punishment as are used for felony at common law, yet this shall not be carried so far as to make it also agree with it in other particulars which are not mentioned; and therefore it shall not be included in a general pardon of all felonies. Moor, 756. 3 Inst. 112. Co. Lit. 391. H. P. C. 77. 2 Hal. Hist. Plac. Cor. 370. — Nor shall an attainder for this offence work any corruption of blood. 3 Inst. 112. H. P. C. 77. — But it hath been resolved, that an offender standing mute on an arraignment, by force of this statute, shall have judgment of *peine forte & dure*. 3 Inst. 114. Dyer, 241. [But by 12 Geo. 3. c. 20. "Standing mute in piracy amounts to a conviction, and the court shall award the same sentence as on a conviction by verdict or confession."]]

"And it is further enacted, That such persons to whom such commission or commissions shall be directed, or four of them at the least, shall have full power and authority to inquire of such offences, and every of them, by the oaths of twelve good and lawful inhabitants in the shire limited in their commission, in such like manner and form as if such offences had been committed upon the land within the same shire; and that every indictment found and presented before such commissioners of

“ any treasons, felonies, robberies, murthers, manslaughters,
 “ or such other offences, being committed or done in or upon
 “ the seas, or in or upon any other haven, river, or creek, shall
 “ be good and effectual in the law ; that if any person or persons
 “ happen to be indicted for any such offence done, or hereafter
 “ to be done upon the seas, or in any other place, above limited,
 “ that then such order, process, judgment, and execution shall
 “ be used, had, done, and made to and against every such per-
 “ son and persons so being indicted, as against traitors, felons,
 “ and murtherers, for treason, felony, robbery, murther, or other
 “ such offences done upon the land, by the laws of this realm is
 “ accustomed ; and that the trial of such offence or offences, if
 “ it be denied by the offender or offenders, shall be had by
 “ twelve lawful men inhabited in the shire limited within such
 “ commission, which shall be directed as is aforesaid, and no
 “ challenge or challenges to be had for the hundred ; and such
 “ as shall be convicted of any such offence, by verdict, confes-
 “ sion, or process, by authority of any such commission, shall
 “ have and suffer such pains of death, losses of lands, goods,
 “ and chattels, as if they had been attainted and convicted of
 “ any treasons, felonies, robberies, or other the said offences
 “ done upon the land ; and shall also be excluded from the
 “ benefit of their clergy.”

(a) *Rule Yelv.*
 134.

It was (a) held, that by force of this statute accessories to piracy could not be tried ; but this is remedied by 11 & 12 W. 3. c. 5. by which aiders, and comforters, and the receivers of the goods, are made accessories, and to be tried as pirates, by 28 H. 8. c. 15. [And by 8 G. 1. c. 24., made perpetual by 2 G. 2. c. 28., persons made accessories by 11 & 12 W. 3. are to be deemed principal pirates, felons, and robbers, and to be proceeded against accordingly.] Also, the said statute 11 & 12 W. 3. directs how pirates may be tried beyond sea, according to the civil law, by commission under the great seal of *England*.

By the 5 Eliz. c. 5. § 30. several offences in the act mentioned, if done on the main sea, or coasts of the sea, being no part of the body of any county, and out of any haven and pier, shall be tried before the admiral or his deputy, and other justices of *oyer and terminer*, according to the statute of 28 H. 8. c. 15.

By 1 Ann. sess. 2. c. 9. § 4. captains and mariners belonging to ships, and destroying the same at sea, shall be tried in such places as shall be limited by the king's commission, and according to 28 H. 8. c. 15.

See 4 G. 1.
 c. 12. § 3. and
 8 G. 1. c. 24.,
 made perpet-
 ual by 2 G. 2.
 c. 28. § 7. and
 11 G. 1. c. 29.

And by 4 G. 1. c. 11. § 7. all persons, who shall commit any offence for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 W. 3. c. 5. may be tried and judged for every such offence according to the form of 28 H. 8. c. 15. and shall be excluded from their clergy.

|| By 39 G. 3. c. 37. all offences committed on the high seas out of the body of any county of the realm, are declared to be offences of the same nature respectively, and to be liable to the same punish-

punishment respectively, as if they had been committed on the shore, and are to be inquired of, heard, tried, and determined and adjudged in the same manner as treasons, felonies, murders, and confederacies are directed to be by the act of 28 H. 8. c. 15. And any person tried for the crime of murder or manslaughter committed upon the sea, by virtue of any commission directed under the said act, and found guilty of manslaughter only, is entitled to receive the benefit of clergy in like manner, and subject to the same punishment, as if he had committed such manslaughter upon the land.

By 43 G. 3. c. 113. § 5. accessaries to any felony committed on the high seas are triable in the manner prescribed by the act of 28 H. 8. c. 15.

The subjects of foreign states charged with offences committed aboard *English* ships on the high seas are triable under this act of 28 H. 8. c. 15. || Taunt. 32.

[By stat. 33 G. 3. c. 66. § 70., which was to continue in force during the then hostilities with *France*, a session of *oyer* and *terminer* and gaol-delivery for the trial of offences committed on the high seas, within the jurisdiction of the admiralty of *England*, is required to be holden twice at least in the year. And any § 71. commissioner named in the commission for trying such offences, or any justice of the peace may take informations upon oath touching the said offences, and cause the parties to be apprehended and committed; and shall bind over all persons, whom § 72. they shall respectively judge necessary, to appear, prosecute, and give evidence against the offender at the next admiralty sessions, which information and recognizance shall be transmitted to the registrar to be laid before the court: And the marshal, his de- § 73. puty, all sheriffs, and other officers for keeping the peace are required diligently to obey and execute the precepts, warrants, and orders of the court.]

(E) By what Law it proceeds, and the Form of such Proceedings.

ALL maritime affairs are regulated chiefly by the civil law, the *Rhodian* laws, the laws of (a) *Oleron*, or by certain peculiar and municipal laws and constitutions appropriated to certain cities, towns, and countries bordering on the sea. Godolph. Adm. Juris, 40. (a) So called, for that they were made by King *Richard* I. when he was there. Co. Lit. 11. b. 260. b. || *Godolphin*, in "an appendix to his view of the Admiralty Jurisdiction," has given a collection of them in 47 articles. *Selden* thinks, that *Richard* published them, not as Duke of *Aquitaine*, but by his right at that time, as King of *England*, to superintend and direct all transactions on those seas; *Mare Clausum*. c. 24. which perfectly agrees with the opinion of Sir *Leoline Jenkins*, who says of these laws that "the western world received them from the *English*, by way of deference to the sovereignty of our Kings in the *British* ocean, and to the judgment of our countrymen in sea affairs." Sir *Leoline Jenkins*'s Charge to the Cinque Ports, p. lxxxvii. *Henry* II. about 20 years before, had promulgated a law of wreck in that island, which was adopted by his son. *Rymer's Fœdera*. tom. i. p. 127. 20 H. II. A. D. 1174. ||

Roll. Abr.
530.; but *vide*
Roll. Rep. 285.

If the owner of a ship victuals it, and furnishes it to sea with letters of reprisal, and the master and mariners when they are at sea commit piracy upon a friend of the king, without the notice or assent of the owner, yet by this the owner shall lose his ship by the admiral law, and our law ought to take notice thereof.

Sid. 179. Mod.
93. Vent. 146.
12 Mod. 408,
409. 442.

(a) But whether the executors of those

mariners who died before the casting away of the ship may recover the wages due to their testators, *Q. & vide* Sid. 179. Keb. 684. (b) For refusing to fight when commanded by the master, *vide* 22 & 23 Car. 2. c. 11.

Roll. Abr. 530.
Wier's case.

(c) So, upon a judgment given in a court of admiralty, execution may be sued in foreign parts. Godb.

260. *arguendo*. — If a ship is condemned as the king's prize in a foreign admiralty, such sentence may be

executed here. Salk. 32. (d) If a ship is sold by virtue of a sentence in the court of admiralty in *France*, (being then in amity with *England*), the sentence shall not be examined in an action at common law; for we ought to give credit to their sentences, else they will not give credit to the sentences of our court of Admiralty. 2 Lord Raym. 893. 936.; but the way to be relieved is to petition the king, who will examine the case, and, if he finds cause of complaint, send to his ambassador residing there, and upon failure of redress, will grant letters of marque and reprisal, Raym. 473. Skin. 59. & *vide* Vent. 32. — But where the court said they would give no regard to a sentence in the court of Admiralty of *Scotland*, *vide* Rudly and Eggesfield, 2 Saund. 259, 260. Vent. 174. — But it was agreed the sentence in *Scotland* was pleadable in the court of Admiralty here. Vent. 274. 2 Lev. 25. and 2 Saund. 260. The validity of the sentence in the Admiralty in *Scotland* is determinable by the law of the Admiralty here.

Hob. 11.

Moor, 918.

Roll. Abr. 530.

(e) Or he that

is reputed master.

Noy, 95.

But not before

the voyage be-

gins. Stra. 695.

See 12 Mod. 406.

(f) Though in fact it be not employed accordingly, and

the owner must take his remedy against the master. Noy, 95. (g) 2 Sid. 161., said to have

been so lately agreed. — But *vide* Salk. 35. Ld. Raym. 982. 6 Mod. 79. 11 Mod. 30. pl. 1.

That the master cannot by his contract make the owners personally liable, although he may

bind the ship, for he can have no credit abroad without such security by hypothecation.

The (e) master of a ship may hypothecate or pledge the ship without the consent of the owner, for tackling and victuals, or he (f) may borrow money for the necessaries of the ship, and in such cases the party may in the Admiralty court (of which our law will take notice) (g) either proceed against the owner or against the ship.

See 12 Mod. 406. (f) Though in fact it be not employed accordingly, and the owner must take his remedy against the master. Noy, 95. (g) 2 Sid. 161., said to have been so lately agreed. — But *vide* Salk. 35. Ld. Raym. 982. 6 Mod. 79. 11 Mod. 30. pl. 1. That the master cannot by his contract make the owners personally liable, although he may bind the ship, for he can have no credit abroad without such security by hypothecation.

But

But the master cannot sell the ship and broken tackle, Sid. 453. *per Hale*, Ch. B. though there is no probability of its being saved, partly in respect of the tempest, and partly in respect of the barbarity of the inhabitants, who took away every thing that was cast upon the shore.

If a merchant's ship is taken by an (a) enemy, and a month after is retaken by an *English* ship, (b) the first owner (c) shall not have restitution, for the ship was gained by battle with an enemy. 2 Brownl. 11. Weston's case. (a) Otherwise if by a pirate. Vent. 174.

(b) Where the property is not altered until the prize is brought *infra præsidia* of that king, by whose subject it is taken. March. 110, 111. [(c) But the property is not completely vested so as to bar the former owner, in favour of a rescuer or vendee, till there has been a sentence of condemnation in some, foreign or domestick, Admiralty court. 10 Mod. 79. 2 Burr. 694. 1208-9. Doug. 617. And it is usual, in the prize acts, to preserve the right of the original owner, even after condemnation, paying the salvage thereby fixed.]

If two ships meet at sea together, though they went not forth consorts, and one of the ships in the presence of the other takes a prize, the other ship which was present shall have the moiety, for the presence of this ship was a terror to the ship taken. 2 Leon. 182. *per curiam*. See the case of the Cape of Good Hope, 2 Robinson, 282.

If an infant, being master of a ship at *St. Christopher's*, beyond sea, by contract with another, undertakes to carry certain goods from *St. Christopher's* to *England*, and there to deliver them according to the agreement, but wastes and consumes them, he may be sued for the goods in the court of Admiralty, though he be an infant; for this suit is but in nature of a detinue or trover and conversion at the common law. Roll. Abr. 530. Furnes and Smith adjudged.

If goods are thrown overboard in stress of weather, in danger or just fear of enemies, in order to save the ship and the rest of the cargo, that which is saved shall contribute to a proportion of that which is lost; and this average, which by the civil law and custom of merchants binds the owners, may be (d) pleaded to an action at common law. Molloy, 246. (d) 2 Bulst. 290.

But average is not due, unless the goods are lost in such a manner that thereby the residue in the ship are saved; as, if goods are thrown overboard to lighten the ship, or by composition part is given to a pirate to save the rest; but, if a pirate takes part by violence, average shall not be paid for them. Moor, 297.

So, where *A.* being one of the owners of a ship, loaded on board her 210 tons of oil, and *B.* loaded on board her 80 bales of silk upon a freight, by contract both to be delivered at *London*; the ship was pursued by enemies, and forced into an harbour, &c. and the master ordered the silk on shore, being the most valuable commodity, (though they lay under the oils, and took up a great deal of time to get at them,) the ship and oils were afterwards taken, and the owner of the oils brought his bill in equity to have contribution from the owner of the silk; but in this case, as the loss of the oils did not save the silks, nor the saving of the silks lose the oils, the bill was dismissed. Show. Parl. Ca. 18, 19.

By

Roll. Abr. 531. By the civil law the admiralty court may take a recognizance
Cro. Eliz. 685. in (a) nature of a stipulation from the defendant to answer the
Noy, 24. action; and if he does not obey, they may take his body; for it
Hard. 473. is necessary that every court should have a compulsory power of
13 Co. 52. enforcing obedience to his decrees, and this course, having pre-
2 Brownl. 26. vailed there time out of mind, cannot be altered without an act
2 Inst. 51. of parliament.
Yelv. 135.
Godb. 193.

260. (a) But being no court of record they cannot take a recognizance. 4 Inst. 135. 137. —
Yet such a stipulation is good. Raym. 78. adjudged, [though in the form of a recognizance.
Brymer v. Adkins, 1 H. Bl. 164.]

Roll. Abr. 531. So, they may require *fidejussores* to enter into such stipula-
(b) Raym. 78. tion, and such stipulation, if the practice has been so may be
Keb. 489. good, though entered into (b) for a sum certain, and the bail
taken in execution thereupon; and if they had not this power,
the party might be obliged to lie in gaol during the whole suit.

13 Co. 53. ad- Though the court of admiralty is no court of record, because
judged. (c) But they proceed there according to the civil law, yet by the custom
not fine as of the court they may (c) amerce the defendant for his (d) de-
judges of a fault by their discretion, and may make execution for the same
court of re- of the (e) goods of the defendant *in corpore com.*, and if he hath
cord may do. no goods, take his body.
12 Co. 104.

— But they may fine and imprison for a contempt in the face of the court. Vent. 1. (d) They may punish
one that resists the execution of the process of the court, but not give damages to the party.
Vent. 1. But because they had no cognizance of the original matter, upon which the process
was grounded, a prohibition was granted, &c. Style, 171. 340. (e) But they can in no case
take land in execution. Godb. 193. 260. Said by *Coke*, that the process of the admiralty
court is to imprison according to 19 H. 6. *vide* Hard. 474. Noy, 24. Godb. 260. Sid. 148.

Vent. 174. When a (f) provisionate decree, as they call it, or *primum de-*
(f) That upon *cretum*, is given for the possession of a ship, and she is seized,
such interlo- upon security given by the course of the admiralty, she may be
cutory decree hired out.
no appeal lies

to the delegates. Vent. 174. [For this court, as well as the court of chivalry, is governed by
the civil law; and by that law, there can be no appeal, but where *gravamen est irreparabile*.
Sir Henry Blount's case, 1 Atk. 295. *Vide* Moor, 814. *contr.*]

(g) For in such || For the avoiding of tedious suits in civil and marine causes,
case no writ it is enacted by 8 El. c. 5. that "all and every such judgment
of error lies. "and sentence definitive as shall be given or pronounced in
4 Inst. 135. "any civil and marine cause, upon appeal lawfully made therein
339. 341. "to the queen's majesty in her highness court of (g) chancery,
(h) Though "by such commissioners or delegates as shall be nominated and
the word half "appointed by her majesty, her heirs and successors, by com-
seal is here "mission under the half seal, (h) as it hath been heretofore
used, yet a "used in such cases, shall be final, and no further appeal to
commission "be had or made from the said judgment or sentence defini-
under the "tive, or from the said commissioners or delegates for or in the
great seal is "same, any law, &c." ||

act was to re- strain the use of smaller seals than the half seal. Besides, the great seal includes the half
seal. Waltham v. Phoynes, 1 Ro. Rep. 300. Of the half seal I have not been able to ob-
tain any account, there being no seal so named at present in use. Whatever it was, it
would seem (most probably in consequence of this resolution of Waltham v. Phoynes)
to have been superseded in practice by the great seal; for the only course of proceeding
in these cases, within any official memory, has been to issue the commission under the great
seal, upon the chancellour's *fiat* affixed to a petition presented to him for leave to appeal.

[It is only from the ordinary court of the admiralty, that the appeal lies to the delegates. From the *prize* court the appeal is in pursuance of national conventions, to commissioned members of the privy council, called lords commissioners in prize causes.]

|| *Qu.* whether a commission of review be now grantable to examine a sentence of the committee of council in prize causes. ||

3 Bl. Com. 69.

Vide 4 Ves.

202, 205, 206.

OF THE MARSHALSEA AND PALACE COURT.

AT the time of the justiciar, the disputes between the king's servants were determined before the steward and marshal, and for that purpose the court was held within the king's verge, that his servants might not be drawn away from their attendance on him; and the proceedings were by plaint without any original writ.

Fleta, lib. 2. c. 3.

This court hath still a continuance, being holden in *Southwark*, and is a court of record, exercising a jurisdiction within twelve miles of the king's palace, or where his (*a*) ordinary residence is.

Crompt. Juris. 102. 2 Inst. 548. 4 Inst. 130. 13 R. 2. st. 1. c. 3.

15 H. 6. c. 1. 33 H. 8. c. 12. (*a*) The king's going out of the household for his recreation is not such a removing as changes his ordinary residence. 10 Co. 74.

|| The ancient stile of this court was *Aula Hospitii Domini Regis*, &c. It followed the person of the king, were he within or out of the realm, and took cognizance of offences *etiam in alieno regno, dum tamen reus in hospitio regis poterit inveniri*, as the author of Fleta has it, of which he gives two notable instances, the one in *Gascony* in the 12th year of *Edward* the First, and the other in *Paris* in the 14th year of that king. ||

Lib. 2. c. 3. § 9, 10.

By 28 E. 1. c. 3. called *Articuli super chartas*, as "concerning the estate (*b*) of the steward and marshal, such pleas as they (*c*) ought to hold, and in what manner, It is ordained, that henceforth they shall not hold plea of freehold, neither of debt, nor of covenant, nor of contract between the king's (*d*) people, but only of trespass of the house, and other trespasses done within the verge, and of contracts and covenants which one of the king's house shall have made with another of the same house, and in the same house, and not elsewhere. And they shall plead no plea of trespass, other than that which may be attached by them before the king depart out of the verge (*e*) where the trespass shall be done, and shall plead it speedily from day to day, so that it may be pleaded and determined

|| Rot. Pari. 1 R. 2. Petitions, § 65. For the construction of this statute, see 2 Inst. 548. 10 Co. 71. The case of the marshal-sea. 6 Co. 20. Michelborn's case. 1 Bulstr. 207 Cox v. Gray. (*b*) The word in the original

"mined

is *lestat*, rendered in the translation in the printed statutes, *authority*, and Lord Coke explains it to be, the jurisdiction by force of their offices in which the steward and

“ mined before that the king depart out of the limits of that verge where the trespass was done. And if so it chance that they cannot be determined within the limits of that verge, these pleas before the steward shall cease, and the plaintiff’s shall sue at common law. And henceforth the steward shall not take consuance of debts, nor of other things, but of people of the said house; nor shall hold none other plea by obligation made at the distress (*f*) of the steward and of the marshals. And if the steward or the marshals do any thing contrary to this ordinance, their act shall be holden as void.”

marshals have estates, namely, for their lives within the court of the marshalsea. (*b*) This shews that this act was declarative of the common law, for its intent was to reduce the marshalsea court to its true and lawful institution, which the word “ought” imports. The *Articuli super chartas* means according to Herle in 6 E. 3. 33 b. *explanations of the charters*, (the great charter and the charter of the forest), that is of the common law: for this court hath its foundation from the common law of England, 2 Inst. 130. it is not by prescription, which implies a grant, but *de jure communi, pro necessitate*. 1 Bulstr. 211. (*c*) 1 Bulstr. 208. (*d*) The verge is the compass of the jurisdiction, which was twelve miles round the king’s house, ascertained by 13 R. 1. st. 1. c. 3. to be reckoned from the king’s lodging. It is so called, because the marshal *portat virgam* (*quæ signat pacem*), *coram rege per spatium duodecim leucarum*, &c. Fleta, Lib. ii. c. 4. Of the same extent was the like jurisdiction in France. *Apud Francos, curia regia duodecim leucarum quaquaversum esse intelligitur a loco, ubi princeps ipse moratur; uti edicto Francisci 1. mens. Jun. ann. 1544 statuitur*. Du Fresn. *voc. Virga*. We find a similar jurisdiction too in Scotland: *Omnes transgressiones sub virga marescalli domini regis (videlicet infra duodecim leucas) debent determinari in curia regis coram prædictis marescallo et constabulario*. Leges Malcolmi 2. Regis Scotiæ, c. 6. § 3. (*e*) Where either of the parties is not of the king’s house, though stated in the records of the court to be so, the defendant is not thereby estopped, but may aver that fact by 15 H. 6. c. 1. And a judgment in this court where the parties are not of the king’s household, may be avoided by plea without any writ of error. 10 Co. 77. a. (*f*) Fleta, Lib. ii. c. 4.]]

5 E. 3. c. 2.
10 E. 3. c. 1. in
affirmance of
the common law.

|| A writ of error lies from the judgments of this court to the court of king’s bench. ||

6 Co. 20.
Michelborn’s
case.
(a) Sid. 105.

In every action of debt or covenant, both the parties must be within the jurisdiction of the court: (*a*) also, the contract and consideration must be laid to have arisen within the jurisdiction; but in trespass it is said to be sufficient, if one of the parties be within the precincts or jurisdiction of the court.

Vide Sid. 180.,
where it seem-
ed to *Keeling*
that such let-
ters patent
were void.

King Charles the First, by letters patent, granted to the marshalsea or palace-court, jurisdiction of holding plea of all manner of personal actions whatsoever, as debt, trespass, battery, slander, trover, actions on the case, which shall arise within twelve miles of the palace of *Whitehall*.

[The court of the marshalsea, and the palace court, though here treated of, and indeed very frequently confounded together, are in fact two distinct courts. The former is of common right: the latter was erected by letters patent in the 6th year of King Charles the First: the former was originally holden before the steward and marshal of the king’s house, and was instituted to administer justice between the king’s domestick servants, 1 Bulstr. 211. holding plea of all trespasses committed within the verge of the court, where only one of the parties was in the king’s domestick service, 1 Sid. 105. and of all debts, contracts, and covenants, where both the contracting parties belong to the royal household; Artic. *sup. cart.* 28 Edw. 1. c. 3. 5 Edw. 2. c. 2. 10 Edw. 3. st. 2. c. 2. The latter is to be holden before the steward of the household, and knight marshal, and the steward of the court, or his deputy; with jurisdiction to hold plea of all personal actions whatsoever, which shall arise between any parties within

within twelve miles of the palace at *Whitehall*. 1 Sid. 180. 2 Salk. 439. This court, therefore, is stationary, whereas the other is ambulatory, and obliged to follow the king in all his progresses, its verge extending for twelve miles round his majesty's place of residence. 13 R. 2. st. 1. c. 3. Both the courts are now holden together in the borough of *Southwark* once a week: and a writ of error lies from both to the court of king's bench: the writ of error from the marshalsea court is allowed by the statutes of 5 Edw. 3. c. 2. and 10 Edw. 3. st. 2. c. 3. for as this tribunal was never subject to the jurisdiction of the chief justiciary, the writ of error, at common law, lay only to parliament. 1 Bulstr. 211. 10 Co. 79. 3 Bl. Comm. 76.]

COURTS PALATINATE.

THE palatinate courts are superior courts of record, which exercise a jurisdiction within their own precincts in as (a) ample a manner as the courts of *Westminster*, into which the king's ordinary writs do not run. But, although they (b) have *jura regalia*, yet they derive their authority (c) from the crown. At (d) this day no palatinate jurisdiction can be erected without an act of parliament.

merely for causes arising within the palatinate; and therefore if a debtor goes from a foreign into a palatinate jurisdiction, his obligations go along with him as much as if he removed from one kingdom into another, and he may be sued there, though the cause of action arose not within such palatinate jurisdiction. Gilb. Hist. C. P. 189. (b) Might formerly pardon treasons, murder, felonies, &c. but their power as to many things is now restrained, for which vide 4 Inst. 205. 27 H. 8. c. 24. (c) And were probably erected at first as being adjacent to those countries, which were generally in enmity with *England*, viz. That the people of *Lancaster* and *Durham*, which lie towards *Scotland*, and *Chester* that lies towards *Wales*, might have justice administered to them at home, and not be obliged to any attendance elsewhere, that those parts should not be disfurnished of inhabitants that might secure the country from incursions. Vent. 155. *Arguendo*. (d) Vide 4 Inst. 204. *Cromp. Juris*. 137. 2 Inst. 557. (a) 4 Inst. 204. 213.—Is a general court for all the subjects of the palatinate, and not

By 27 H. 8. c. 24. § 3. it is enacted, "That all original writs and judicial writs, and all manner of indictments of treason, felony, and trespass, and all manner of process to be made upon the same in every county palatine, and other liberty within this realm of *England*, *Wales*, and marches of the same, shall be made only in the name of our sovereign lord the king, and his heirs, kings of *England*; and that every person or persons having such county palatine, or any other such liberty to make such originals, judicials, or other process of justice, shall make the *teste* in the said original writs and judicial in the name of that same person or persons that have such county palatine or liberty."

By 11 & 12 W. 3. c. 9. reciting 22 & 23 Car. 2. c. 9. and its reference to 43 Eliz. c. 6. and that the clause, *That in actions of trespass, assault, and battery, and other personal actions, the plaintiff in such actions, in case the jury shall find the damages to be under the value of 40s. shall not recover or obtain more costs of suit than the damage so found shall amount unto*, relates only to the courts at *Westminster*, it is enacted, "That as well

"the

“ the said clause and all the powers and provisions thereby, or
 “ by any other law now in force, made for prevention of frivo-
 “ lous and vexatious suits, commenced in the courts of *West-*
 “ *minster*, shall be extended to, and be of the same force and
 “ efficacy in all such suits, to be commenced or prosecuted in
 “ the court of great sessions for the principality of *Wales*, the
 “ court of great sessions for the county palatine of *Chester*, the
 “ court of common pleas for the county palatine of *Lancaster*, and
 “ the court of pleas for the county palatine of *Durham*, as fully
 “ and amply as if the said courts had been mentioned therein.”

And it is further enacted by the last mentioned statute, “ That
 “ no sheriff, or other officers within the said principality or
 “ counties palatine, upon any writ or process issuing out of any
 “ of his majesty's courts of record at *Westminster*, shall hold any
 “ person to special bail, unless an affidavit be first made in writ-
 “ ing, and filed in that court, out of which such writ or process
 “ is to issue, signifying the cause of action, and that the same is
 “ 20*l.* or upwards, and where the cause of action is 20*l.* and up-
 “ wards, bail shall not be taken for more than the sum expressed
 “ in such affidavit.”

Jennet v.
 Bishop,
 1 Vern. 184.
 Partington v.
 Tarbock, *Id.*
ibid.

¶ No appeal lies in chancery from a decree in a county pala-
 tine; but, if any appeal lies, it must be to the king himself. To
 a bill of appeal and review of a decree in the court of a county
 palatine a demurrer has been allowed, it being apparent on the
 face of the bill that the court of chancery had no jurisdiction.
 But though chancery assumes no appellate jurisdiction in these
 cases, (a) yet it will in some cases remove a suit before the de-
 cision into its own court by writ of *certiorari*.||

(a) *Id.* 177.
 Mit. Equ. Pl.
 123.

The palatinate courts are at this day three, *viz.* *Chester*, *Dur-*
ham, and *Lancaster*.

1. Of the County Palatine of Chester.

4 Inst. 211.
 Crompt. Juris.
 137.

This is a county palatine by prescription, and according to
 my Lord Coke is the most ancient and honourable remaining at
 this day.

4 Inst. 211.

Within this county palatine, and the county of the city of
Chester, there is and anciently hath been a principal officer called
 the Chamberlain of *Chester*, who hath, and time out of mind
 hath had, the jurisdiction of a chancellor; and the court of
 exchequer at *Chester* is, and time out of mind hath been, the
 chancery court for the said county palatine, whereof the chamber-
 lain of *Chester* is judge in equity: he is also judge of matters at
 the common law within the said county, as in the court of
 chancery at *Westminster*, for this court of chancery is a mixt
 court.

4 Inst. 212.

There is also, within the said county palatine, a justice for
 matters of the common pleas, and pleas of the crown, to be heard
 and determined within the said county palatine, commonly called
 the chief justice of *Chester*.

4 Inst. 212.

All pleas of lands or tenements, and all other contracts, causes,
 and

and matters rising and growing within this county palatine are pleadable, and ought to be pleaded, heard, and judicially determined within the said county palatine, and not elsewhere; and if any be pleaded, heard, or judged out of the said county palatine, the same is (a) void, and *coram non judice*, except it be in case of treason, error, foreign plea, or foreign voucher.

(a) That this must be under stood where

the plaintiff by his declaration shews that the matter arose within a county palatine; for as to a transitory action, the plaintiff may allege that the cause of action accrued at any place. *Vide* Sid. 103. and *supra* of courts in general.

A man cannot sue in the chancery of *Chester* for a thing which in interest concerns the chancellour there, because he cannot be his own judge; and therefore he may in this case sue in the chancery of *England*; for (b) otherwise there would be a failure of right.

Roll. Abr. 374.
Roll. Rep. 246.
3 Bulst. 117.
12 Co. 113.
4 Inst. 213.
S. P. (b) If a man hath

cause to complain in equity of a matter arising within the county palatine of *Chester*; if the defendant lives out of the county palatine, he may be sued in the chancery here; otherwise there would be a failure of justice; for proceeding in equity binding the person only, if the person lives out of the jurisdiction of the chamberlain of *Chester*, there can be no relief there. 4 Inst. 213. [In the case of *Edgworth v. Davies*, 1 Ch. Cas. 41. it is stated to have been reported, upon view of precedents, that the jurisdiction of the counties palatine was allowable between parties dwelling in the same county, and for lands there, and for matters local.]

Outlawry in a county palatine cannot be pleaded in any of the courts at *Westminster*, for the party outlawed is only ousted of his law within that jurisdiction, and it shall not extend to disable a man in another county, where they have no power; for the county palatine being a royal jurisdiction within bounds, the losing the privileges of the law within that jurisdiction can be no disadvantage to him in another county; and if he does not live within the palatine jurisdiction, he is not obliged to attend there. But it seems that outlawry in the county palatine of *Lancaster* may be pleaded in the courts of *Westminster*, because that county was erected by act of parliament in *Edward* the Third's time, but *Durham* and *Chester* are by prescription.

Fitz. Coro.
333. 12 E. 4.
16. D. Plit.
396. Vent.
157. 2 Sid.
146.

2. Of the County Palatine of Durham.

This is also a county palatine by prescription, and said to have been erected soon after the conquest, and is parcel of the bishoprick of *Durham*.

4 Inst. 216.
Crompt. Juris.
138. See
12 Mod. 181.

The jurisdiction of the Bishop of *Durham* (c) extends to all places between *Tine* and *Tees*.

Roll. Abr. 540.
Roll. Rep. 397.
3 Bulst. 156.

S. P. (c) His jurisdiction extends as well to the manors of other men as to the demesnes of the bishop. Roll. Rep. 397. 3 Bulst. 156.

In this county palatine there is a court of chancery, which is a mixed court both of law and equity, as the chancery at *Westminster*.

4 Inst. 218.

If an erroneous judgment be given, either in the chancery upon a judgment there, according to the common law, or before the justices of the bishop, a writ of error shall be brought before

4 Inst. 218.

fore the bishop himself; and if he give an erroneous judgment thereupon, a writ of error shall be sued returnable in the king's bench.

2 Inst. 219,
220.

If a man be surety for another to keep the peace, and, after he break the peace, and the surety have lands in the county palatine of *Durham*, the king shall command the Bishop of *Durham*, or his chancellour, to do execution; and so it is in the other counties palatine, and in the same manner it is of a statute staple, &c. recognizances, &c.

Chapman v.
Mattison,
Andr. 191.
2 Str. 1089.
S.C.

¶ If a latitat issue out of the court of king's bench into a county palatine, the officer there must make out a mandate for its execution, else he will be attached. ¶

3. Of the County Palatine of Lancaster, and the Dutchy Court.

4 Inst. 204.
Plov. 215.
It does not
appear that this county palatine was erected by any statute in this reign; *Edmond*, son of *Henry 3.* was Duke of *Lancaster*. It hath been a county palatine time out of mind. *Crompt.*
Juris. 137.

The county palatine and dutchy of *Lancaster* were erected by act of parliament in the reign of *Ed. 3.*

Vent. 157.

If lands, (a) parcel of the dutchy lie within the county palatine, a suit in equity may be for them in the dutchy court.

Roll. Abr. 539.

(a) How the county palatine became parcel of the dutchy, *vide* 1 E. 4. c. 1. 1 H. 7. 4 Inst. 205. Vent. 155.

Roll. Abr.

530., *Holt's*
case. *Hob. 77.*

S. C. adjudged; and a

prohibition

awarded, be-

cause the dutchy hath no jurisdiction in respect of the person, as because the suitors dwell within the county palatine, nor upon the lands of the subject any where but upon the king's own land, and his own revenue, and perhaps upon bonds and assurances given for his revenue of the dutchy.

But, if a man enters into an obligation concerning lands lying in the county palatine, and he is sued upon this at common law, he cannot sue in equity in the dutchy court to be relieved against this bond, for the jurisdiction being local, it cannot be extended to this collateral matter.

Vent. 155.

Fisher and
Batten, 2 Lev.

24. 2 Keb.
826. S.C.

But it hath been since holden that a bill may be exhibited in the dutchy court, to be relieved against the forfeiture of a mortgage of lands lying within the county of *Lancaster*.

4 Inst. 206.

(b) It doth not

appear how

this court of

equity began,

but it would

be inconve-

nient now to

The proceedings of the dutchy court at *Westminster* are as in a court of (b) chancery for lands, &c. within the (c) survey of the court by *English* bill, &c. and decree, and the process the same as in chancery; but it is not a mixed court as the chancery of *England* is, (d) partly of the common law, and partly of equity.

examine the power thereof after so long continuance, &c. 2 Lev. 24. (c) Whatever belongs to the jurisdiction of the dutchy may be determined in the exchequer. *Hard. 171.* [or in the court of chancery. 1 Ch. Rep. 55.] (d) They cannot try the validity of letters patent, or other matter properly triable at law. *Roll. Rep. 42. 252. 3 Bulst. 119. 12 Co. 114.*

|| An appeal lies to the dutchy court from a decree in the court of equity at *Lancaster*.||
 Addison v. Hindmarsh,
 1 Vern. 442. Omerod v. Hardman, 5 Ves. 722.

It was granted by patent, that this court might make ordinances for the hospital of *W.* how they *se gererent, conversarentur & eligerentur*, and this patent was confirmed by the statute of the 14 Eliz. yet it was resolved, that the court hereby hath no power to determine the right of the possessions; and the hospital having exhibited a bill in this court to avoid a lease by them made, of lands lying out of the dutchy, a prohibition was granted.

Roll. Rep. 42.
 Sir Thomas Beaumont and the Hospital of Wigston.

By the statute of 16 Car. 1. c. 10., reciting that the proceedings, censures, and decrees of the court of *Star-chamber* were found an intolerable burden to the subject, &c. it is enacted, "That the court of *Star-chamber* and all its power, jurisdiction, and authority, shall be dissolved, and the like jurisdiction then used and exercised in the court of the dutchy of *Lancaster*, &c. is repealed, revoked, and made void."

* By 4 G. 3. c. 16. infants in counties palatine are enabled to convey by order of the respective courts belonging to the counties palatine.*

OF THE ROYAL FRANCHISE OF *ELY*.

ELY is (a) not a county palatine, but a royal franchise, granted by Henry 1. to the Bishop of *Ely* and his successors, (b) of hearing and determining as well civil as criminal pleas. (b) This jurisdiction the bishop now exercises by his justices, by prescription grounded on the said grant. 4 Inst. 220. [The franchise is of much earlier date than the time of Henry the First. The bishoprick was founded by that prince in the tenth year of his reign, A. D. 1109., and immediately after, the grant here alluded to was made. But the franchise itself may be traced back to the seventh century, and Henry's charter refers to preceding grants, and declares that the church of *Ely* shall continue to have the same privileges and liberties as it had, *dic, quâ Edwardus vivus et mortuus fuit*. See Bentham's *Ely*, 46. Appendix, 23.

4 Inst. 220.
 (a) 2 Inst. 223.
 Carth. 109.
 So resolved.

And therefore the party, who is sued in the courts of *Westminster*, cannot plead that the lands lie, or that the cause of action arose within *Ely*, but (c) conusance must be demanded, which is all the jurisdiction a franchise hath. (c) Of the manner of demanding conusance, *vide* Sid. 283. Keb. 946. 948. [See the record in this case, Bentham's *Ely*, Appendix, 26. *Vide supra*, tit. *Courts and their Jurisdiction in general*, D. 3.]

Carth. 109.
 Cotton and Johnson, Saik, 183. 1. S. C. adjudged.

|| The court of *Ely* is a court of superior jurisdiction, and hath cognizance of all transitory actions, though not arising within the jurisdiction.

Pigge v. Gardner,
 1 Lev. 208.

Gunter v.
Gunter,
Codb. 380.

The justices of this court sit, as do those of *Lancaster* and *Durham*, under commissions of *oyer and terminer*, gaol-delivery, and the peace under the great seal; but the patent to hold pleas at *Ely* is granted by the bishop to his chief justice, of whom the courts at *Westminster* take notice as the king's justice; the writ of error to remove a record out of this court being directed *justiciario nostro*.

Grant v.
Bagge, 3 East,
128. See also
Bowring v.
Pritchard,
14 East, 289.

But the bishop not having a palatinate jurisdiction within the isle, though exercising *jura regalia* there, process out of the courts of *Westminster* into the isle must go in the first instance to the sheriff of *Cambridgeshire*, who thereupon issues his mandate to the bailiff of the franchise. If it go in the first instance to the bailiff, it is error, and the bailiff is a trespasser if he executes it.||

4 Inst. 221.
(a) But, if an
action, that
in its nature
is joint, rise
partly within
4 Inst. 220.

If one be bailiff of lands in *A.* and *B.*, and *B.* be within the franchise of *Ely*, and *A.* not, the bailiff cannot be charged in (a) a joint action, for this would oust the franchise of its jurisdiction.

and partly without the franchise, the franchise cannot claim consuance.

COURTS OF THE FOREST.

Manwood,
143.

A FOREST, as described by *Manwood*, is a certain territory of woody grounds and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide there in the safe protection of the (b) king for his delight and pleasure, which territory of ground so privileged is meted and bounded with (c) unremoveable marks, meets, and boundaries, either known by matter of record, or by prescription, and also replenished (d) with wild beasts of venary or chase, and with great coverts of (e) vert for the succour of the said beasts there to abide; for the preservation and continuance of which place, together with the vert and venison, there are particular (f) officers, (g) laws, and privileges belonging to the same, requisite for that purpose, and proper only to a forest, and to no (h) other place.

(b) The king
only can make
a forest, and
therefore
every forest
must appear to
be such by
matter of re-
cord, or by
prescription,
which sup-
poses a grant
from the

crown for that purpose. Plow. 318. Bract. lib. 2. c. 1. 4 Inst. 300. Bro. Quo Warranto, 7. — But a subject may have a forest by grant from the crown. Dyer, 169. Manwood, 155. — Before the statute of *Charta de Foresta*, the king used to convert the open and woody grounds of his subjects into forests; but though at this day he may make a forest, yet he cannot afforest any of his subjects' lands. 4 Inst. 300. (c) But need not be actually inclosed with hedge, ditch, &c. Manwood, 145. (d) Of the several beasts of the forest, vide 4 Inst. 316. (e) This word comprehends every thing bearing green leaves in the forest. Manwood, 146. (f) The chief of whom is the chief justice in *eyre*, who was formerly created by writ, as other justices in *eyre*; but by the statute 27 H. 8. c. 24. he is made by letters patent, and may execute his office by deputy. [The office is divided between two, one for the forests on this side of *Trent*,
the

the other for those beyond.] 4 Inst. 291. 314. — The other officers are the rangers, stewards, verderors, foresters, regards, agistors, and woodwards; these must duly attend their respective offices, and therefore are privileged from attending on juries in the county, &c. F.N.B. 164. 2 Inst. 291. 1 Jon. 266. (g) Which differ in many cases from the common law of England, for which vide 4 Inst. 315. (h) For although warrens and parks are civil inclosures, and a chase is a franchise differing only from a park, in that it is not inclosed; and though these enjoy privileges by grant from the crown distinct from other lands, yet are they not to be considered as forest, having neither particular laws, nor particular officers; and, therefore, offences committed in these must be punished by the common law. 4 Inst. 308. Manwood, 49. Co. Lit. 233.

There are three courts (a) incident to a forest.

(a) Poph. 150.
Roll. Rep.
191.

1. The Justice Seat.
2. The Swainmote Court.
3. The Court of Attachments.

1. Of the Justice Seat.

This court is so (b) incident to a forest, that there cannot be a forest without it, but it (c) cannot be holden oftener than every third year.

(b) 2 Bulst.
298.
(c) 4 Inst. 290.

It must be summoned at least 40 days before sitting, and one writ of summons shall be directed to the sheriff, &c. the other *custodi forestæ vel ejus locum tenenti*, to summon all officers, &c., and all persons that claim liberties within the forest, to shew how they claim them.

4 Inst. 291.

This court may inquire, hear, and determine all trespasses within the forest, (d) according to the law of the forest, and all claims of franchises, &c. within the forest.

4 Inst. 291.
(d) Whether
a man may be
imprisoned
dubitatur.

for non-payment of a fine set there, Webb's case, Roll. Rep. 411. 2 Bulst. 213.

By 6 R. 2. c. 3. it is enacted, "That (e) no manner of jury shall be compelled by any officer of the forest, or other person, to travel from place to place, out of the place where their charge is given, against their gree, but shall give their verdicts upon their charge in the place where their charge is given to them."

(e) [In a *scire facias* against the defendant, *quare non* satisfecit a fine set upon him at the justice seat in the

forest of *Deanc*, the plea was, that the justice was at *Gloucester*, which is out of the forest; and thereupon it was demurred, because the beginning of the justice seat was at such a place within the forest, and adjourned to *Gloucester*. All the court held it good enough, although the justice seat were begun in a place out of the forest, and gave judgment for the king.] Roll. Abr. 534. Cro. Car. 409.

The proceedings in this court are *de horâ in horam*, and therefore the defendant must plead to an indictment there (f) presently.

Jones, 268.
(f) Where the
indictment
was removed

in B. R., and the defendant there put to answer. 4 Inst. 295

By 9 H. 3. c. 2. "Men who dwell out of the forest henceforth shall not come before our justices of the forest by common summons, unless they be empleaded there, or be pledges for some others who are attached for the forest."

By 34 E. 1. st. 5. c. 6. "Our justice of the forest, or his

"lieutenant, in the presence of our treasurer, and by his assent, shall have power to take fines and redemptions of them who are indicted of trespasses committed in the forest before this time, and not tarry for the eyre of the justice."

4 Inst. 315.

A felony committed within the forest must be inquired of, &c. before the judges of the common law, and it belongs not to the consuance of the chief justice of the forest.

4 Inst. 317.

A receipt of an offender in hunting, &c., or of the king's venison, out of the forest, cannot be punished by the law of the forest, because the jurisdiction is local.

4 Inst. 290.

(a) By 9 H. 3.

c. 16. pre-

sentments of the foresters, when enrolled and inclosed under the seals of the verderors, shall be presented to the chief justices, &c. and be determined before them. — How the truth of such presentment shall be inquired of, and after by assent of the foresters, verderors, regards, &c. confirmed and sealed with their seals, *vide* 34 E. 1. c. 1. And indictments taken in other manner shall be void. — And by 34 E. 1. stat. 5. c. 2. If any officer is dead, or sick, so that he cannot be at the swainmote, the justice of the forest shall put another in his place, so that the indictment may be by all, in form. — If sealed with the seal of one officer only, by assent of all the verderors, &c. it is well enough. Jones, 268.

Jones, 279.

If, upon the first sitting of the justice seat, the four men and reeve of any town make default, the whole vill shall be amerced; but, if after appearance they make default upon an adjournment, the defaulters only shall be amerced.

4 Inst. 290.

(b) Jones, 347.

(c) Nothing

can be done

but upon their

presentments.

2 Bulst. 297.

4 Inst. 313.

If at the swainmote the presentment of the foresters concerning vert and venison is found true, the offender is convict in law, and (b) cannot traverse; but a presentment at a justice seat (c) not found at the swainmote may be traversed, because presented but by one jury.

If the king pardons a trespass in a forest, and an offender at a justice seat pleads it, by the law of the forest, before any allowance thereof, the justices must charge the ministers of the forest to inquire whether the delinquent hath done any trespass in vert or venison since the date of the pardon, and when the pardon is allowed, the entry is *quod invenit manucaptores quodammodo non forisfac.*, &c.

4 Inst. 313.

If an offender be convicted for a trespass in the forest in hunting, &c. and adjudged to be fined or imprisoned, though he pays the fine, yet he must find sureties for his good abearing.

4 Inst. 294.

(d) How the

ch. justice may

inquire of the

truth of such claims

Ibid.

If a claim is allowed where which (d) ought not, the party grieved may, by *certiorari*, remove the record in *B. R.*, and thereupon have a *scire facias*, &c.

per ministros forestæ, or *tam per ministros quam per alios*, at his discretion.

4 Inst. 297.

But, if refused to be allowed where it ought, the party shall have a writ *de libertatibus allocandis* to the justices of the forest.

4 Inst. 295.

But, if upon such claim a difficulty arises, or a demurrer is joined, the chief justice may adjourn it in *B. R.*, &c.

Sid. 296.

Duke of Norfolk v. Duke

A *certiorari* was prayed on behalf of the Duke of Norfolk, to remove a presentment taken in the forest of *Pickering*, to be directed

rected to the chief justice in *eyre*; the judgment was, because there was a question of right, to whom certain woods there did belong, whether to the Duke of Norfolk, or to the Duke of Newcastle; and the Duke of Newcastle, being chief justice in *eyre*, would not let the woods be cut, to the prejudice of the Duke of Norfolk's right, but caused them to be presented; whereas in truth these woods had been deafforested: it was holden by the court, that in this case no *certiorari* should go, for the right of the woods is not in question; for a man (a) cannot cut his own woods to destroy the vert, but shall fine for it; and so the chief justice in *eyre* may be a judge for the king, though not for himself; and if it be deafforested, trespass lies, for the proceedings will be *coram non iudice*; but if they should be removed, there will be a failure of justice; for the *K. B.* cannot proceed to convict, not having their laws nor their officers; but after a conviction it may be otherwise.

of Newcastle,
2 Keb. 81. S. C.
by the name of
Rex v. Maxie.

(a) *Vide* Man-
wood, 370,
&c.

The chief justice in *eyre* cannot, upon an information that such and such persons have killed does and felled trees in the forest, issue his warrant for apprehending such persons; for it (b) is expressly provided, that no man shall be taken or imprisoned by any officer of a forest without due indictment, or being taken with the (c) manner.

Carth. 77.
Lord Love-
lace's case,
and several
persons appre-
hended on his
warrant, dis-
charged on a

habeas corpus. (b) As by 1 E. 3. c. 8. 7 R. 2. c. 4. & *vide* Reg. f. 8. F. N. B. 67. 4 Inst. 289. (c) What shall be a taking in the manner, Carth. 79. & *infra*.

Nor can any such warrant be directed to a messenger or other person that is not an officer of the forest; for herein the authority of the chief justice in *eyre*, and that of a justice of peace, is the same, who cannot direct his warrant to his servant, or any other person, but must direct it to the constable or parish officers; and the warrant *supra* being directed to a messenger, for this reason, principally, the persons were discharged.

Carth. 78.

2. Of the Swainmote.

|| The swainmote is the court within the forest to which all the freeholders owe suit and service. The word is derived from the Saxon *Spein*, *minister*, *Mote*, *curia*; so that it is properly a court of the ministers of the forest, and called *swainmote*, because it is but a preparative to the justice seat.||

Manw. 336.
4 Co. 239.

The swainmote is holden by the steward before the verderors as judges, (d) thrice in the year, and the (e) foresters are to present their attachments at the next swainmote, where the freeholders within the forest are to appear to serve on juries.

4 Inst. 289.
(d) And at
what time, and
who bound to
appear there,

vide 9 H. 3. c. 8. (e) 9 H. 3. c. 6.

|| Before the making of *Charta de Foresta*, there was not any certain time limited for the holding of the courts of the forest, and therefore the chief wardens and foresters kept the swainmotes as often as they would and compelled the inhabitants of the forest to attend those courts, till at last this became a very great oppression.

Manw. 332.

oppression. For these courts were so frequently held, that the people could not constantly attend, and several fees were exacted from those who could not, and so their appearance was excused. To remedy which inconvenience it was provided by that statute, that *nullum swainmotum de cætero teneatur in regno nostro nisi ter in anno, viz.* fifteen days before the feast of *St. Michael*, when the agistors of the king's woods do meet to take agistments, and about the feast of *St. Martin*, when the said agistors receive the pannage; and to those two swainmotes, the foresters, verderors, and agistors, and none other, shall come, or be compelled by distress. The third swainmote shall be kept fifteen days before the feast of *St. John Baptist*, when the agistors meet to fawn the deer, and the foresters, and verderors, and none other shall come to this court, and if they fail shall be compelled by distress.

But this law is now altered by the statute of 34 E. 1. called *Ordinatio forestæ*, c. 1. and likewise several years after that, *viz.* in the beginning of the reign of king E. 3. The words in *Ordinatio forestæ* are, that presentments of offences in *Vert* and *Venison* shall be made in the next swainmote before the foresters, verderors, regards, agistors, and other ministers of the same forest, &c. and that indictments made in any other manner shall be void. So that now it appeareth by this statute, that notwithstanding the negative words in *Charta de Foresta*, the foresters, verderors, regards, agistors, and other ministers of the forest are to come to this court, and also freeholders and all other honest and lawful men of the forest; for otherwise indictments there made are void. And the reason is, because the indictments must be found by all the officers of the forest; therefore they must all be present, and if any of them are dead, or by sickness, or any other means, are disabled or hindered in coming to this court, the chief justice of the forest, or his deputy, shall constitute others in his or their room, that the indictments may be made by all; and this is according to *Ordinatio forestæ*, 34 E. 1. c. 2. Then by the other statute, *viz.* 1 E. 3. c. 8. it appears, that the freeholders and other good and lawful men of the forest must be present at this court to make inquests and juries there; for by the words of this last statute, the presentments must be made *per sacramentum tam militum quam aliorum proborum et legalium hominum de partibus vicinioribus ubi, &c.* This is also proved by the statute of 7 R. 2. c. 3. So that though by *Charta de Foresta* it is enacted, that only three sorts of officers shall come to the swainmote, *viz.* the foresters, verderors, and regards, & *nulli alii per districtionem*, yet the woodwards, and all other the officers of the forest, and all the freeholders dwelling therein, and the four men and the reeve of every village in the forest, must come to the swainmote, and give their attendance there, and in default thereof to be amerced, and the same to be estreated to the chief warden of the forest to levy it by distress.

By the words in the *Ordinance of the Forest*, c. 1. *viz. ac aliis earundem forestarum ministris*, are meant stewards of the swainmote;

mote; and such should be learned men, especially in the laws of the forest. And it appears by the *Assises of the Forest*, c. 22. that there ought to be a steward at every swainmote. The words are, *quod homo attachiatus pro ramis cæsis, placitum illud pertinet ad swanimotum coram seneschallo, &c.*

By the statutes before mentioned it is plain, that all offences in the forest against *Vert* and *Venison* (and indeed all offences in the forest) are to be presented at the next swainmote, and it is there mentioned in what manner, *viz. coram Forestariis, Viridariis, Regardatoribus, Agistatoribus, & aliis earundem forestarum ministris, & si in alio modo fiat indictamentum, pro nullo penitus habeatur.* And if the jury find the presentment true, then the offender is convicted by law, and shall not traverse the indictment.||

This court may inquire *de superoneratione forestarum & aliorum ministrorum forestæ & de eorum oppressionibus populo illat.*

4 Inst. 289. §
vide 34 E. 1.
stat. 5. c. 4.

This court may convict, as well as inquire, but (a) not give judgment.

4 Inst. 289.
(a) And therefore
fore a swain-
mote 298. per Coke.

mote without a justice seat is of no force at all. 2 Bulst.

||All who are indicted in this court and in these words, *Quod sunt communes malefactores de venatione domini regis in foresta,* may be outlawed.||

Manw. 344.

3. Of the Court of Attachments.

The court of attachments, or woodmote court, is to be held before the verderors, every forty days; and at this court the foresters bring in their attachments *de viridi & venatione*, and the presentments thereof, and the verderors receive and enrol them: but no man ought to be attached by his body for vert or venison, unless taken with the (b) manner within the forest, else the attachment must be by his goods.

ready to slip his dogs, or with his hands bloody; also taking upon a fresh pursuit, is a taking in the manner. Carth. 79. Agreed *per totam Curiam.* — But finding timber of the forest in a man's possession, as in his yard, is not a taking in the manner. Carth. 79., per three justices against the chief justice, who doubted.

4 Inst. 289.
(b) Taking in
the manner, is
when a man is
taken in the
very fact, or
ready to do it,
as with his
bow bent, or

||Before the making of *Charta Forestæ*, this court was held very often, but at no certain time, only at the will and pleasure of the chief officers of the forest. To remedy which it is provided by that charter, that *singulis quadraginta diebus per totum annum convenient Forestarii et Viridarii* to hold this court, and therefore it is by some called the *Forty Days' Court*, which before was called the *Woodmote*, *Charta de Foresta*, c. 8. So that the time of holding this court being limited by this charter or statute, *viz.* that it shall be kept every forty days throughout the year, it hath been adjudged, that if it is kept at any other time, sooner or later, (unless the fortieth day happen to be *Christmas-day* or a *Sunday*, in which case it may be held on the day following,) the keeping of such court is void. Yet I am of opinion,

Manw. 24.

4 Co. 289.

says

says Mr. *Manwood*, that the proceedings in such court are not void in law; for if there are presentments then made, and afterwards those presentments proceed to the Swainmote, and then the defendant takes exception to them, because they were first made at a court of Attachments not held according to the time limited by the statute, such exception shall not be allowed; because the court of Attachments doth not proceed *judicially*, but only to receive the presentments and cause them to be enrolled, in order to deliver them to the next Swainmote; so that the receiving of a presentment or attachment at such an irregular court will not make it void; for if it had not been made there, it is still good in law, though it is not presented till the next Swainmote, and not before. But, if a court of Attachments is held contrary to the statute, and a Forester hath attached an offender in the forest, either by an ox or horse, to appear at such court before the Verderors, and he doth not appear, so that the court doth adjudge the beast forfeited for this default, and appoints it to be sold, and the money paid to the king; this proceeding is void in law, because they did proceed *judicially*, which they ought not to do.

Hesket, 13.

But, where it is said, that this court doth not proceed in a cause *judicially*, it must be intended where the value of the trespass is above 4*d.*; for in such case it must be enrolled in that court by the Verderors, and sent from thence to the Swainmote, to be tried there according to the laws of the forest. But, if the trespass is under the value of 4*d.* this court may determine it, that is, the verderors may assess the fine, and cause it to be levied to the use of the king, which must be entered on the Roll.

By 16 Car. c. 16. § 5. "No place or places within this realm of *England*, or dominion of *Wales*, where no Justice Seat, Swainmote, or Court of Attachment hath been held or kept, or where no Verderors have been chosen, or Regard made within the space of sixty years next before the first year of the reign of King *Charles* the First, shall be at any time hereafter judged, deemed, or taken to be forest, or within the bounds or metes of the forests; but the same shall be thenceforth for ever hereafter disafforested, and freed, and exempted from the forest laws; any Justice Seat, Swainmote, or Court of Attachment held or kept within or for any such place or places, at any time or times since the beginning of the said reign, or any presentment, inquiry, act or thing heretofore made, or hereafter to be made or done to the contrary notwithstanding."

[By some late acts of parliament for the punishment of deer-stealers, the accusations are to be judged and sentence is to be given in the ordinary tribunals.]

2 Wils. 124.

It is to be observed, that as the forest law is not the general law of the land, the king's courts are not bound to take notice of it, unless it be pleaded.]

OF THE SHERIFF'S TORN.

THE inhabitants of every county were formerly divided into decennaries, *i. e.* ten families living together in the same precinct, the masters whereof were every one of them mutually bound for each other, and punishable for the default of any member of any such family, in not appearing to answer for himself on any accusation made against him.

Over every county an earl presided, and he, or the shire-reeve, arrayed the several persons within the county; and for this purpose the perambulation was through the county twice every year, and (a) if any person was found that had no compurgators, he was put into prison until he could procure some decennary to admit him: on the law-days the sheriff used to give in charge the several articles of the crown law; and if any person was guilty of the breach of any of them, he was delivered up by his compurgators.

itali die, &c. But the law takes no notice of any such court, under the stile of *torn vicecom. tent.* &c. for the word *torn* does not properly signify the sheriff's court, but his perambulation. 2 Inst. 71. Dalt. Sheriff, 385. 391. Fitz. Leet, 11. 2 Hawk. P. C. c. 10. § 3.

But though the custom of the decennary be now worn away, yet the sheriff's torn still subsists, which is the king's court of record holden before the sheriff, for the redressing of common grievances within the county, to which all persons, above the age of twelve years, not specially privileged, are bound to attend; not only to make proper enquiries, but to take the oaths of allegiance, &c.

But for the better understanding hereof I shall consider,

- (A) The Manner of holding this Court.
- (B) What Persons owe Suit to it.
- (C) In what Cases it has a Jurisdiction.
- (D) Of the Form of its Proceedings.

2 Inst. 70, 71.
Bract. 124.

Preface to
9 Co. 2 Inst.
70. 121.
(a) Hence the
stile of this
court is *Curia
Vistis Franci
Plegii Domini
Regis tenta
apud C. coram
vicecom. tent.
in turno suo*

Finch, 241.
F. N. B. 82.

(A) The Manner of holding this Court.

6 H. 7. 1. b.
Co. Lit. 115.
cont.

BY the common law the sheriff might hold his torn at what place, and as often as he thought fit; but this proving inconvenient, in giving the sheriff too great a power of oppressing the subject,

By the statute of *Magna Charta*, c. 35., it is enacted, "That no sheriff, or his bailiff, shall make his torn through a hundred but twice in a year, and at the place accustomed, viz. once after *Easter*, and again after the feast of *St. Michael*; and that the view of frankpledge shall be at the term of *St. Michael*."

Also by the 31 E. 3. c. 15., it is enacted, "That every sheriff shall make his torn yearly one time within the month after *Easter*, and another time within the month after *St. Michael*; and if they hold them in other manner, that then they shall lose their torn for the time."

Dyer, 151.
Keilw. 193.
2 Hawk. P. C.
c. 10. § 6.

It is agreed, that since these statutes, if the sheriff holds his torn at a different time, or at an unusual place, he may be indicted for it.

Vent. 107.
2 Sand. 290.
2 Keb. 731.
2 Hawk. P. C.
c. 10. § 9.

Also, it hath been holden, That in every caption of an indictment taken in a sheriff's torn, or court-leet, the day whereon it was taken ought to be set forth, that it may appear not to have been on a *Sunday*.

[2 Hawk. P. C.
c. 10. § 12.]

The sheriff is to hold his torn in each particular hundred; yet, as he has a jurisdiction in the whole county, he may receive presentments in one hundred, of offences committed in another; but the jury cannot be charged on oath to present any offences but those which arose within their particular hundreds. Also, by the statute of *Marlbridge*, c. 10. it is provided, that those who have tenements in different hundreds, shall not be compelled to come to any torn, but only in the bailiwick where-in they shall be conversant.

(B) What Persons owe Suit to it.

2 Hawk. P. C.
c. 10. § 10.
(a) That every
master may be

ALL persons, as well masters as (a) servants, above the age of twelve years, are by the common law bound to appear at this court in their (b) proper persons.

be amerced for suffering a servant to continue with him a year and a day without being put into the decennary. 41 E. 3. 26. b. 45 E. 3. 26. b. (b) And therefore no persons so bound to appear, are within the benefit of the statute of *Merton*, c. 10. which allows suit service to be performed by attorney. 2 Inst. 99.

F. N. B. 161.
2 Inst. 121.
2 Hawk. P. C.
c. 10. § 11.

But tenants in ancient demesne are privileged by the common law from coming to this court, unless they and their ancestors have time out of mind used to come to it: also, parsons of churches

churches have the like privilege by the common law, and all peers of the realm, and women have the same privilege by the statute of *Marlbridge*, 52 H. 3. c. 10. unless their presence be required for some particular cause.

Also, by the common law, as well as the statute of *Marlbridge*, 2 Hawk. P. C. c. 10. § 12. no one is bound to such suit to a torn, within the jurisdiction whereof he doth not reside.

And if a man has a house which stands within the precincts of (a) two leets, he shall do his suit to the court in whose jurisdiction his bed-chamber lies. 2 Hawk. P. C. ubi supra.

family in two leets, he ought to do his suit to that wherein for the most part he personally resides. 2 Hawk. P. C. ubi supra. (a) If one have a house and

But no man can be of two leets; and therefore one, who lives within a private leet, shall owe no suit to the torn or other leet, unless the private leet be seised into the king's hands, or unless the lord neglect to hold his court. 2 Hawk. P. C. ubi supra.

(C) *In what Cases it has a Jurisdiction.*

THE jurisdiction of the sheriff's torn is confined to offences at common law, and cannot take consuance of any crime made so by an act of parliament, unless (b) enabled to do so by the act itself; (c) nor can it inquire of any offence, unless it arose since the holding of the last court. 2 Hawk. P. C. c. 10. § 50. (b) Vide 2 Dan. 291. Several statutes mentioned, which give the sheriff's torn and court-leet jurisdiction. (c) Kielw. 66.

All capital offences being of a public nature, as (d) treasons, (e) felonies, are properly inquireable of at the sheriff's torn. Crompt. Juris. 112. 2 Hawk. P. C. ubi supra.

against the king's person. 9 H. 6. 44. — But 2 Hawk. P. C. ubi supra cont., and yet it seems strange, that the highest offence should be exempted; however, it is clear, that the sheriff has no power to inquire of any offence made treason by statute, as of a treason, but only as it was an offence at common law. (e) Except rape, because as the law now stands, it is a felony only by statute. 2 Hawk. P. C. c. 10. § 51. — And except the death of a man, because no common nuisance. But *Qu. & vide* 2 Hawk. P. C. *ibid*. (d) Except

It may inquire of assaults and batteries, if accompanied with bloodshed, but otherwise not; because without bloodshed they are not accounted common grievances. 2 Hawk. P. C. c. 10. § 53.

Also, it may inquire of all affrays, as being *in terrorem populi*. 2 Hawk. P. C. c. 10. § 54.

Also, it may inquire of the common breaking of hedges, dikes, or walls, and of all pound breaches, as being common grievances. Also, it may inquire generally of inferior offences, touching the king's interest, as of all purprestures or incroachments upon the king, and alienations in mortmain (f) and seizures of treasure-trove, or of waifs or estrays, or wreck belonging to the king. *Vide* 2 Hawk. P. C. c. 10. § 55. 57. and the several authorities there cited. (f) But *Q.* Whether it can prescribe

to inquire of the seizure of such things belonging to the lord, being a subject. 2 Hawk. P. C. *ibid*.

2 Hawk. P. C. c. 10. § 58, 59. and the authorities there cited.

It may inquire of all common nuisances, as all annoyances to common bridges, or highways, bawdy-houses, &c., and also, of all other such like offences, as selling corrupt victuals, breaking the assise of beer and ale, neglecting to hold a fair or market, keeping false weights or measures, &c. Also, it is said, that it may inquire of all common disturbers of the peace, as barrators, evendroppers, and of all common oppressors, as usurers, &c., and of all dangerous persons, as vagabonds, night-walkers, &c., and of all suitors to the court who shall make default, and of those who shall levy hue and cry without cause, or shall neglect to levy one where they ought, &c., and of the neglect of keeping a pair of stocks in any vill within the precinct, for which every such vill shall forfeit 5*l*.

Roll. Abr. 541.

2 Roll. Abr. 85.

But a man cannot be amerced in a leet for surcharging a common, because this only concerns the private interest of the inhabitants.

Roll. Abr. 542.

Lane, 55.

(a) Of common right any leet, with the

assent of the tenants, may make by-laws under certain penalties, in relation to matters properly cognizable by the court, as the reparation of highways, &c. But by-laws of a private nature are most proper for a court-baron. 2 Hawk. P. C. c. 10. § 62.

2 Hawk. P. C.

c. 10. § 13.

(b) As this statute has been construed to extend to

stewards of courts, neither the torn nor court-leet can deliver any persons indicted before them for felony, but must refer them to the justices of gaol-delivery. 2 Inst. 32. 2 Hawk. P. C. *ibid*.

2 Hawk. P. C.

c. 10. § 14.

But this statute of *magna charta* doth neither restrain the torn nor leet from taking indictments, or awarding process thereon as before; but this power of awarding such process is taken from the sheriff's torn, but not from courts-leet, by 1 E. 4. c. 2.

(c) Not only the judge of the court is punishable for awarding such process, but also the officer for obeying it. Jones, 301. Cro. Car. 275.

By which it is enacted, That on indictments and presentments before any of the king's sheriffs of his counties, except in *London*, their under-sheriffs, clerks, bailiffs, or ministers, at their torns, or law-days, they nor any of them shall (c) have power to attach, arrest, or put in prison, or to levy any fines or amercements of any person so indicted or presented by reason of any such indictment or presentment; but that the said sheriffs and under-sheriffs, clerks and bailiffs, and their ministers, shall deliver all such indictments and presentments to the justices of the peace at such next county sessions, and that the said justices of the peace shall have power to award process on all such indictments and presentments as the law doth require, and in like form as if the said indictments and presentments were taken before the said justices of peace, and also to arraign and

and deliver all such persons so indicted and presented before the said sheriffs, &c., and such persons which shall be indicted or presented of trespass, shall make such a fine as shall seem lawful by their discretions; and the estreats of the said fines and amercements shall be enrolled, and by indenture be delivered to the said sheriffs, under-sheriffs, their clerks, bailiffs, or ministers, or some of them, to the use and profit of him that was sheriff at the time of such indictments or presentments taken; and if any of the said sheriffs, their under-sheriffs, clerks, bailiffs; or their ministers, do arrest, attach, or put in prison, or cause any fine or ransom to be taken, or levy any amercement of any person or persons so indicted or presented, by reason or colour of any such indictment or presentment taken before them, at their terms or law-days above rehearsed, before that they have process from the said justices of peace, or estreats delivered out of the said indictments or presentments so brought, delivered, and presented to them; that then the sheriffs, which so do, shall forfeit an hundred pounds.

It seems agreed, that, at this day, neither the torn nor leet have any power to try any person indicted before them, of any offence whatsoever, and that there is no remedy for such presentments as are traversable, but by removing them into the king's bench.

But a presentment by twelve or more, in a torn or leet, of any offence within the jurisdiction of the court, being neither capital, nor concerning freehold, subjects the party to a fine or amercement, without any farther proceeding, and binds him for ever, after the day on which it is found, and admits of no traverse (a). But, if it concern life or freehold, as, if it charge a man with not repairing a highway as he ought to do by the tenure of his lands, it may be removed into the king's bench, and there traversed; but not if it barely charge his person, as for not cutting the branches of his trees hanging over the highway, &c. Also it seems, that an indictment of an offence out of the jurisdiction of a leet, as of an affray done out of its precinct, is in like manner traversable.

bench, and there traversed. *Rex v. Roupell*, Cowp. 458. But the court will not grant a *certiorari* for such purpose, where the amercement has been estreated, and the fine paid. *Rex v. Ripon*, 2 T. Rep. 184.] — If a fine in a court-leet be unreasonable, it may be avoided by plea and judgment of the court; for the judges are to determine the reasonableness of the fine. R. 11. Co. 44.

Also, notwithstanding the above-mentioned statutes, the sheriff may, at this day, impose a (b) fine on all such as shall be guilty of a contempt in the face of the court, and on a suitor refusing to be sworn, and on a bailiff refusing to make a panel, and on a tithingman refusing to make a presentment, and on a jurymen refusing to present the articles given in charge, and on a person duly chosen constable refusing to be sworn. But he (c) ought to fine each offender severally, and not all jointly, except where a vill is to be fined.

Amercementis. (c) 8 Co. 33. Also,

2 Hawk. P. C.

c. 10. § 13. 76.

2 Hawk. P. C.

c. 10. § 75.

3 Mod. 138.

(a) [A presentment is not traversable in a court-leet; but in order to give the defendant an opportunity of being heard, it may be removed by *certiorari* into the king's

bench, and there traversed.

certiorari for such purpose, where the amercement has been estreated, and the fine paid.

Rex v. Ripon, 2 T. Rep. 184.] — If a fine in a court-leet be unreasonable, it may be avoided by plea and judgment of the court; for the judges are to determine the reasonableness of the fine.

R. 11. Co. 44.

2 Hawk. P. C.

c. 10. § 13.

(b) Or may

award an

amercement

at his discre-

tion. 8 Co. 32.

Dalt. Sheriff,

400. But for

this vide tit.

Fines and

Amercementis. (c) 8 Co. 33.

Also,

2 Hawk. P. C. c. 10. § 21., &c. and several authorities there cited.

Also, on the presentment of a nuisance in a torn or leet, the sheriff or steward may either amerce the party, and also order him to remove it, by such a day, under a certain pain, or may order him to remove it, under such a pain, without amercing him at all, and the party having notice of such order, shall forfeit the pain on a presentment at another court, that he hath not removed the nuisance, without any farther proceeding; and every pain so forfeited may be recovered in like manner as a fine or amercement, by distress, or action of debt; neither shall it be affeered to a less sum than was at first set.

(D) Of the Form of its Proceedings.

Keilw. 66. 141. 148. Dalt. Sheriff, 388. Crompt. 212. 9 H. 6. 44. b.

IN making presentments, it is said to have been the course, formerly, to impanel, not only a grand jury, but also a jury of twelve men which was commonly called the petit jury, and to have offences first presented by the headboroughs, and the presentment affirmed by the petit jury, before they were brought to the grand jury.

2 Hawk. P. C. c. 10. § 70.

But, however the practice might have been, it seems now agreed, that no exception can be taken to any such indictment, in respect of the non-observance of any such custom or usage; for that no averment lies against the acts of a court of record, and every judge of such court shall be presumed to act according to the rules of it.

(a) In the construction hereof, it hath been holden, that if there be more than twelve jurors, and all agree, all must put their seals, but that if twelve only agree, it is sufficient for those twelve to set their seals. Dalt. Sheriff, 389. || *Qu.* Whether a presentment by fewer than twelve would be good in a court leet. *Vide* 1 Wils. 248. ||

By Westm. 2. 13 E. 1. c. 13. "The sheriff shall take no inquest (a) but by twelve men at the least, who shall put their seals thereto."

(b) That a court leet seems not to be within the equity of this statute, for it is said, that any person happening to be present at a leet, or riding by where it is holden, may, for want of jurors, be compelled to be sworn. 7 H. 6. 13. 12 H. 7. 18. b. Bro. Lect, 15.

By 1 R. 3. c. 4. "No bailiff or other officer shall return or impanel any person in any shire of *England*, to be taken or put in or upon any inquiry in any of the sheriff's torns (b) but such as be of good name and fame, and having lands and tenements of freehold within the same shires to the yearly value of 20s. at the least, or else lands and tenements holden by custom of manor, commonly called *copyhold*, within the said shires, of the yearly value of 26s. 8d. over all charges, at the least. And if any bailiff or other officer within the said counties return or impanel any person contrary hereunto, he is to lose for every person that he so impanelleth and returneth, not being of the sufficiency as is aforesaid, as often as he offendeth, 40s. And the said sheriff other 40s. the one half thereof to the king or sovereign lord, and the other half thereof to such as will sue in that behalf, &c. And that every such indictment before any sheriff in his turn otherwise taken, be void and of none effect."

By 1 E. 3. stat. 2. c. 17. "Sheriffs and bailiffs of franchises and all others who take indictments in their torns, or elsewhere,

“ where, where indictments ought to be made, shall take
 “ them by roll indented, whereof the one part shall remain with
 “ the indictors, and the other with him that takes the inquest;
 “ so that the indictments shall not be embeziled as they have
 “ been in time past; and so that one of the inquest may shew
 “ the one part of the indictment to the justices, when they come
 “ to make deliverance.”

But it must be observed, that what is above said, concerning
 indictments taken before the sheriff at his torn, is to be intended
 of such as are taken before him *ex officio*, for he is restrained to
 take them by virtue of any writ or commission, by 28 E. 3. c. 9.
 which, reciting the mischiefs which had happened from commis-
 sions and general writs granted to sheriffs at their own suit, for
 their singular profit, enacteth, that no such commissions nor
 writs shall be granted.

OF THE COURT LEET.

A COURT-LEET is a court of record, (a) having the same
 jurisdiction within some particular precinct, which the
 sheriff's torn hath in the county.

Finch. 246.

2 Hawk. P. C.
 c. 11. (a) And
 said to have

been derived out of the torn, being a grant to certain lords for the ease of their tenants and
 residents within their manors, that they may have the array of them, and administer justice
 amongst them in their manors, &c. from whence came the duty in many leets *de certo leetæ*,
 towards the charge of obtaining the grant of the leet; for the non-payment whereof, or de-
 fault to present it, such grantees may prescribe to amerce the defaulters, and to distrain for
 the amercement; but they cannot so prescribe for any matter of a private nature. 2 Inst. 71.
 Jones, 283. 6 Co. 77. b. Dyer, 30. pl. 209. See 12 Mod. 598.

The statute 18 E. 2. which shews of what things the sheriff's
 torn and court-leet shall have consuance, (b) does not confine
 their jurisdiction to those particulars enumerated in the statute.

4 Inst. 261.

Crompt. Jur.

213. (b) That
 the leet may

inquire of the same offences with the sheriff's torn, of which *vide tit. Sheriff's Torn, supra*.

— May inquire of corrupt victuals, as a common nuisance, though omitted in this statute.
 4 Inst. 261. — That a railer is presentable there. Hob. 247. — So, a night-walker. Poph.
 208. — Of the several statutes which empower this court to inquire, &c. *vide* 2 Dan. 291.

— That by the 31 Eliz. 5. they may inquire of user, of unlawful games, or of any art or
 mystery, not being brought up in it; but exercising a trade contrary to 5 Eliz. c. 4. is not
 within the act, nor presentable in the leet. Sid. 289. 2 Keb. 50. Raym. 154. S. C. || They
 cannot amerce for any but publick nuisances, and not for a particular trespass to the lord or
 any other person; for in that case an action lies to recover damages. Rex v. Dickinson,
 1 Saund. 135. Rex v. Ayres, Sir T. Raym. 160. 2 Keb. 139. Blunt and Whiteacre's case,
 1 Leon. 242. Wood v. Lovatt, 6 T. Rep. 511. ||

No man can be within two leets at the same time, and in the
 same respect; therefore, he who resides within the precincts of a
 leet, the lord whereof doth duly hold his court, cannot be com-
 VOL. II. M m pelled

2 Hawk. P. C.
 c. 11. § 3, 4.
 and several
 authorities
 there cited.

pelled to come to a superior leet, for any purpose which may as well be answered by his attendance at his own leet. But, if a private leet be specially granted for two or three articles only, it seems that the inhabitants must attend the torn for all other matters. Also, a grand leet may prescribe to oblige a certain number of inhabitants in every town within its precinct, to appear at every such grand leet, to inquire of such offences as were omitted by the inferior. Also, if a leet be seized into the king's hands, all who owed suit to it ought to come to the torn, &c. Also the sheriff's torn, as an overseer of the leet, is to inquire whether the tithings be full, and may inquire of the concealments of offences inquirable in leets.

Wicker v.
Norris,
Ca. temp.
Hard. 116.
Steverton v.
Scroggs, Cro.
Eliz. 698.

||Debt lies for an amercement in a court-leet; but in order to give it jurisdiction to amerce, it should be alleged in the declaration that the party was an inhabitant within the manor at the time of the offence committed, and likewise at the time of the amercement set; for the jurisdiction of the leet extends only over residents. But this omission, though fatal on demurrer, is helped by verdict.

Davidson v.
Moscrop,
2 East, 56.
Moore v.
Wicker, Andr.
50.
2 Hawk.
P. C. c. 11. § 5.

A custom to swear the jurors at one court-leet to inquire and return their presentments at the next court is bad. The jurisdiction of a leet jury, like that of a grand jury, would seem to be confined to things happening before their being sworn or during their sitting.||

A court-leet shall be forfeited, not only by acts of gross injustice, but also by bare omissions and neglects, especially, if often repeated, and without excuse.

Salk. 195.
Ld. Raym.
638.

The caption of an indictment in a court-leet, *ad cur. viz, franc. pleg. cum cur. baron., &c.* is good, for the words *cum cur. baron.* shall be rejected; for it shall be intended that the indictment was taken by that court, which alone hath the colour of authority to take it.

Salk. 200.
See 12 Mod.
500.

The not setting forth in the caption, whether the court was holden by grant or prescription, is helped by the multitude of precedents.

But the business of both the torn and leet hath declined many years, and is devolved on the quarter-sessions.

OF THE COUNTY COURT.

Spelm. Rem.
50. 4 Inst. 266.

BY the escheat of earldoms and baronies, the tenants of such earls and barons were to hold from the king, and not being qualified to sit in the king's own court, they composed a court in each county, under the array of the sheriff, or the king's bailiff. These were the *pares* of the county court; and hence it is, that
ever

ever since it has been (a) held, that the sheriff is no judge, but only the suitors. (a) That suitors are judges. 2 Inst. Mod. 171.

225.— Though the proceedings be upon a *justicies*. 2 Inst. 312. 6 Co. 11. b. Mod. 171.

(b) This court is no court of (c) record; therefore an action of account against a receiver for 13s. and 4d. or other sum under 40s. lies not in the county court; for being no court of record it cannot assign auditors. 2 Inst. 380. 4 Inst. 266. (b) The stile of the court is *Curia prima comitat. E. C.*

milit. vic. com. prædict. tent. apud B. &c. 4 Inst. 266. (c) Therefore a writ of false judgment lies of a judgment there, and not a writ of error. 4 Inst. 266. — But in a *reſiſſein* the sheriff is made judge by the statute of *Merton*, c. 3. And a writ of error lieth of his judgment. 4 Inst. 266.

It is a maxim of the common law, *quod placita de catallis, debitis, &c., (d) quæ summam (e) 40s. attingunt vel excedunt (d) Though founded upon several contracts, each of which were under 40s. Vent. 65. (e) An entire debt, cannot be divided and sued for by several plaintiffs under 40s. 2 Inst. 312. But for this vide 2 Roll. Abr. 317. pl. 1. — If the plaintiff counts to his damages 40s. though the jury finds the damages under 40s. so that in truth the cause de jure belonged the court, yet he shall not have judgment. 2 Inst. 312.*

But by *justicies* this court may hold plea of goods, (f) debts, &c., of any value, and the process therein is an attachment of his goods, &c., but no *capias*. (f) Or debts *ex contractu*, but not of debts *ex delicto*, as upon the statute of tithes. Lev. 253. *dubitatur*.

So, by force of a *justicies* it may hold plea of trespass *vi & armis*. 2 Inst. 312.

In replevin, by writ or plaint upon the statute of *Marlbridge*, this court may hold plea of goods and chattels above the value of 40s. 2 Inst. 139. 312.

|| Debt lies in this court for use and occupation; and it is the proper tribunal for an action on the case for an injury to a house, where the damage is under 40s. Parker v. Vaughan, 2 Bos & Pull. 29. Melton v. Garment, 2 N. R. 84.

No action can be brought in this court, unless both the defendant reside, and the cause of action arise, within the county: therefore, though the demand be under forty shillings, yet, if the cause of action arise in one county, and the defendant reside in another, the action must be brought in the superior courts. Walsh v. Troyte, 2 H. Bl. 29. Tubb v. Woodward, 6 T. Rep. 175. Smith v. O'Kelly, 1 Bos. & Pull. 75.

By *Magna Charta*, c. 35. no county-court shall be holden but from month to month; and where a greater time hath been used, there shall be greater. || A custom to hold a court, called a county court in the county palatine of *Durham de quindecim diebus in quindecim dies* seems to have been considered as good. Anon. 1 Mod. 170.

By the statute of *Gloucester*, made 6 E. 1. c. 6. " Sheriffs shall plead pleas of trespass in their counties, as accustomed, &c., " but

(a) So that this court hath no jurisdiction in such case; *secus*, of a battery without wounding or maiming. 2 Inst. 312. — But it cannot hold plea of any trespass *vi et armis*. Co. Lit. 118. 2 Lev. 93. Mod. 215.

And by the statute of 12 G. 2. c. 13. § 7. “ If any person shall commence or defend any action, or sue out any writ, process, or summons, or carry on any proceedings in the county court, who shall not be admitted an attorney or solicitor according to the act of 2 G. 2. c. 23. he shall forfeit 20*l.* with costs, to him who shall sue in any court of record.”

OF THE HUNDRED COURT.

2 Inst. 71.

4 Inst. 267.

(b) Of the first division of

counties into hundreds, and of the grants of hundreds, *vide* 6 Co. 11. 9 Co. 25. 4 Co. 33. Dyer, 175. Roll. Rep. 118. Raym. 360. Vent. 399. 3 Mod. 199. (c) And therefore is no court of record. 4 Inst. 267. — Cannot hold plea of debt or trespass, where the debt or damages amount to 40*s.* Co. Lit. 118. — Nor of trespass *vi et armis*. Co. Lit. 118.

4 Inst. 267.

Although the stile of this court is *curia E. C. militis hundredi sui de B. in com. Buck. tent. &c, coram A. B., seneschallo ibidem*, yet the suitors are judges.

Pasch. 30 Car. 2. Clever and Curteis.

In an hundred court, the plea was laid to be *coram seneschallo & sectatoribus*. Serjeant *Newdigate* took an exception to it, that it should be laid to be held *coram seneschallo per sectatores*; but *Wyndham*, *Atkins*, and *Scroggs* thought it well enough; but the chief justice *contr.*, and cited the case of *Wyatt and Wiggles*, 4 Co. 47. where the coroner of the hostel and the coroner of the county took an indictment, where it did not appear that the party was killed within the verge, and resolved to be ill; for that there the record was entire, and it could not lie *coram non judice*, as to the coroner of the hostel, and so void; and good as to the coroner of the county; and perhaps the jury, in their finding, were principally directed by the coroner of the hostel; so it might be here, for they in the hundred court may be swayed principally by what the steward said. Another objection was, that the first process was an (d) attachment; but as the defendant appeared, the court said, that fault was cured; so judgment was affirmed.

(d) That the court of king's bench daily grants attachments against goods. Salk. 201.

stewards of hundred courts, for granting attachments against all the party's

The true process of this court at common law is a *distringas*, Salk. 201. but by custom the process may be (a) a *levari facias*; and it is (a) An execution may be in said, that most hundred courts have this custom. the hundred

court by *levari facias*; and therefore, where the books speak of a *distringas*, they must be intended of a *levari*, for a distress infinite would be endless in an execution. 2 Lev. 81. 2 Keb. 117. 126. Vide Carth. 54. — And for the manner of setting forth a judgment in this court, vide also Carth. 53, 54. 2 Lutw. 1369. 3 Lev. 403.

If a jury in an hundred, or other inferior court, will not agree Salk. 201. on their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, till they agree; and the steward may, from time to time, adjourn the court till they do agree.

OF THE COURT-BARON.

THIS court is (b) incident to every manor, and had (c) an- 4 Inst. 264. ciently consuance of all pleas of land within the manor, so 4 Co. 33. Co. Lit. 58. that no person within the manor could apply to any other jurisdiction without a *remisit curiam* from the lord. (b) That it is incident to a manor, and

was at first instituted for the ease of the tenants, for ending controversies where the debt or damage was under 40s. at home, &c. 4 Inst. 268. Owen, 35. Brownl. 175. Bulst. 55. (c) But at this day is no court of record, nor can it hold plea of debt or trespass, where the debt or damage amounts to 40s. Co. Lit. 118. 2 Inst. 311. — Nor of trespass *vi et armis*, because it cannot impose a fine. Co. Lit. 118. 2 Inst. 311, 312.

The suitors are (d) judges, and the (e) steward but as a 6 H. 4. pl. 3. registrar. Co. Lit. 58.

4 Inst. 268. S. P. [4 T. Rep. 446. 484. S. P. Sp. Laws, h. 28. c. 27. & 42.] (d) Though the plea there is held upon a writ of right. 6 Co. 11. b. 12. a. 4 Inst. 268. (e) And a man cannot prescribe to hold a court-baron before his steward, but before suitors. Cro. Ja. 582. adjudged. See Mod. 173. Cro. Eliz. 792. Noy, 20. Godb. 49. — But perhaps may prescribe to hold a court before his steward, but not a court-baron. Cro. Ja. 582. Leon. 316. Brownl. 21. Noy, 20. 2 Jones, 23. Godb. 68. — A court-baron being incident to a manor of common right cannot be prescribed for. Cro. Eliz. 792. adjudged. Noy, 20. adjudged. 2 Ld. Raym. 861. || But, if there be a prescriptive manor, there may be prescriptive incidents to it, and in that case a court-baron to be holden before the steward may be prescribed for. Lord Paget v. Stretchey, Co. Entr. 118. 4 T. Rep. 446. ||

[The court therefore should be stated to be holden before Co. Lit. 58. them, and the suitors before whom it is holden, should, regularly, be named. Moore, 75. 3 Leon. 8. S. C.

If there are not two free suitors at the least, the court-baron cannot be holden. But it should seem that there must be more Br. Court-Bar. p. 22. Com- than two free suitors to enable the lord to hold a court; for prise, p. 31. Kitch. 4. a. otherwise,

Glover and Lane, 3 T. Rep. 445. Tomkin v. otherwise, if one of these two was the plaintiff, and the other the defendant, the lord would be under some difficulty to try them by their peers.]

Crocker, Ld. Raym. 863. Chetwode v. Crewe, Willes's Rep. 614. Bradshaw v. Lawson, 4 T. Rep. 443. ||The truth seems to be, says Mr. Watkins, that there should be so many frank tenants, as, in case of an action, to leave a plurality of suitors to sit as judges in the cause. There is an instance in the Register, 11. b. of a cause being removed out of a court-baron, by reason of there not being four suitors there. *Br. Cause a remover plea*, &c. p. 35. Britt. c. 120. de Court de Baron, 274. b. 275. a. 1 Watk. Copyh. 9.||

4 Inst. 268. The stile of this court is (a) *curia baronis E. C. militis manerii* (a) My Lord *sui predicti* (having the manor's name written in the margin) Coke says, he hath seen *tent. tali die coram A. B. seneschallo ibidem*, &c. court rolls in the reign of Ed. 1. (having the name of the manors in the margin) stiled thus, *Aula ibidem tent. tali die*, &c. because it was holden in the hall of the manor. *Ibid.*

Co. Lit. 58. a. This court cannot be holden out of the manor; but if a man be lord of two or three manors, and there be a custom to hold a court at one for them all, such courts are by custom good.

Co. Lit. 58. (b) Note: The court of king's bench has granted informations against lords and stewards for oppressing the tenants, by warning This court is of two natures. The first is by common law, and called the freeman's court, or court-baron; and of this the suitors are judges, and the steward is registrar; and this may be kept from (b) three weeks to three weeks. The second is (c) a customary court, and concerns copyholders, of which the lord, or his steward, is judge. As the first cannot be without freeholders, so this cannot be without copyholders. A court-baron may be of this double nature, and then the roll contains matter concerning both.

courts-baron every three weeks, and distraining them to appear, or pay a certain sum of money, upon no occasions at all, but to extort amercements from them. (c) For this *vide* 4 Co. 27. Cro. Car. 366. Jones, 342.

Watk. Gilb. Ten. 432. Baldwin v. Tudge, 2 Wils. 20. Willes's Rep. 619. S. C. 1 Freem. 525. [Where the court-baron and customary court are blended together, care should be taken to keep the acts of the several suitors quite distinct. For debt will not lie for an amercement of a tenant, unless it appear satisfactorily that the persons who affect it are free tenants also. It seems to be the safer way, when the courts are holden together, not to mention expressly before whom they were holden, but to state the persons present generally, and to leave it to the law, which will consider the proper business of each court to be transacted before the regular judges.]

(c) For the exposition thereof *vide* 2 Inst. 39. By *Magna Charta* (c) c. 24. "A *præcipe in capite* is not to be granted, whereby any freeman may lose his court."

(d) The king bound hereby in his court-baron, hundred, or county court. 2 Inst. 143. (d) "No man shall cause his freeholders to swear (e) against their will, for that ought not to be done without the king's (f) commandment."

(e) Intended between party and party, for to inquire for the lord of all the articles belonging to the court-baron or hundred, they may be sworn. 2 Inst. 142. For which articles *vide* statute 4 Edw. intituled *extenta manerii*. (f) In a writ of right patent, wherein plea is held of freehold, the court may give an oath, for the writ is *mandatum regis*. 2 Inst. 143

All pleas in a court-baron, of common right, and by course of law, are determinable by wager of law; but by prescription they may be determined by jury. 4 Inst. 143.

If a man recovers in a court-baron, they have not power to make execution to the plaintiff of the goods of the defendant; but they may distrain him, and retain the distress till satisfaction. 4 H. 6. 17. 22. Ass. 72. Roll. Abr. 543. Bro. Court-Baron, 6. S. C.

But a *quære* made, for it is usual for the suitors, assigned by the steward, to tax the sums, and then to award a *levari facias*. *Quære*, If by custom, or common law? See 12 Mod. 124. — By Brownl. 81. upon a *levari* out of a court-baron, goods cannot be sold without a custom to sell, &c., & *vide* Noy, 17.

If in a court-baron the defendant appears not upon the distress, yet the goods distrained are not forfeited, nor can be sold by the bailiff; for the distress is but in nature of a pledge; and though by the course of the common law, where a man is attached by his goods, and appears not, they are forfeited; yet in a court-baron no (a) attachment lies, but a distress infinite only. Yelv. 194. Gomersal and Medgate, adjudged. Cro. Ja. 255. Bulst. 52. S. C. adjudged. (a) The process in a court-baron is summons, attachment, and distress infinite. 2 Roll. Rep. 493., & *vide* Bulst. 53.

COURTS OF THE CINQUE PORTS.

THE cinque ports are (b) ancient trading towns lying towards the sea coasts; these held *per baroniam*, and were represented in parliament by the lord warden or keeper of the cinque ports; but they did not hold by the tenure of knight-service, only by sending ships to sea, &c. and as they were instituted for the defence and safety of the kingdom, they had several (c) liberties and privileges granted them, in respect of their necessary attendance in those ports. Bract. lib. 3. f. 118. 4 Inst. 222. (b) For ancient records touching the cinque ports, *vide* 2 Inst. 558. — At first the privileged

ports were but three, *viz.* *Dover*, *Sandwich*, and *Romney*; but *Hastings* and *Hithe* were added by *William the Conqueror*. 4 Inst. 222. — To which *Winchelsea* and *Rye* were adjoined; these now send each of them their representatives to parliament; and though seven in number, are still called cinque ports. 2 Inst. 556. 4 Inst. 222. (c) To which they have a lawful title, confirmed by *magna charta*, c. 9. in these words, *Barones de quinque portibus & omnes alii portus habeant omnes libertates & liberas consuetudines suas*. 2 Inst. 20. — But this confirmation does not extend to pleas of the crown, with which they intermeddle as justices of the peace. Cro. Car. 253.

There are several courts within the cinque ports; one before the constable of the castle of *Dover*; others within the ports themselves, before the mayors and jurats; (d) another which is called *curia quinque portuum apud Shepway*. 4 Inst. 223. (d) Sid. 166. It is said by *Twisden*, that nobody knows where this court is.

Sid. 166. *per curiam*. (a) Sid. 356. It is said the great use of their chancery is to relieve against errors in proceedings at law, which they used to indorse upon the bill.

There is a court of chancery in the cinque ports, but no original writs issue thence, but it serves only to decide (a) matters of equity.

2 Inst. 556. (b) Exempt from the admiralty of *England*; which jurisdiction is saved to him in several acts of parliament, as 2 H. 5. stat. 1. c. 6. 27 H. 8. c. 4. 28 H. 8. c. 15. 5 Eliz. c. 5. 11 & 12 W. 3. c. 7. & *vide* 2 Jon. 66, 67. Chan. Ca. 305.

The lord warden hath two jurisdictions, 1. The (b) authority of an admiral, to hold plea by bill concerning the guard of the castle, &c. according to the course of the common law.

(c) Who is always warden of the five ports. 2 Inst. 556.

By 28 Edw. 1. c. 7. "The (c) constable of the castle of *Dover* shall not hold any foreign plea of the county at the castle gate, except it touch the keeping of the castle; nor shall the said constable distrain the inhabitants of the cinque ports to plead any otherwhere nor otherwise than they ought after the form of charters obtained of kings of their old franchises, confirmed by *magna charta*."

2 Inst. 557. Dyer, 376. 4 Inst. 224. S.P. (d) *Secus*, upon the judgment of the court of *Shepway*; Sid. 356. *per Twisden*; and so are the books which speak of a writ of error to the cinque ports to be intended.

The mayors and jurats of the several cinque ports have power to hold plea, &c., and (d) upon their judgment no writ of error lies in *B. R.* but they are examinable by bill in nature of a writ of error, *coram domino custode seu guardiano quinque portuum apud curiam suam de Shepway*.

4 Inst. 224. (e) Otherwise in debt, or trespass transitory. Cro Eliz. 910. — Where a stranger comes within the cinque ports, and does a transitory trespass, and after goes out of their jurisdiction, he to whom the trespass was done may have an action at common law, else he would be without remedy; for they can call none in who are out of their jurisdiction, and the privileges were granted for the ease and benefit, and not the prejudice, of the inhabitants. Yelv. 12. 2 Inst. 557. (f) And they hold plea of freehold by plaint. Sid. 166. But a judgment in *B. R.* for lands there shall bind for ever, though such judgment for lands in Wales, or a county palatine, is merely void. 2 Inst. 557. 4 Inst. 223. Bro. Cinque Ports, 24. *Qu.* — That they cannot plead to the jurisdiction of the court of *Westminster*, but must demand consuance. 4 Inst. 224. — Also, if an ejectment on a feigned lease be brought of lands within the cinque ports, the courts of *Westminster* will not allow the tenant of the lands, on his prayer, to be made defendant to plead to the jurisdiction of these courts, but will tie him strictly to the rules of confessing lease, entry, and ouster, and pleading not guilty. This is not like the case of ancient demesne, where a recovery in the courts above makes the lands frankfree for ever.

2 Inst. 557. Said to have been resolved between Waes and Braines. Cro. Eliz. 694. S.C. adjudged.

If a man is murdered in any of the cinque ports, his wife may have an appeal against the murderer, (g) directed to the sheriff of the county, and he shall execute the writ (h) within the cinque ports, for the constable hath no jurisdiction to hold plea thereof.

(g) Because the king in a manner is concerned; for if the plaintiff is nonsuit, the defendant shall be arraigned at his suit. Yelv. 13. Cro. Eliz. 911. (h) Yet in Yelv. 13. *per Poph.* If the defendant at all times after continued within the cinque ports, so that he might be proceeded against there, no appeal would lie elsewhere.

So, if the defendant is *in custodia mareschalli*, the appeal may be against him by bill. 2 Inst. 557. Cro. Eliz. 695. 778.

If a man hath judgment in any of the king's courts, and the defendant hath no lands or goods but in the cinque ports, the plaintiff may have (a) a writ to the lord warden to make execution. 4 Inst. 223. (a) The record must be certified into

from thence by *mittimus* to the lord warden to make execution. Amd. 28. 3 Leon. 3. W. Bendl. 46. Chancery, and

If a man is imprisoned at *Dover* by the lord warden, (b) an *habeas corpus* (d) may issue to the lord warden, &c.; for the privilege, that the king's writ runs not, must be intended between (e) party and party, for there can be no such privilege against the king. Cro. Car. 543. Palm. 55. Sid. 355. 4 Inst. 223. 2 Lev. 86. 3 Keb. 598. Hard. 475. — Where a *certiorari*, vide Roll. Abr. 395. 2 Hawk. P. C. c. 27. § 24. (c) *Ad faciendum & recipiendum*; but, if *ad respondendum* a private person, Q. Mod. 20. 8 Mod. 22. 12 Mod. 666. (d) But Sid. 166., it was said by some, that it had scarce ever been known that a prohibition or *habeas corpus* went to the cinque ports. [But there can be no doubt, but that they will go thither.] (e) *A quo minus* lieth to them. Hard. 475. Cro. Ja. 543. Palm. 96. S. C. adjudged. (b) Whereas a prohibition, *mandamus*, &c.

The (f) lord warden is the immediate officer of the court, and (g) writs shall be directed to him (h) as in all real actions, &c. for lands within the five ports. 2 Inst. 557. 4 Inst. 223. S. P. (f) The constable or

keeper of *Dover Castle* is also warden of the cinque ports, and the writs directed to him are, *Rex, &c. constabulario castri sui de Dover & custodi quinque portuum, &c.* 2 Inst. 556. 4 Inst. 223. (g) But writs of appeal must be directed to the sheriff. Cro. Eliz. 604. Because the king is in a manner concerned. Vide Yelv. 13. Cro. Eliz. 911. 2 Inst. 557. (h) But, if there be an indictment before justices of peace within the cinque ports, a *certiorari* may be immediately directed to them; for they proceed by virtue of their commission, and not their ancient charters, &c. Cro. Car. 253, 254. but for this, vide Roll. Abr. 395.

¶ By stat. W. & M. sess. 1. c. 7. reciting, “ that the election of members to serve in parliament ought to be free; and that the late lord warden of the cinque ports had pretended unto, and claimed, as of right, a power of nominating and recommending to each of the said cinque ports the two ancient towns, and their respective members, one person whom they ought to elect to serve as a baron or member of parliament for such respective port, ancient town, or member, contrary to the ancient usage, right, and freedom of elections; it is declared and enacted, that all such nominations or recommendations are contrary to the laws and constitutions of this realm, and for the future shall be so deemed and construed, and hereby are declared to have been and are void to all intents and purposes whatsoever; any pretence to the contrary notwithstanding.”

If a murder is committed at *Sandwich*, and an appeal brought by original in *B. R.*, directed to the sheriff of the county of *Kent*, and he brings in the defendant, who pleads that *Sandwich* is part of the cinque ports, *ubi breve domini regis non currit, &c.*, and demands judgment of the writ, this is a bad plea; for the defendant having done the murder within the cinque ports, and after Yelv. 12, 13. Cro. Eliz. 910. S. C.

(a) For the after flying out, if this pleading should be allowed, (a) there would be a failure of justice.
 cinque ports cannot award process of outlawry, for that ought to be proclaimed in open county. Cro. Eliz. 910.

Yelr. 13.

But, if the defendant by his plea shews that at the time of the murder supposed, and at all times after, he had been an inhabitant, and commorant within the cinque ports, and so had given jurisdiction to the judges there, and shewed they might have proceeded, &c., it would be a good plea.

OF THE COURTS OF THE STANNARIES.

4 Inst. 229.

(b) For ancient charters, records, and acts of parliament concerning the stannaries, and for an ex-

position of the charter of E. 1. and the statute 50 E. 3. which gave great privileges to the tinners, vide 4 Inst. 232., 12 Co. 10, 11., Plow. 327., Roll. Abr. 547, 548.; & vide 16 Car. 1. c. 15. by which their privileges are declared and circumscribed.

4 Inst. 229.

(c) For the stile of the court, vide 4 Inst. 299. — And that the lord warden hath jurisdiction of all the tin in *Cornwall* and *Devon*. 4 Inst. 229.

The jurisdiction of the (c) court is guided by special laws, by customs, and by prescription time out of mind.

4 Inst. 230.

[3 Bulstr. 183. Dodridge's Hist. of Cornw. 94.]

(d) For any matters touching the stannaries; otherwise, upon a judgment there given upon

collateral matters. 3 Bulstr. 183. Per Coke, Ch. Justice, said to have been so resolved upon a conference by all the judges, as is to be seen recorded in Chancery in the petit-bag office, Q. Ow. 8. Sid. 233.

4 Inst. 231.

Resolved by all the judges. Vide 2 Roll. Rep. 44. d

he statute 16 Car. 1. c. 15.

Blowers, and all other labourers and workers, without fraud or covin, in and about the stannaries in *Cornwall* and *Devon*, have the privilege of the stannaries during the time they work there.

All matters concerning the stannaries, or depending thereupon, are to be heard and determined (a) according to the custom of the same time out of mind used.

4 Inst. 231.
Resolved by
all the judges.
(a) But *vide*
Cro. Car. 333.

Transitory actions between tinner and tinner, or worker and worker, though not concerning the stannaries, nor arising therein, if the defendant be found within the stannaries, may be brought in these courts, or at common law.

4 Inst. 231.
Resolved by
all the judges.

But, if one party only be a tinner or worker, such transitory actions as concern not the stannaries, nor arise therein, cannot be brought there, and in such case the defendant by the custom and usage of that court may plead to the jurisdiction, (b) and ought not to be arrested *eundo* to swear it, or *redeundo*.

4 Inst. 231.
Resolved by
all the judges.
(b) 2 Roll.
Rep. 379. S.P.
But it was said

by the chief justice, that after the oath taken they will for 3d. enter the plaintiff a tinner.

There ought to be no demurrer in these courts for want of form but for matter of substance only.

4 Inst. 231.
Resolved by
all the judges.

They have no jurisdiction of (c) any local action arising out of the stannaries, and (d) matters of life, member and plea of land, are expressly excepted out of their charters. plaintiff must shew that he was a tinner, and that the court was held within the jurisdiction of the stannaries. 7 Mod. 103. (d) They have no court of equity, and therefore a suit concerning an agreement relating to mines, &c. proper here. 2 Vern. 483.

4 Inst. 231.
Resolved by
all the judges.
(c) That the

[See further upon this subject *Pearce's Laws and Customs of the Stannaries.*]

OF THE COURT OF COMMISSIONERS OF SEWERS.

BY the (e) common law the king used to grant commissions for inquiring into the want of reparations of sea walls, ditches, gutters, sewers, &c.

(e) Reg. 127.
F.N.B. 113.
4 Inst. 276.

But, as these matters are now to be regulated according (f) to several acts of parliament, it will be necessary to set down the purport of such as are mostly in use at this day.

(f) As *Magna Charta*, c. 15,
16. 23. For
which *vide*

2 Inst. 29, 30. 25 E. 3. c. 4. 45 E. 3. c. 2. 1 H. 4. c. 12. 6 H. 6. c. 5. 9 H. 6. c. 10. 23 H. 6. c. 9. 12 E. 4. c. 6. 4 H. 7. c. 1. 6 H. 8. c. 10.

18 H. 6. c. 5.

The chief statute relating hereto, is 23 H. 8. c. 5. which ordains that the lord chancellor, treasurer, the two chief justices for the time being, or any three of them, whereof the lord chancellor to be one, shall, as often as need be, direct commissions, and appoint commissioners; the form of which commission is set forth in the statute, which fully declares the duty and authority of

23 H. 8. c. 5.
Which *vide* at
large, made
perpetual by
3 & 4 E. 6. c. 8.
and *vide* 1 M.
§ 3. c. 11.
This statute to

extend to
Glamorgan,
&c.

of the commissioners, viz. That they do inquire by the oaths of the honest and lawful men, &c., through whose default the hurts and damages have happened, &c., and who hath or holdeth any lands or tenements, &c., or hath or may have any hurt, loss, or disadvantage, &c., and all these persons and every of them to tax, &c., and to make and ordain statutes, ordinances, &c., after the laws and customs of *Romney Marsh* in the county of *Kent*, or otherwise after their own wisdoms and discretions.

|| By § 17. the laws, acts, decrees, and ordinances, which shall be made according to the tenor of the commission, and under the authority of this act, shall stand good and be put in due execution so long as the commission endureth (which by § 16. of this act is limited to three years, supersedable however at any time at the royal pleasure,) and no longer; except such laws and ordinances be made and engrossed in parchment, and certified under the seals of the commissioners into the court of chancery, and then the royal assent be had to the same, which by § 19. is to be certified into the court of chancery under the king's privy seal.

This act was to endure for twenty years, but is made perpetual by 3 & 4 E. 6. c. 8.||

25 H. 8. c. 10.

The 25 H. 8. c. 10. enacts, That no person shall be compelled to take upon him the execution of any such commission, unless he be a dweller in the county whereof he is appointed commissioner. Also that every person refusing to take the oath of commissioner, as appointed by 23 H. 8. c. 5. shall, as often as such refusal shall be certified into chancery, forfeit five marks.

3 & 4 E. 6. c. 8.

The 3 & 4 E. 6. c. 8. directs in what manner the king's lands shall be liable, and taxed by the commissioners, and his tenants discharged and indemnified in their payments of such taxes, and that every such commission shall be in force for five years from the teste, unless superseded.

13 Eliz. c. 9.

By the 13 Eliz. c. 9. all commissions of sewers shall continue in force for 10 years after the date thereof, unless they be repealed by a new commission or *supersedeas*. Also, by this statute all laws, ordinances, and constitutions (a) duly made, according to the statute 23 H. 8. c. 5. and written in parchment, indented under the seals of the commissioners, or six of them, (whereof one part shall remain with the clerk of the commission, and the other in such place as the commissioners or six of them shall appoint,) shall without any certificate to be made into the chancery, and without the king's assent, continue in force, notwithstanding any determination of such commission by *supersedeas*, until the same laws, ordinances, and constitutions shall be altered, repealed, or made void by commissioners afterwards assigned.

(a) || These words have the same meaning with the words "laws, acts, decrees, and ordinances" in § 17. of the statute of 23 H. 8. c. 5. 9 East, 125.||

|| § 2. After the end of ten years next ensuing the teste of any commission, all such laws, ordinances, and constitutions as were made under it, and written in parchment indented and sealed as above, without certificate thereof, or royal assent thereto had, shall, notwithstanding the expiration of the commission by such lapse

lapse of time, continue in force for one year then next ensuing; (a) and the justices of peace shall during that year have power to execute the same; provided, that if a new commission issue, the power of the justices shall cease.

(a) A decree made under a former commission, which

had expired by lapse of ten years, cannot be enforced by commissioners under a new commission issued more than a year after the expiration of the former, as to so much of it as remains unexecuted; though it is good to the extent to which it has been executed. *Rex v. Commissioners of Sewers for the County of Somerset, 9 East, 109.*

By § 5. the commissioners are not compellable to make any certificate or return of the commissions, or of any of their ordinances, laws, or doings by authority thereof. ||

By 3 Ja. 1. c. 14., all walls, ditches, banks, gutters, sewers, gates, causeways, bridges, streams, and watercourses within two miles of *London*, having their fall into *Thames*, shall be subject to the commission of sewers, and to all statutes made for sewers, and to all penalties in the said statutes contained.

3 Jac. 1. c. 14. & vide 7 Ann. c. 9. by which power is given to the lord mayor of *London*.

don to appoint

By the 7 Ann. c. 10. reciting the power of the commissioners by former statutes, as to selling the lands of those who refused to pay the taxes and proportions with which they were charged, and that these laws did not extend to copyhold lands, it is enacted, that the commissioners shall have the like power as to copyhold lands, and that the lords of such copyholds shall admit the vendees, &c. Also, by this act it is enacted, that it may be lawful for the commissioners by warrant to authorize any person to levy the sums of money assessed upon the lands, &c., by distress and sale of the goods of the party refusing, returning the overplus.

7 Ann. c. 10.

Notwithstanding the ample powers by the above-mentioned statutes given to the commissioners of sewers, yet are their proceedings still examinable in the courts above, and accordingly we find several resolutions in which their proceedings and sentences have been controuled by the courts at *Westminster*.

4 Inst. 276.

As, where the commissioners, on the finding of a jury that *J. S.* had seven acres of land next adjoining to a bank on the river *Thames*, and that the occupiers of those seven acres used to repair, but that there were besides 800 acres within the same level liable to be surrounded, had taxed each of the seven acres at 8s. it was held; 1st, That the finding that the occupiers of these seven acres used to repair, was not material, because that such occupiers might have been tenants at will, whose acts could not bind him who had the inheritance. 2dly, That though these seven acres lay next the bank, yet ought the commissioners to tax all those lands which were in danger of being damnified by the overflowing of the waters, and consequently received benefit by the repairs; for though they are to act (b) according to their discretion, yet such discretion must be governed and directed by the rules of law and reason.

5 Co. 99. b. Rook's case.

(b) Hard. 146.

The

(a) *Vide* 10 Co.
137, 138.
13 Co. 35.
Moor, 825.
Sid. 145.
(b) 2 Keb. 129.

The commissioners of sewers cannot make any (a) new inventions to charge the people; (b) but, if there were an old wall, they may build another (if that be decayed) on the inside, or some small way distant, if it be necessary, and may compel them that repaired the former to repair it, if they have no damage by the remove.

10 Co. 139.
Keighley's
case, 5 Co.
100. a. S. P.

If one be bound by prescription to repair a bank, which by sudden violence, and without the default of him who is so bound to repair, is thrown down, the commissioners are not to charge him only with the repair, but ought to tax all others according to the advantages accruing to them from such repairs.

2 Bulst. 197.
Cro. Ja. 356.
S. P. 3 Inst.
125. S. P.

The commissioners of sewers cannot tax a whole township, but must proportion each man's share according to the quantity of his land, &c., and, therefore, where the commissioners assessed a fine on the village of *D.*, and by their warrant ordered it to be levied on *J. S.*, whose cattle being distrained, he brought his action, and had judgment; and afterwards refusing to release the judgment, was committed by the commissioners; upon complaint thereof, the court of king's bench committed and fined the commissioners, and held that by such proceedings after a judgment at law, they were guilty of a *præmunire*.

Sid. 145.

It has been holden, that, though the commissioners of sewers are a court of record, and may thus commit for a contempt; yet that must be understood of a contempt in the face of their court, and not to imprison a person for disobeying their orders.

Lev. 288. The
case of the
Commission-
ers of Sewers
for White-
chapel, Raym.
186. Vent. 66.
Mod. 44.
2 Keb. 635.
S. C. Salk. 145.
S. C. cited.

There was a complaint of the inhabitants of *Whitechapel* at the council-board, that the commissioners of sewers had taxed the said inhabitants for a repair of a sewer in *Wapping*, whereas they were not within the level; thereupon the council ordered a *certiorari* out of *B. R.*, and that the matter in question should be tried there; which was accordingly done, and the *certiorari* delivered; notwithstanding which they issued out their warrants for putting the orders in execution, and the officers refusing to execute the same were fined 10*l.* a man. Thereupon a second *certiorari* was delivered to return all proceedings and all orders, &c. concerning the same. This being also disobeyed, and new orders made for fining some of their officers for their contempt, they appeared; and though they alleged the advice of counsel in what they did, yet they were committed for the contempt. The next day the return was brought into court, and upon the several *certioraris* the returns were several, which the court disallowed, and ordered them to return all their proceedings upon the return of the first writ, and to return upon the last, that *ante adventum brevis* they had returned the whole matter, which was accordingly done, and filed; and after they had continued a week in prison without bail, they were fined 40 marks a piece, and discharged, and the matter ordered to be tried in *B. R.* It was here moved in behalf of some of the commissioners, that these orders, whereby the

contempt of the commissioners appeared, though they were returned, might not be filed upon a clause in 13 Eliz. c. 9. which excuses them from returning their orders, and exempts them from penalties; but it was resolved that that, and other provisoes in the same statute, did only extend to the court of chancery, to abridge the power which the court of chancery had over the said commissioners, and the orders by 23 H. 8. c. 5. and that it did not at all (a) restrain the court of *B. R.* from proceeding by *certiorari*.

(a) That the commissioners of Cam-

bridge *Fenns*, by 15 Car. 2. c. 17., have an absolute jurisdiction, and are not to return their proceedings on a *certiorari*; but, if they observe not the statute, their proceedings will be void, & *coram non iudice*, and the parties may examine the same by an action at law. Sid. 296.

If it be found before commissioners of sewers, that such a one ought to repair a bank, and he remove the proceedings into *B. R.*, the court will neither quash the inquisition, nor grant a new trial, unless he, who is found to be the person that ought to repair, will first repair the bank; after which, if it be otherwise found, they will order him to be reimbursed. Sid. 78. Lord Dunbar's case.

There is a rule in the court of king's bench, that no order of commissioners of sewers ought to be filed without notice given to the parties concerned. Also, it is every day's practice of that court, before it will suffer the return of a *certiorari* for the removal of the orders of such commissioners to be filed, to hear affidavits concerning the facts whereon they are grounded; and if the matter shall still appear doubtful, to direct the trial of feigned issues, and either to file the return, or supersede the *certiorari*, and grant a *procedendo*, as shall appear to be most reasonable for the trial of such issues, and to give (b) costs against the prosecutor of the *certiorari*, if it appears to have been groundless. 2 Hawk. P. C. c. 27. § 34. Salk. 145. pl. 6. [See further for the practice of the court with respect to the filing of the orders, Anon. 2 Barnardist. 151. Rex v. Cann, 2 Str. 1263. A *certiorari* to bring up an order for the removal of their clerk, is of common right, and not discretionary. 1 Str. 609. Fortesc. 374. 8 Mod. 331.] (b) 2 Keb. 500.

An order of sewers was made for levying 9*d.* per acre on 1312 acres, to be paid to the clerk, to be applied towards defraying the charges in and about the execution of the commission, which was confirmed by the court of king's bench.

2 Str. 1127. [Q. Whether an acre-tax be a right assessment? whether the right Commissioners

way be not to assess the particular lands according to the danger they lie in. of Sewers v. Newburgh, 3 Keb. 827. Bow v. Smith, 9 Mod. 94.]

[A rate may be made to reimburse charges.]

2 Str. 1127.

COURT OF PIPOWDERS.

(a) Incident to every market as well as fair. 4 Inst. 272. Keilw. 99. **THIS** court is incident to every fair and (a) market, and is called *curia pedis pulverisati* (b); because for contracts or injuries done concerning the fair or market, justice shall be done as speedily as the dust can fall from the foot. (c) Brownl. 175. Bulst. 55. Cro. Eliz. 773. — That there may be a court of pipowders by custom without fair or market, and a market without an owner. 4 Inst. 272. (b) Mirror, c. 1. § 3. Bract. lib. 3. fol. 334. 4 Inst. 272. (c) A more ingenious and satisfactory etymology is given by a learned modern writer, who derives it from *pied puldreaux*, a pedlar, in old French, and therefore signifying the court of such petty chapmen as resort to fairs or markets. Barrington's Observat. on the Stat. 337.]

4 Inst. 272. It is a court of record, of which the steward is judge, there being no suitors. 6 Co. 12. 2 Bulst. 23.

4 Inst. 272. Its jurisdiction consists herein, that the (d) contract or (e) cause (d) Cannot hold plea of obligations, for this court is ordained for things arising within the fair. of action be in the same time of the same fair or market, and not before, or in former; it must be for some matter concerning the same fair or market, done, complained of, heard and determined the (f) same day within the precinct of the same fair or market.

Roll. Abr. 545. Moor, 830. Cro. Ja. 313. 2 Bulst. 21. (e) If one slanders another who trades in the market, in any thing which concerns his trade, as by disparaging his goods, which he exposes to sale there, an action lies; *secus*, if the words do not concern any thing touching the market. 10 Co. 73. Hall and Jones, adjudged. Cro. Eliz. 773. Moor, 623. S. C. adjudged. 4 Inst. 272. Roll. Abr. 544. S. C. cited. (f) The proceedings being *de horâ in horam*. 2 Inst. 272. — This court continues during the time of the fair, and no longer. 2 Bulst. 23. — It may be adjourned from market to market. Keilw. 99. — The continuance may be entered by an *idem dies*, &c. Moor, 459.

Made perpetual by 1 R. 3. c. 6. By the 17 E. 4. c. 2. reciting, that divers persons coming to fairs be grievously vexed and troubled in the court of pipowders, (g) Though such oath ought to be made if the defendant will insist upon it, yet it shall not be made part of the record. by feigned actions, and also by actions of debt, trespasses, feats, and contracts made and committed out of the time of the said fair, or the jurisdiction of the same, contrary to equity and good conscience, &c. it is enacted, that no minister of any such court of pipowders shall hold any plea (g) without (h) oath made by the plaintiff or his attorney, in the presence of the defendant, that the contract, trespass, or other feats contained in the declaration, was made within the fair, and within the time of the fair, and within the jurisdiction and bounds of the said fair. (h) Yet this concludes not the defendant, but notwithstanding he may, by the statute, plead to the jurisdiction of the court. 4 Inst. 272. 2 Bulst. 22.

Howell v. Johns, Cro. El. 773. From this court a writ of error lies, in the nature of an appeal to the courts at *Westminster*, which are now bound by the statute of 19 G. 3. c. 70., to issue writs of execution in aid of its process

process after judgment, where the person or effects of the defendant are not within the limits of this inferior jurisdiction.]

OF THE COURTS IN LONDON.

THERE are several courts within the city of *London*, which exercise a jurisdiction according to their own stated rules and forms, but yet are subject to the controul and correction of the king's courts at *Westminster*, whenever they exceed their jurisdiction. The chief of these are,

1. *The Court of Hustings.*

This is the (a) highest and most ancient court of record within the city of *London*, and is always held at *Guildhall*, before the lord mayor and sheriffs of *London* for the time being; but, when any matter is to be argued and determined in this court, the recorder sits as judge with the lord mayor and sheriffs, and gives rules and judgments therein.

thing, that is, the house of causes or things. 4 Inst. 247. [So, Sir H. Spelman in his Glossary *voc.* Hustings. — But by Fortese. pref. to Monarchy 59. it is a pure Saxon word, signifying any council or court in general, and therefore applied to the supreme court of the city of *London*. The Saxon word, according to Junius, is borrowed from the *Islandick*.]

This court hath jurisdiction of (b) all pleas real, personal, and mixt; and for this purpose it is distinguished into two courts, as the judges sit one week on real actions, and the other on those which are personal or mixt. *veries* may be passed, wills may be proved, and replevins, writs of error, writs of waste, writs of partition, and writs of dower, may be determined for any matters within the city of *London* and the liberties thereof. Lex Lond. 105.

Judgment of catlawry in the hustings is not given by the mayor, who is coroner, or his deputy, but by the recorder, by the custom of the city.

In this court the lord mayor for the ensuing year, the sheriffs, chamberlain, and bridge-masters, are chosen.

Upon a judgment given in this court of hustings, a writ of error lies at *St. Martin's* (c) before certain justices.

2 Saund. 252. S.P. And upon a judgment of the said justices a writ of error lies in parliament. 2 Leon. 107. (c) For their commission, &c. *vide* Reg. 130. F.N.B. 23.

2. *The Sheriffs' Courts.*

There are two sheriffs of *London* and *Middlesex*, each of whom keeps a court of record for all personal actions within the city of

London. These courts are kept at *Guildhall*, and in each court a steward is the judge. They have belonging to these courts two prisons, called *counters*, the one in *Wood-street*, the other

(a) Both these in the *Poultry*. (a)

counters are now taken down, and a new sheriffs' prison has been erected under the local acts 52 G. 3. c. 209. and 55 G. 3. c. 98.

(b) But for The (b) process in these courts is by summons, arrest, (c) fo-
this *vide Lex* reign attachment, &c.
Lond. 241. &c.

(c) *Vide* for this title *Customs of London*.

4 Inst. 247,
248.

From these courts a cause may be removed by *habeas corpus* to *Westminster-hall*; but, if an erroneous judgment be given, the cause may be removed by writ of error to the *Hustings*, before the lord mayor and sheriffs.

Skin. 105.

If a plaint be levied in a counter in *London*, and a *habeas corpus* brought, it is returned by that sheriff in whose counter the party is in custody, and he only is to answer if he escapes.

3. *The Court of Equity before the Lord Mayor, commonly called the Court of Conscience.*

4 Inst. 248.

(d) That this is a reasonable custom, although it hath been of late abused. Skin. 67. pl. 13.

Hil. 26, 27.
Car. 2. in B. R.
Buxton v.
Singleton,
3 Keb. 432.
S. C.

The jurisdiction of this court arises from (d) a custom in *London*, viz. that if a plaint of debt is entered in the sheriff's court, upon suggestion of the defendant, the lord mayor may send for the parties, and for the record, and examine the parties upon their plea; and if he finds that the plaintiff is satisfied, he may award that the plaintiff shall be barred, but he cannot examine after judgment.

Judgment was given in an action in the sheriff's court in *London*, and after it was removed to the mayor's court by *levata querela*, within which court there are four attorneys, who, by an exclusive custom, are the only attorneys of the court. One of them was assigned to the plaintiff by the recorder, who refused to act, as did all the others, because the then lord mayor was concerned in interest. On complaint to *B. R.* it was held, that no person could withdraw himself from the jurisdiction of the king's bench, which had a power of obliging all officers to do their duty; that the denying justice in such a manner was of dangerous consequence, and might be punished by information, &c.; that in the case of the abbot of *Croxland*, 20 E. 4. the liberties were seized, because he had not officers; and that the attorney's refusal in this case was sufficient to fore-judge him.

Lex Lond.

229. (e) First begun by an act of council, 9 H. 8. but has since been confirmed by act of parliament, 3 Ja. 1. c. 15. || amended and explained by 14 G. 2. c. 10. and further explained, amended, and extended by 39 & 40 G. 3. c. 104. of the publick local acts.||

There is also the court of requests, which is called the court of conscience, and is held before certain commissioners at *Guildhall*, and was (e) established for recovering debts under forty shillings, || but now raised to debts not exceeding five pounds. ||

3 Keb. 533.

This court cannot grant prohibitions to stay proceedings in the courts at *Westminster*; and therefore where *J. S.* brought debt upon

upon an obligation of 10*l.* for payment of 5*l.* in *B. R.*, against a freeman of *London*, who cited the plaintiff in the court of conscience, surmising that less than 40*s.* was due; the plaintiff appeared there, and shewed the obligation; notwithstanding which, the commissioners there, upon the allegation of the defendant, that less than 40*s.* was due, ordered the plaintiff to accept it, and to stay proceedings in *B. R.*, which he refusing, the commissioners ordered the registrar to keep the obligation, so that the plaintiff could not proceed in *B. R.*; whereupon the court granted an attachment against the commissioners and registrar.

[This court hath no jurisdiction, unless both the plaintiff and the defendant reside within the city.] 2 H. Bl. 220. *Tucker v. Crosby*, 2 Taunt. 169.

¶ An action on promise may be maintained in this court for the single value of tithes, if the amount does not exceed 5*l.* this not being a matter "concerning or properly belonging to the ecclesiastical court" within the exception in 39 & 40 G. 3. c. 104. § 11. *Sandby v. Miller*, 1 Smith, 396. 5 East, 194. S. C.

An attorney, plaintiff, is not compellable under this act to sue in this court at the peril of costs, for a debt under 5*l.*, even though the defendant be an attorney also. *Board v. Parker*, 7 East, 47. *Hodding v. Warrant*, *Id.* 50.

An attorney, who has no office or residence in the city, is not within the act of 39 & 40 G. 3. c. 104., that act not applying to "persons" merely on account of "seeking a livelihood" in the city unless they reside there, or seek their livelihood there openly and substantially. *Gould v. Colyer*, 1 Smith, 334.

A person plying as a porter, and resorting to a house of call in the city, but not lodging there, is not a person "seeking his livelihood" there within the above act. *Skinner v. Davis*, 2 Taunt. 196.

A market gardener, who rents a stand with a shed over it in *Fleet* market at an annual rent, which he occupies three times a week on market-days 'till ten o'clock in the forenoon, after which and on other days it is occupied by others, does not keep a stand within the meaning of this act, so as to be privileged to be sued in this court for a debt under 5*l.* *Gray v. Cook*, 8 East, 336.

This act provides, § 12. that if any action be commenced out of this court for any debt not exceeding 5*l.* (within the jurisdiction) the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to costs, &c. It was holden that after judgment by default and the damages assessed upon a writ of inquiry, the defendant might come into court and move to stay proceedings on payment of the damages assessed without costs. *Dunster v. Day*, 8 East,

If a debt be reduced by part-payment below 5*l.* before the action brought, the case is within this act. || *Horn v. Hughes*, 8 East, 347.

CURTESY OF ENGLAND.

Dr. & Stud.
lib. 1. c. 7.
Co. Lit. 30. a.
Cowel. tit.
Curtesy; it
began in Eng-
land and Ire-
land in the
time of H. 1.

TENANT by the curtesy is he, who after his wife's death (having had issue by her inheritable) is introduced into her inheritance, and has an estate for life therein; and he is so called from the favour or curtesy of that law which made this provision for him, to which he had no natural right, nor to which any other nations, (a) except those of *Great Britain* and *Ireland*, admitted him.

Seld. Jan. 65. and in *Scotland* in the time of *Malcom*. Macan. 56. Both by a positive institution. (a) [This is a mistake; it was known in other countries, though not under this name. By the rescript of *Constantine* it is established, *ut hæreditatis maternæ pater usum fructum, filii proprietatem haberent*. Crag. j. f. dieg. 22. § 40. Cod. l. 6. le. 1. And the laws of the *Almains* define the estate almost in the very terms used by the laws of *England*. Lindenbrog, L. Aleman. 1. 92. We find it in the feudal system, not indeed as a necessary consequence of the feudal tenure in its original purity, but arising from the express terms of the investiture. The language of the feudal law is *maritus uxori non succedit in feudum, nisi sit specialitèr investitus*. Wright's Ten. 193. n. c. — Sir *W. Blackstone* inclines to think, that tenancy by the curtesy of *England* was so called, as signifying an attendance upon the lord's court or *curtis*, (that is, being his vassal or tenant,) not as denoting any peculiar favour belonging to this island. 3 Comm. 126. The contrary, however, is maintained by one of his successors in the *Vinerian* chair. 2 Wooddes. 18.]

Rot. Claus.
11 H. 3.
Wright's Ten.
193. n. 9.
Hale's Hist.
C. L. 180.

[The words of this law, as they are found in a writ of 11 H. 3. ordaining the reception of it in *Ireland*, are, *Si aliquis desponsaverit aliquam mulierem, sive viduam, sive aliam, hæreditatem habentem, et ipse postmodum ex eâ prolem suscitaverit, cujus clamor auditus fuerit inter quatuor parietes, idem vir, si super vixerit ipsam uxorem suam, habebit totâ vitâ suâ custodiam hæreditatis uxoris suæ licet ea fortè habuerit hæredem de primo viro suo qui fuerit plenæ ætatis*.

(b) Lib. 7. c. 18.
(c) Lib. 5. c. 30.
§ 7.

The right of a husband to retain the land of his deceased wife was confined, according to *Glanville* (b), to such estates as were given with the woman in *maritagium*. But in *Bracton*'s time the claim had extended itself; for he says (c), the husband should have the land if he married a woman *habentem hæreditatem vel maritagium, vel aliquam terram ex causâ donationis*, having any inheritance, whether a *maritagium* or other gift of land.

1 Reeves's
Hist. 298.
Among the
statutes which
are classed
under the de-
nomination of
*statuta incerti
temporis*, we

It appears from both these writers, that the second husband was equally entitled to be tenant by the curtesy with the first. But this doctrine was combated by one *Stephanus de Segrave*, whose name is found among the justices itinerant in the reign of *Henry* the Third, as founded on a misconception of the meaning and design of this sort of estate. He thought there was an injustice in giving an estate *per legem Angliæ* to the second husband,

more especially when there were children alive of the first marriage. And this opinion of *Stephanus de Segrave* was afterwards established by the statute *de donis* in respect of conditional estates.] find the *statutum de tenentibus per legem Angliæ*, which must evi-

dently have been written before the statute *de donis*, inasmuch as it declares that the second husband shall inherit. Again, as it confines the curtesy to estates given in *maritagium*, according to *Glanville*, without including all inheritances, as *Bracton* does, it must have been written before the latter author penned his book. But, if this was a statute before *Bracton's* time, that author, where he examines the question of the second husband claiming by the curtesy, and mentions *Segrave's* opinion against it, (lib. 5. c. 30. § 7.) could not be supposed to omit noticing any statute that had been made so decisive as this is. 2 Reeves's Hist. Law, 315. || In Rastall's Collection of the statutes 1603, the following note is subjoined to this statute: " But this seemeth to be no statute, but only one man's opinion." ||

(A) What Persons may be Tenants by the Curtesy ; what not.

(B) Of what Sort of Inheritances this Estate is allowable ; of what not.

(C) What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy : And herein,

1. *The descendible Quality of such Estate.*
2. *The Seisin of the Wife thereof.*
3. *When this Estate and Seisin is to begin, and how long it must continue.*

(D) Of the Husband's Title being initiate by having of Issue, and to what Purposes : And herein,

1. *What Sort of Issue this must be.*
2. *When it must be born.*
3. *What it must do to entitle the Husband to be Tenant by the Curtesy.*

(E) The Nature and Quality of such Tenancy by Curtesy :

1. *With respect to the Estate itself.*
2. *With respect to the Privity between him and the Heir.*

(F) By what means this Title may be prevented and destroyed.

(A) What Persons may be Tenants by the Curtesy; what not.

(a) [But the marriage of persons in this unhappy state is merely void, by reason of their incapacity to contract, and one of the circumstances necessary to the completion of their title to the estate is therefore wanted.] (b) The lord, if he will, may enter and hold those lands against the villain and his issue for ever. Co. Lit. 118. 123. a.

(c) For they forfeit only their goods and chattels absolutely, for of their lands the king gains but a pernaney of the profits. 5 Co. 110. Co. Lit. 92. b. 391. a. Stanf. 192. (d) Bro. tit. Outlawry, 26. 36. 59. Co. Lit. 128. For such process of outlawry might be easily superseded, and thereby the king's pernaney of the profits discharged.

(e) Bro. tit. Curtesy, 15. Staundf. 196. Godb. 323. (f) Co. Lit. 391. a. 3 Inst. 43. (g) But, if the alien be made denizen, or the person attainted pardoned, and have issue after, they may be tenants by the curtesy, in respect to that issue had after, but not in respect of any issue had before. 7 Co. 25. — Popish recusants were disabled from being tenants by the curtesy, 3 Ja. 1. c. 5. § 13.

(B) Of what sort of Inheritance this Estate is allowable; of what not.

Dr. & Stud. c. 22. Perk. 457. 463. Dyer, 9. pl. 25. 1 Co. 123. 4 Inst. 87. (h) [But curtesy of trusts is now allowed in equity, tho' dower is refused. Otway v. Hudson, 2 Vern. 583. Williams v. Wray, id. 681. Chaplain v. Chaplain, 3 P. Wms. 229. And therefore

1. OF a use at common law, or what is now called a trust, it is expressly resolved, that a man shall not be tenant by the curtesy; (h) and *Doctor and Student* assigns this as one reason, why so much land was put in use to prevent this title; and the 27 H. 8. c. 10., in the preamble recites this as one of the mischiefs that statute intended to remedy. The reason seems, that of a use there was neither tenure nor wardship, nor any escheat nor benefit to the lord, and therefore not within the reason of this law; besides that the feoffees were tenants to the lord, and the land in their hands the proper subject of such titles, and there could not be double out of the same lands. Another reason may be, that the use consisting merely in privity between the feoffor and feoffees, and being in the nature of a thing in action, for which no remedy lay but by *subpœna* in chancery, and therefore none could have any remedy for it but those who were parties or privies to the feoffment, or within the words or plain

plain meaning thereof, and consequently, the husband could not be tenant by the curtesy, nor his wife be endowed thereof, they being strangers and collaterals to the feoffment; and the denying them the rents and profits, could be no breach of trust in the feoffees, they not being originally trusted for any such purpose, nor compellable to account to them.

of money to be invested in land. Sweet-apple v. Binden, 2 Vern. 536. Cunningham v. Moody, 1 Ves. Ch. Rep. 4c4.]

174. Dodson v Hay, 3 Br.

2. A man shall not be tenant by the curtesy of a copyhold unless there be a special custom to warrant it, for the freehold and inheritance being in the lord, and the copyhold being only a customary right of taking the profits time out of mind at the will of the lord, this custom, like all others, must be a law to itself, and all estates derived thereout are so far good as they are warranted by that law, and no farther. If, therefore, there be no custom for a man to be tenant by the curtesy, of his wife's estate, there is no law by which he can claim it; and if there be no law, he can have no more right than to another man's property. And this statute cannot operate upon copyhold, since this statute, like other statutes, was made within time of memory, and so falls short of any share in the original constitution, or governing of copyholds; and for this reason, where such custom of holding by the curtesy has prevailed, it has yet been taken literally strict, and not extended in the least beyond those bounds the custom has allowed of.

4 Co. 22. Hob. 216. Cro. Eliz. 361.

3. As, where *J. S.* set forth, that within such a manor there was a custom, that if one took to wife any customary tenant of the said manor in fee, and had issue by her, if he outlived such wife he should be tenant by the curtesy; and the case was, that *J. S.* married a woman, who at the time of the marriage had not any copyhold, but afterwards, during the coverture, a copyhold descended to her; it was adjudged, that he should not be tenant by the curtesy by this custom, for that his wife was not a customary tenant at the time of the marriage, which by the strict and literal meaning of the custom she ought to be.

Sir John Savage's case, 2 Leon. 109. 208. S.C. cited. [But this case was

denied to be law by *Holt, C. J.* and *Powell, J.* in the case of *Clements v. Scudamore*, 1 P. Wms. 62. and 2 Lord Raym. 1028.; and in 1 Salk. 243. S.C. it is said to have been denied by the whole court.]

4. Of an annuity to a woman and her heirs, after a writ of annuity brought, a man shall not be tenant by the curtesy any more than a woman shall be endowed thereof, for thereby it becomes a personal inheritance.

Co. Lit. 144. b. Poph. 87.

5. A man may be tenant by the curtesy of lands held in *ancient demesne*, and a woman may claim dower of such lands: also, of lands in *Borough-english*.

Alden's case. 5 Co. 105. Cro. Eliz. 826. [S. C.

2 And. 178. S. C.; but this point does not appear in any of the reports.]

6. Of lands in *gavelkind*, (a) a man may be tenant by the curtesy without having issue by his wife, by the custom, and herewith our statute has nothing to do, since custom, a law of

Co. Lit. 30. a. Dav. 50. L. P. R. 627. (a) [But of much

such lands of the wife the tenancy by curtesy extends only to a moiety, and it ceaseth if the husband marries again. This at least is the custom of gravelkind in *Kent*. Robins. Gav. b. 2. c. 1.]

Prærog. Regis, c. 13. 4 Co. 55. 7. There are some kinds of inheritances whereof a man may be tenant by the curtesy, though a woman, in such case, shall not be endowed; as, if lands holden of the king by knight's service descend to a woman, and after office found she intrude and take husband, and have issue, in this case the husband shall be tenant by the curtesy; yet, if the heir male, after office found in the like case, intrude, and take a wife, she shall not be endowed, by the express provision of *Prærogat. regis*, c. 13. But this statute doth not alter or abridge the statute that gives a man a title by the curtesy.

Co. Lit. 30. b. 8. So, if a man marry the niece of the king, by his license, (which amounts to an enfranchisement, at least during the coverture,) and after lands descend to the wife, and the husband have issue by her, and then she die, the husband shall be tenant by the curtesy: but, if a woman marry the villain of the king, by his license, she shall not be endowed; for notwithstanding the license, he still remains a villain to the king, who may enter at his pleasure, and defeat the wife's title of dower by his own title paramount.

Co. Lit. 30. b. 9. A man shall be tenant by curtesy of a castle, of a (a) house that is *caput baronie*, or *comitatús*, because able to defend the realm, and of a common without number; but of these a woman shall not be endowed.

resolution a woman shall be endowed of such a house.

Plow. 379. 10. Of offices of profit a husband shall be tenant by the curtesy. My Lord Coke cites some ancient records, wherein tenancy by the curtesy was allowed of dignities and offices of honour, as to carry a sword before the king at his coronation, to be his carver upon that day; to be Earl of *Salisbury*, by the curtesy; but these being offices, as appears, annexed to particular dignities, or being dignities themselves, and capable of being entailed, may without any inconvenience be allowed the privilege of this law. Co. Lit. 29. But see note (1.) in the 13th edit.

Roberts v. Dixwell, 1 Atk. 607. [11. Where a testator directed his trustees to convey a fourth part of his freehold lands to the use of his daughter for her natural life, so as she alone should take the rents, her husband not to intermiddle therewith; and after the performance of several other trusts, in trust for the heirs of the body of the daughter, Lord *Hardwicke* held, that in this case the trust was merely executory, that the wife took an estate for life only, and therefore the husband was not entitled to be tenant by the curtesy.]

Id. ibid. || But it has been held, said his lordship, in a case of a trust estate for payment of debts, and in the case of an equity of redemption, that a husband may be tenant by the curtesy; for in the

the case of a trust for payment of debts, it is only a chattel interest in the trustees, and the first taker has a freehold over.||

(C) *What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy.*

1. *LITTLETON* acquaints us, that it must be an estate either in fee-simple or fee-tail general, or where the wife has it as heir of the special tail (*a*); and my Lord *Coke* says, for the husband to be tenant by the curtesy is one of the incidents to an estate-tail, which to restrain by condition were repugnant, &c.; and therefore if a woman, tenant in tail general, marries and hath issue, which issue dieth, and then the wife dies, so that the estate is thereby determined, yet the husband shall be tenant by the curtesy. The same law if the limitation had been to the woman and the heirs of her body, upon condition, that if she die without issue then to remain to another; for this is not a condition but a limitation, and no more than what the law saith.

2. So, if one, seised of a rent in fee, makes a gift in tail general, or if a rent *de novo* be granted in tail general to a woman, who marries and hath issue, the issue dieth, and then the wife dieth without other issue, yet the husband shall be tenant by the curtesy of the rent, though the estate-tail therein be determined and spent; for this being an incident to such an estate at the time of its creation, whenever the husband has issue, his title is initiate, and shall not be lost after by failure of issue, which, being the act of God, ought not to turn to his prejudice. And this is within the words of our law *hereditatem habentem*, without fixing its continuance.

and a wife dower of a rent reserved upon a gift in tail. For though as between the donor and his heirs, and the donee and his heirs, the rent is incident to the reversion in consequence of the statute *de donis*, yet, as against a husband claiming curtesy, or a wife claiming dower, the donor must, to warrant the positions of Lord *Coke*, have a rent in gross, that is distinct from any estate, as he had before the statute *de donis*. Preston on Estates, c. 6. note.]

|| It is stated by the learned editors of *Coke upon Littleton*, as the result of the several cases in the margin, that where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower, and the husband his curtesy, after the expiration of the period to which the fee charged with the dower or curtesy is to continue; but that where the fee is originally devised in words importing a fee simple, or fee tail absolute and unconditional, but by subsequent words is made determinable upon some particular event; there, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which they are annexed. A different doctrine, however, as to cases of the latter description, seems to have been laid down in the case of *Buckworth v. Thirkell*. There *Joseph Sutton* devised his estate to trustees, upon trust to pay the rents and profits for the maintenance and education of *Mary Barrs*,

Lit. § 35. Dyer, 148. 6 Co. 41. 8 Co. 36. Co. Lit. 227. 8 Co. 34. Leon. 167. Pain's case, Co. Lit. 30. a. (a) [But the wife must be sole tenant both of the freehold and the inheritance. Co. Lit. 183. a.]

Co. Lit. 30. a. note (2.) 13th edit. [As the statute *de donis* does not extend to husbands claiming curtesy, or wives claiming dower, it is for this reason, probably, that a husband may have curtesy,

Co. Lit. 241. n. (4) 13th edit. F. N. B. 149. G. note. Flavell v. Ventrice, Ro. Abr. 676. Sammes v. Payne, 1 Leon. 167. 1 Anders. 184. 8 Co. 34. Gouldsb. 81.

Tr. 25 G. 3. B. R. Co. Lit. 241. a. note (4) 13th edit.

1 Collect.
Jurid. 332.
S. C. 3 Bos. &
Pull. 652. note,
S. C. See the
observations
of the learned
editors of Co.
Litt. (*ubi su-
pra*) on this
case. See also
the case of Doe
v. Hutton,
3 Bos. & Pull.
643. and Pres-
ton on Estates,
c. 6.

Barrs, till she arrived at twenty-one, or was married; and from and after the said *Mary Barrs* should have attained her age of twenty-one years, or should be married, he gave and devised all the said land and premises to the said *Mary Barrs*, her heirs and assigns for ever. But in case the said *Mary Barrs* should happen to die before she arrived at the age of twenty-one years, and without leaving issue of her body lawfully begotten, then, from and after the decease of the said *Mary Barrs*, without issue as aforesaid, he gave and devised all his said estates unto his grand-son *Walter* for life, with several remainders over. *Mary Barrs* married *Solomon Hansard*, and had issue a son, who died in her life; and afterwards *Mary Barrs* died under twenty-one. In this case the court of king's bench were unanimously of opinion, that on the decease of *Mary Barrs*, her husband became entitled to be tenant by the curtesy for his life, and that, subject thereto, the devisees over became entitled by way of executory devise.||

But to understand the nature of the wife's estate, we must consider farther,

1. *The Descendible Quality of such Estate.*

This rule seems to have been formed

1. The rule herein to be observed is, that the issue of such husband may by possibility inherit. after the statute *de donis*, and by virtue thereof; for our statute requires no such property in the inheritance, neither did the common law; but for this *vide* 2 Inst. 336. 8 Co. 35, 36. Co. Lit. 29. b. Perk. 465.

8 Co. 35. Co.
Lit. 29. b.

2. Therefore, if lands are given to a woman and the heirs male of her body, and she has issue a daughter, and dies, the husband shall not be tenant by the curtesy. The same law if they are given to her and the heirs female of her body, and she has issue a son.

Bro. tit. Cur-
tesy, 8. Perk.
466. 8 Co. 34.
Lit. § 52.

3. But, if a woman seised in fee marries, and hath issue, and then the husband dies, and she takes another husband, and hath issue by him, and dies; though the first issue be living, yet the second husband shall have it by the curtesy, because his issue, by possibility, may inherit; as if the first issue die without issue, whereby it comes to the uncle, &c.

8 Co. 34. Sum-
ner v. Par-
tridge, 2 Atk.
47.

[It is essential to this estate, that the issue should take as heir to the wife; that they should take by descent; for if they take by virtue of a remainder over, their birth will not entitle the husband. The tenancy by curtesy is an excrescence out of the inheritance.]

2. *The Seisin of the Wife thereof.*

Dr. & Stud.
Lib. 2. c. 15.
Perk. 464. Co.
Lit. 29. a. 90.
8 Co. 34. 36.
F. N. B. 143.
Keilw. 2. a.

1. That the wife must be *seised* of the estate, is required by the very words of the law, which says, *aliquam hereditatem habentem*, so that there must be a possession of such inheritance by the very words of the law; and therefore if a man die seised of lands in fee-simple or fee-tail general, and those lands descend to his daughter, and she marry, and have issue and die, before any

any entry made by her and her husband, or any other for them, the husband shall not be tenant by the curtesy. But here we must understand seisin in a two-fold sense, *viz.* seisin in fact and seisin in law; and where a seisin in fact may be had, as in the above case, there a seisin in law will not do; nay, though the husband doth all he can to get possession in his wife's life-time, and as soon as he heareth of her father's death, goeth towards the land to take possession; and before he can come there the wife dies, yet he shall not be tenant by the curtesy, and therefore one * book says, he should have spoken to some neighbour, being near the lands, to have entered for his wife, as in her right, immediately after the father's death. And the reason of this is from the words of the law, which require that the wife should have actual possession of the inheritance; and of things lying in livery the wife hath not actual possession till the entry of the husband. (a)

Bro. tit. Curtesy, 7.

* Perk. 470.

(a) [But entry is not always necessary to give seisin in fact; for if the land be in lease for years, curtesy may be without entry, or even receipt of rent, the possession of the lessee for years being deemed the possession of the husband and wife. *De Grey v. Richardson*, 3 Atk. 469.]

[Where a man agreed to give a cottage to his grandson on his marriage, but no conveyance was executed, and the grandson entered, fitted it up at his own expence, and lived in it several years; and then the grandfather died intestate, leaving one child only, (the mother of the grandson,) who never entered on the cottage, or received or demanded any rent for it; and the mother died leaving a husband, and an only son (the above-named grandson); the husband was holden not to be entitled to be tenant by the curtesy; for the wife never reduced the estate into possession; she never had a seisin in fact.

Rex v. Inhabitants of Great Farringdon, 6 T. R. 679.

Where a woman, tenant in tail, by lease and release previous to her marriage conveyed to trustees, to the use of herself till marriage, then to the intended husband for life, then to herself for life, then to the first and other sons of the marriage, &c. and the marriage took effect, and the wife died in the life-time of the husband, leaving issue; the husband could not take as tenant by the curtesy, for there was not a moment during the coverture when the wife was seised of an estate-tail in possession.]

Doe v. Rivers, 7 T. Rep. 277.

|| *A.* died leaving a wife, a son, and a daughter: the widow entered upon the estate, and was seised as tenant in dower of one part, as tenant in common with her son of another part, and as guardian in socage of her son of a third part. The son went beyond sea, and died under age, whereby the daughter became entitled, who during her infancy married the plaintiff, and together with him applied to the mother to be let into possession of the son's part, which the mother refused, imagining that the son was still alive, and therefore insisting upon holding the land for him. Upon this they filed a bill in chancery against her for an account, which was accordingly directed. After this the daughter died, and upon further application to the court by the husband, one question was, whether the seisin of the mother, (after the son's death,) being tenant in common with the daughter,

Sterling v. Penlington, Vin. Abr. tit. Curtesy (A.) pl. 11. S. C. tit. Jointenants, (P. a.) pl. 5.

daughter, was, under the circumstances, the seisin of the daughter, sufficient to make the husband tenant of the curtesy of her part. And the court held, that it was sufficient. Where indeed one tenant in common *enters claiming the whole for himself in exclusion of his companion*, this may not serve as the entry of his companion, being made directly against him: but that is not this case; for it appears that the mother's keeping possession of the whole against the daughter and her husband was entirely owing to a mistake, in imagining that her son was still living, and not with an intent to exclude the daughter from her right, and therefore no inference can be drawn from it.||

Co. Lit. 29.
Perk. 468, 469.
7 Ed. 3. 66.
Keilw. 104.
Co. 97. 6 Co.
68. F. N. B.
149. Bro. tit.
Curtesy, 5. 9.
2 Sid. 110.

(a) [But, if the advowson be appendant to a manor, and the wife die before entry into the manor, Lord Hale thought the husband would not be entitled to be tenant by the curtesy of the advowson. Hal. MSS. Hargr. notes on Co. Lit. 29. a.]

2. But now of such inheritances, whereof there cannot possibly be a seisin in fact, a seisin in law is sufficient; and therefore, if a man seised of an advowson (a), or rent in fee, hath issue a daughter, who is married and hath issue, and he dieth seised, and the wife dieth likewise before the rent becomes due, or the church becomes void, this seisin in law in the wife shall be sufficient to entitle her husband to be tenant by the curtesy, because, say the books, he could not possibly attain any other seisin, as indeed he could not, and then it would be unreasonable he should suffer for what no industry of his could prevent. But the true reason is, that the wife hath these inheritances which lie in grant, and not in livery, when the right first descends upon her; for she hath a thing in grant when she hath a right to it, and nobody else interposes to prevent it.

not be entitled to be tenant by the curtesy of the advowson. Hal. MSS.

Casborne v. Scarfe, 1 Atk. 603. Vin. Abr. Curtesy, E. pl. 23. S. C. more fully reported.

[So, of lands mortgaged in fee by the wife previously to the marriage, the husband shall be entitled to be tenant by the curtesy. For his neglect in not paying off the mortgage is not similar to the case of laches in a husband, viz. as in a case where entry is requisite, because it is nothing near so easy to pay off a mortgage as to make an entry; and an objection of this kind holds equally strong in the case of a trust estate, for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is attended with many delays.

Ewer v. Astwike, 1 Anders. 192. Moor, 272.

In copyholds where the custom allows of this estate, the entry of the husband in the right of his wife in her life-time, though she dies before admittance, will, it seems, be a sufficient seisin.

Hearle v. Greenbank, 3 Atk. 695. 1 Ves. 298. See Mr. Preston's observations on this case in his chapter upon this title. Prest. on Estates. See also 1 Atk. 609.

With respect to trusts or equitable estates, the wife must have such an interest that her husband may have a seisin or possession in nature of a seisin in her right. Therefore, where a father devised estates to trustees in trust to apply the profits for the sole and separate use of his daughter (a *feme covert*) during her life, and not to be subject to the debts or controul of her husband, with power to dispose of them by will, notwithstanding the coverture; Lord Hardwicke held, that the husband had no seisin either in law or in equity, and therefore was not entitled to be tenant by the curtesy: that the legal estate was in the trustees: that

that the father had made the daughter a *feme sole*, giving her the profits for her life, but not subject to the controul of her husband; the husband then had no seisin in equity during the coverture: and further, the tenancy by curtesy in this case would be directly contrary to the intent of the testator.]

3. *When the Estate and Seisin is to begin, and how long it must continue.*

1. The estate and seisin of the wife ought to begin some time during the coverture; so the words of the law import, *si aliquis desponsaverit aliquam hereditatem habentem, &c.*, and therefore if a woman be disseised and marry and die, leaving issue before any re-entry made, the husband shall not be tenant by the curtesy; for here she had no inheritance, but only a right to an inheritance, which is out of the words of this law; but if the husband or wife had entered during the coverture, there, after the wife's death, he should have it by the curtesy, because she had *hereditatem* during the coverture. Co. Lit. 29. a. 30. a. Perk. 458.

2. If a woman seignores intermarry with the tenant, and have issue and die, the husband shall not be tenant by the curtesy of the seignory, because by the intermarriage the seignory was in suspence, and so she could not be said to have it, or if she had, it is like the seisin of an instant, whereof a woman shall not be endowed. 3 Leon. 347. Perk. 460. Co. Lit. 29. b.

3. A woman tenant in tail, *apres* possibility, &c. takes husband, and hath issue, and the fee-simple descends upon the wife, be it before or after marriage, the husband shall be tenant by the curtesy, because by the descent of the fee the other estate was merged and gone, and she became tenant in fee-simple executed. Bro. tit. Curtesy, 4.

4. In trespass, the defendant says, that one *A.* was seised of those lands in her demesne as of fee, and that he took her to wife, and they had issue between them, and after *A.* died, and he held himself in as tenant by the curtesy, and (*inter alia*) it was moved, that he did not shew that after the marriage he was seised in his demesne as of fee in right of his wife; and though it was answered, that his shewing that *A.* was so seised, and that he took her to wife was sufficient, since it could not be intended but that the defendant was seised in fee, as in right of his wife; yet, says the book, the defendant, *videns opinionem curiæ*, amended his plea according to the exception taken by the plaintiff. Keilw. 2. which plainly shews, that seisin in the wife, some time during the coverture, is essential to make the husband tenant by the curtesy.

5. If a woman seised in fee makes a lease for life, or endows her mother, and after has issue and dies, leaving the lessee or mother, the husband shall not be tenant by the curtesy of the reversion. But in the case of the lease, if a rent were reserved to her and her heirs,

Q. if the husband shall not have the rent during its continuance, and after the death of the lessee, the land itself, as tenant by the curtesy; and *vide* Perk. 467. Co. Lit. 29. a. Bro. tit. Curtesy, 10. Co. Lit. 15. a. 32. a. Keilw. 104. pl. 12.

Bro. tit. Cur-
tesy, 121.

6. In a *quare impedit* by the king against divers, the defendant makes title that the advowson descended to three coparceners, who made partition to present by turns, the eldest to have the first, the middle the second; and that he married the youngest, and had issue by her, and she died, and the church became void, and so it belonged to him to present, and doth not allege that ever his wife presented; yet he was allowed tenant by the curtesy by the seisin of the others; the reason of which case seems to be, that the advowson being in its nature entire and indivisible, and descending upon all the daughters as coheirs, though they agree to share the fruits of it in such proportions among themselves, yet the inheritance remains entire in them all, and they all have a seisin in law before presentment by either, which, according to the rules before laid down, is sufficient to entitle the husband to be tenant by the curtesy.

2 Sid. 110. 117.
Dethick v.
Bradburn.

In this case no
judgment is
given but the
opinion of
Glyn Ch. Just.

7. A rent-charge is granted to a woman and her heirs, payable at two feasts of the year; the first payment to begin at such of the two feasts as shall happen after the death of *J. S.* The feme takes husband, and hath issue and dies: then *J. S.* dies; and one question was, if the husband should be tenant by the curtesy of this rent.
was, that he should; for though this begins *in futuro*, yet it is grantable over presently, which proves it to be *in esse*, and then she may be well said *habere hæreditatem*, and the seisin is not material, especially in the case of a rent.

The time when this estate and seisin in the wife is to begin, whether before or after marriage, is not material; and therefore if a woman marries, and hath issue, which dies, and after lands descend to the wife, and the husband enters, and then the wife dies without other issue, yet the husband shall be tenant by the curtesy, for the time of the descent is not material, so it be during the coverture. The same law is, if lands had been conveyed to the wife *mutatis mutandis*.

Co. Lit. 40.

a. 351. a. Bro.
tit. Curtesy,

(3). But Q.

If in this case

after issue had,

the feme had

been attain-

ed of treason,

if the hus-

band's initiate

title shall pre-

vail against

the king?

Q. Also, in the

case of the

felony, if the

husband may enter

presently upon the attainder during the wife's life, who is thereby *civilliter mortua*, as he might, if the wife had abjured the realm, which is one kind of attainder; for which, *vide* Co. Lit. 133.

As to the continuance of this estate and seisin in the wife, in some cases it is necessary it should continue in her till issue had, and in some not; and in some cases continuance both before and after will not serve: for the first, if a woman seised in fee of lands hath issue, and after commits felony, and is attainted thereof, yet the husband shall be tenant by the curtesy, in respect of the issue had before, and which by possibility might have entered; *aliter*, if the wife had been attainted before issue: but in the other case, the husband's title, by the having of issue was so far initiate, that the lord might avow upon him for homage without the wife, and then her crimes after shall not defeat him of it; besides, this is within the letter of our law, &c.

Perk. 472.

Co. Lit. 30. a.

In some cases it is not necessary that the seisin should continue till issue; and therefore, if a man, seised of lands in fee in

in right of his wife, is disseised before issue, and afterwards he hath issue, and the wife die before any re-entry made, yet the husband may re-enter, and hold the land as tenant by the curtesy, for the disseisin left a right in him to be tenant by the curtesy, if he had issue, as it did in the wife and her heirs to the inheritance.

So, in such case, if a recovery had been had against the baron and feme by erroneous process or by false swearing, and after execution sued thereof they have issue, and the wife dieth, yet the husband shall have error or attain, and upon reversal shall enter and hold as tenant by the curtesy, for being party to the record he may well have these writs, and when the recovery is reversed, it is so *ab initio* as to him. Perk. 475.

In some cases continuance of seisin before and after issue will not do, therefore, if a woman makes a gift in tail, reserving rent in fee, and marries and hath issue, and then the donee dies without issue, and then the wife dies, the husband shall not be tenant by the curtesy of the rent, for that is determined and gone, but he shall have the land. Co. Lit. 30. a.

If a woman marries and hath issue, and lands descend to the wife, and the husband enters, and after the wife is found an idiot, by office, the land shall be seised for the king; for when the title of the king and a common person begin at one instant, the title of the king shall be preferred; *a fortiori*, in this case, if the woman had lands before issue, and after issue had been found an idiot. Plow. 263.
Co. Lit. 30. b.
55. But *qu.*
of this case, be-
cause the
king's title can
continue no
longer than
during the
idiot's life.

If a daughter inheritrix marries and hath issue, and after a son is born, who enters upon the husband and wife, and then the wife dies, the husband's title is defeated; but if after the son had died without issue, and the husband had re-entered, it seems he should be tenant by the curtesy, whether he had issue by his wife after or not, and though such first issue was dead before his re-entry: so, if the daughter in such case after issue had endowed her mother, and after the mother dieth, and the husband re-enters, and his wife dieth without other issue, yet it seems reasonable the husband should have it by the curtesy: otherwise, in these cases, if the son or the mother had not died till after the death of the wife, for their title in both cases was paramount to the wife's, and disaffirms her title *ab initio* from the death of the father; but when the son or the mother dies, living the wife, then the estate comes to her again, and whether it come before or after issue, so there be an entry made, is not material, as before appears. Bro. tit. Cur-
tesy, (10. 13.)

If a woman tenant in tail generally makes a feoffment in fee, and takes back an estate in fee, and marries, and hath issue and dies, yet the issue may recover in a *formedon* against his father, and then he shall not be tenant by the curtesy; for the estate-tail he cannot have, that being discontinued during the whole coverture; the fee he cannot have, that being defeated and gone, and the issue restored to his right *per formam doni*; and Co. Lit. 29. b.

as the estate of the wife, during the coverture, was tortious, so must the husbands be too after her death, and liable to be defeated by the issue.

(D) Of the Husband's Title being initiate by the having of Issue, and to what Purposes: And herein,

1. *What Sort of Issue this must be.*
2. *When it must be born.*
3. *What it must do to entitle the Husband to be Tenant by the Curtesy.*

8 Co. 35.
Pain's case,
Co. Lit. 29. b.
S. P.

AS to the first, if a woman be delivered of a monster, which hath not the shape of mankind, this is no issue in law; but however deformed it may be, or if it be born deaf and dumb, or an idiot, yet this is such issue as will entitle the husband to be tenant by the curtesy.

8 Co. 35.
Co. Lit. 29. b.

2dly, It must be born during the life of the wife; therefore if the wife die in child-bed, and the issue is ript out of her womb, the husband shall not be tenant by the curtesy, because he hath no issue during the marriage, and therefore he cannot be said *ex eâ prolem habere*, and in pleading he must allege that he had issue during the marriage.

8 Co. 34.
Co. Lit. 29. b.
Dyer, 25.
pl. 159. Bendl.
21. Perk. 471.
Keilw. 2. a.
But in Scotland they require that the child should cry.

3dly, The statute says, *cujus clamor auditus fuerit*; but this is put but for an instance; for if it be born alive, though dumb, and could not cry, it is within the meaning of this statute; and there are other signs of life besides crying, as motion, &c. But some books seem to incline, that it ought to be baptized, and if it be not, through the husband's neglect, he shall not be tenant by the curtesy; but the statute requires no such thing, and therefore it seems no essential part of his title.

Co. Lit. 30. a.
67. a. 2 Inst.
145.

As to what purposes this title is initiate in the husband by the having of issue, it appears before, that after issue had he shall do homage alone, and receive homage alone during the life of his wife, and avowry shall be made only upon him; for the statute says, *si ex eâ prolem habuerit, &c. habebit tota vita sua custodiam hæreditatis*; but homage done by the husband before issue shall not bind the wife.

17 Ed. 3. 51.
Co. Lit. 30. a.
183. a. accord.
2 Roll. Abr.
90. Co. Lit.
183. a. cont.

Therefore if an estate be made to two women, and the heirs of their two bodies, and one of them marry and have issue and die, the husband shall be tenant by the curtesy of her moiety; for this statute severs the jointure between them by giving the husband the custody of it in the life of the wife; but, if such limitation had been to two men in this manner, their wives should not be endowed, for the jointenancy takes place of the dower.

Co. Lit. 30. a.
326. a. Dyer,
363. pl. 26.
8 Co. 72.

If the husband, after issue, makes a feoffment in fee, and the wife dies, the feoffee shall hold it during the life of the husband, and the heir of the wife shall not, during his life, avoid it by *sur cui*

cui in vitá, for it could not be a forfeiture, because the estate of tenant by the curtesy was but initiate, and not consummate; and now since 32 H. 8. c. 28. the issue shall not enter in such case till after the husband's death, which shews, that in this feoffment his interest and title to be tenant by the curtesy are involved, and pass by it to the feoffee, though not to such purpose as to make him tenant by the curtesy, which none but the husband himself can be. For the same reason, it seems, that after issue he may lease the lands for his own (a) life.

such feoffment or lease before issue shall be made good for his life by issue had after. — [In answer to this question, another may be asked, viz. Who is to avoid the lease, if the tenant chooses to hold the land?] (a) But Q. if

Baron and feme have issue, and after join in suffering a recovery, the feme was within age and appeared by attorney, yet after her death it seems the heir could not assign this for error till after the husband's death. Hob. 324. Darcy v. Lee.

(E) The Nature and Quality of such Tenancy by Curtesy.

1. *With respect to the Estate itself.*
2. *With respect to the Privity between him and the Heir.*

AS to the first, this estate, in several respects, is looked upon as a continuance of the estate of the wife, and therefore if three coparceners are of an advowson, and they agree to present by turns, the eldest first, and so on, and the eldest die, her husband, tenant by the curtesy, shall present as she should have done; and so of any of the other sisters.

So, a writ *de partitione faciendá* lies against tenant by the curtesy, because he is in continuance of the estate of coparcenary, though not being a coparcener in fact he cannot have such writ.

If baron seised of an advowson in right of his wife presents, and after hath issue, and the wife dies, and then the church becomes void, the husband shall not have assise *de darrein presentment*, because he is in of another estate than that upon which he presented before; for before he had no estate but in right of his wife, and now he is seised for his own life, as tenant by the curtesy.

The wife's heir shall not be in ward during the life of tenant by the curtesy, because by his continuance of his wife's estate, the descent to the heir is interrupted.

If a woman, tenant in tail, acknowledge a statute and marry, and have issue and die, the land may be extended in the hands of her husband, tenant by the curtesy.

So, the entry of the disseisee is congeable of the tenant by curtesy, but not on the heir after his death.

If tenant by the curtesy alien in fee, in tail, or for life of the lessee, he in the reversion shall have a writ of entry *in casu consimili* presently, by the statute of Westm. 2. c. 24.

3 Co. 22. Co. Lit. 166. b. 186. a. 2 Inst. 365. Cro. Eliz. 19. F. N. B. 34. Bro. tit. Curtesy, (2.)

Co. Lit. 174: b. 175. a. Keilw. 118.

2 Roll. Abr. 38. Keilw. 118. Q. But it seems clear, if the first presentment had been after issue, he should have had this writ.

F. N. B. 143.

Dyer, 51. in *margin.*

9 H. 7. 24.

2 Inst. 309.

Hob. 21.
2 Jones, 8.
Roll. Abr. 167.

If tenant by curtesy grant his estate with warranty, and come in as vouchee, he shall have aid of him in the reversion for the weakness of his estate; so, if he himself be empleaded.

3 Co. 23. 9 Co.
142. 11 Co.
83. 4 Co. 62.
Co. Lit. 54.
2 Inst. 301.
F. N. B. 56.
Cro. Car. 430.
Dr. & Stud.
lib. 2. c. 1.

As to the privity between him and the heir, this is so inseparable, that at common law, although both had, as it were by consent, granted away their estates, yet no action of waste lay against any other than the tenant by the curtesy, nor against him by any other than the heir at law; but now by the statute of Gloucester, c. 5. remedy is provided for the grantee of the reversion against tenant by the curtesy, so long as he continues his estate, or against his assignee, if he assign it over; but still so long as the heir keeps the reversion, tenant by the curtesy is liable to his action of waste notwithstanding any assignment, that statute having provided no remedy for this case; and the same law of tenant in dower.

(F) By what Means this Title may be prevented and destroyed.

Bro. tit. Cur-
tesy, (6.) Co.
111. Hob. 338.
Moor, 31, 32.
But *Q.* as to
the first case,
because the
feoffment
being before
issue, the hus-
band hath not title either initiate or consummate, but his title began wholly afterwards by the having of issue, and then the wife was in actual seisin by the remitter.

IF the husband before issue make a feoffment in fee, and retake an estate to him and his wife, by which the wife is remitted, and after he have issue, and the wife die, yet he shall not be tenant by the curtesy, for the law gives him *custodiam hæreditatis*; and if he part with it in fee, so that it is once out of him, there is no law that gives it to him again, since he hath extinguished it by his unjust alienation; *a fortiori*, if after issue he hath made this feoffment.

Co. Lit. 3c. b.

(a) Perk. 474.

So, if after issue he make a feoffment in fee upon condition, and re-enter for the condition broken, and then the wife die, yet he shall not be tenant by the curtesy, for that title was inclusively past and given away by the livery, and the condition was not annexed to his title but to the feoffment; and yet if such feoffment were before issue, one (*a*) book makes a *q.* of it; but it seems clear in this case he shall not, because upon his re-entry for the condition broken, he is not in of an estate in right of his wife, but of the tortious estate gained upon the discontinuance of his wife's right.

Bro. tit. Cur-
tesy, (1.)

A woman, tenant in tail general, marries; she and her husband levy a fine, and take back an estate to them and the heirs of their two bodies, and have issue, the husband dies, she marries another, and hath issue and dies, and the husband claims to be tenant by the curtesy, upon pretence, that by the estate taken back upon the fine his wife was remitted to her general tail, and so every issue inheritable, and he tenant by the curtesy; but *op-tima opinio*, that as his wife was estopped, so shall the second husband who claims by her.

Cro. Ja. 482.
Cro. Eliz. 128.

Baron and feme seised of lands in right of the feme (whereof the husband was entitled to be tenant by curtesy) levy a fine,

which was after reversed as to both, for the nonage of the feme, the husband shall have it again, as tenant by the curtesy, because the fine was utterly avoided.

[The husband leaving his wife, and living in adultery with another woman, does not forfeit his tenancy by the curtesy.]

If by articles previous to marriage a woman grants to her intended husband, during their joint lives, the interest of her money, and the rents of her estate, to maintain the house, &c. this does not abridge his legal rights, but he is entitled to curtesy both in such real estates as she had at the time of the marriage, and in what came afterwards.]

|| A tenant in tail, with power to lease, remainder to *B.* the wife of *C.*, made leases exceeding his power. By will he devised some benefits to *B.*, but *B.* elected to take her estate tail in opposition to the will. After her death *C.* claimed as tenant by the curtesy, though he also derived and had accepted benefits under the will; and he brought ejectments against the lessees, some of whom had laid out large sums. It was holden, that the lessees could not raise an equity against *C.* taking under *B.*'s election of her estate tail, the tenancy by the curtesy being an emanation of her estate, and that estate, by her election remaining entire, must take place with all its legal effects.||

Charnock and Worsley, adjudged.

3 P. Wms. 269, 276, 277.

Steadman v. Pallings, 3 Atk. 423.

Earl of Darlington or Lady Cavan v. Pulteney, 2 Ves. Jun. 544. 3 Ves. 384.

CUSTOMS.

- (A) Of the Commencement and Length of Time necessary to establish a Custom.
- (B) What Persons are affected with, or bound by a Custom.
- (C) Of such Customs as are against the Rules of the Common Law, yet, not being unreasonable in themselves, are good, and, from the Convenience of them, bind in particular Places.
- (D) Where, from the Benefits accruing from them, they shall bind.
- (E) Where, from the Certainty or Uncertainty of them, they shall be deemed good, or void.
- (F) How to be construed; and to what Things a Custom shall be said to extend.
- (G) Custom, how destroyed.
- (H) Of the Manner of alleging and pleading a Custom.

(A) Of the Commencement and length of Time necessary to establish a Custom.

Co. Lit. 110. b. Dav. 32.

(a) That all laws bind by the assent of the people, and such assent may be expressed as

THE frequent repetition of an act, which at first was (a) assented to by the people of a certain place (b) for their mutual conveniency and advantage, is called a custom, and every such custom, being certain and reasonable in itself, and commencing time immemorial, and always continuing without interruption, has obtained the force of a law, and in such places shall prevail, though (c) contrary to the general laws of the kingdom.

well by facts as by writing or word. 44 E. 3. 19. Dav. 32. (b) The difference between custom and prescription is, that custom is local, as prevailing in a certain province, county, hundred, &c. but prescription is for the most part personal, being made in the name of a certain person and his ancestors, or those whose estate he has, or of a body politick, and their predecessors. Co. Lit. 113. b. 6 Co. 60. 8 Co. 62. & vide 2 Bulst. 206. Roll. Rep. 46. [But a prescription may be laid by way of custom, where the necessity of the case requires it; as, in case a copyholder claims a right of common out of the manor, he must lay a prescription in the lord; but where he claims common in the waste of the lord, as he hath strictly no inheritance in the land, but is only tenant at will, and as a prescription must always be laid by way of a *que estate*, which he cannot allege, not being tenant in fee, for in strictness the fee-simple is in the lord; therefore, the law allows him to allege it as a custom in the occupiers of such an estate. 6 Co. 60. b. Ca. temp. Hardw. 293. So, where a man claims only a discharge in his own soil, or a mere easement in the soil of another, he may lay it by way of custom. *Ibid.* || Grinstead v. Marlowe, 4 T. Rep. 717. Hardy v. Hollyday, E. 5. G. 3. C. B. there cited.] So matters of personal privilege or exemption may be laid generally to express the nature and extent of such privileges; either as having respect to place, as, all the citizens of London, Hob. 86. or to condition, as all serjeants at law, all attorneys, &c. 1 Ventr. 386. — Another difference to be remarked between custom and prescription, is, that the latter must always have a legal origin; it must be of such things as may be created by grant, reservation, or deed: whereas it is not always necessary that the cause or consideration on which the former is founded should appear. 6 Co. 60. b. 1 Ventr. 387. Cowp. 47. Dougl. 126. Hence, the corporation of London having a customary duty on corn imported, it was holden to be a good custom, that factors free of the corporation shall receive to their own use that part of the duty which arises from corn consigned to them as factors; though neither the commencement nor consideration of such custom could be traced. Cocksedge v. Fanshawe, B. R. Dougl. 119. affirmed in the exchequer-chamber, and afterwards in the house of lords. Printed cases of the lords, 15th June 1783.] (c) *Consuetudo ex certa causa rationabili usitata privat. communem legem.* Lit. § 37. — [But no man can allege a custom or prescription against an act of parliament; as, that every pound of butter sold in a particular market shall weigh eighteen ounces. Noble v. Durell, 3 T. Rep. 271. However, a man may prescribe against an act of parliament, when his prescription or custom is saved or preserved by another act of parliament. Co. Lit. 115. a. And Lord Coke makes a difference between acts in the negative and in the affirmative: for a statute made in the affirmative without any negative expressed or implied, doth not take away the common law. 2 Inst. 200. And he observes a difference likewise between statutes that are in the negative; for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as well as he may against the common law. Co. Lit. 115. a. See Mr. Hargrave's annotations on this part of Lord Coke's commentary. See also 2 Mod. 39.]

Co. Lit. 110. b. (d) The continuance of an usage from the

Time and usage are essential parts of a custom, and therefore no custom is (d) allowable but such as hath been used by title of prescription, viz. time out of mind.

reign of R. 1. which is the time of limitation in a writ of right, is said to be a good title of prescription. Co. Lit. 113. That laying a custom for forty years is naught, though it was said that it might have been for more years, and so time out of mind. Skin. 108. — That customs may be time out of mind, though not coeval. Salk. 203.

46 E. 3. 16.
Bro. Estray.
5 Co. 109.

Hence it is, that though a lord of a manor may have waifs and strays by prescription, yet he cannot have the *bona felonum* & fugi-

& *fugitivorum* without grant from the king, because no man can prescribe for them; for every prescription must be immemorial, and the goods of felons and fugitives cannot be forfeited without record (a), which presupposes the memory of that continuance.

Co. Lit. 114.
(a) [This doctrine is controverted by a late writer.

2 Wooddes. 51.]

(B) What Persons are affected with, or bound by a Custom.

THE king only, by his prerogative, can make a corporation, conservator of the peace, &c., therefore in these, or in other things which (b) highly touch the king's prerogative, no title can be gained by custom or prescription, as consuance of pleas, to have a sanctuary, to make a corporation, coroner, conservators of the peace, &c.

Co. Lit. 114.
Roll. Abr. 566.

(b) A custom that exalts itself above the king's prerogative is void. Dav. 33. [The objection to a custom, that it interfered with the king's prerogative, was grounded on the maxim "*nullum tempus occurrit regi*," and as that maxim is now abrogated by st. 9 G. 3. c. 16. the objection seemeth to be at an end.]

But treasure trove, waifs, estrays, wreck, to hold pleas, courts-leet, hundreds, infangthef, outfangthef, a park, warren, royal fish, fairs, markets, frankfoldage, keeping of a gaol, toll, &c., may be claimed by prescription, without any matter of record; and a county palatine may be claimed by prescription, and, by reason thereof, *bona felonum*, &c. Also, a corporation may be by prescription.

Co. Lit. 114. b.

Also, customs that bind private persons do not extend to the king; therefore, if lands in gavelkind descend to the king and his brother, the king shall take one moiety, and his brother the other; but, if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure coronæ*; therefore it shall attend the crown, and, consequently, go to the eldest son.

Plow. 205. a.
Co. Lit. 15. b.
Raym. 77.
Sid. 138.

So, the custom of *London*, as to retaining goods mortgaged till satisfaction be made of the money lent on them, extends not to the king's jewels.

35 H. 6. 26.
Dav. 33. b.
Roll Abr. 566.
2 And. 152.

So, if a man hath toll, or wreck, or strays, by prescription, this extends not to the king's goods.

Dav. 33. b.

A custom may extend to and give an (c) infant a power of doing that which by the rules of the common law he could not do; as, an infant at the age of fifteen may make a (d) feoffment of lands of the nature of (e) gavelkind. But this, like all other customs, is to be construed strictly, and in such manner as that no prejudice may accrue to the infant thereby; and therefore such feoffment must be for (f) valuable consideration; must be made in (g) person, and not by attorney; cannot be with (h) warranty; must be of lands which (i) descended to him in gavelkind, and not of lands by purchase; and must be of lands in (k) possession, not in remainder or reversion.

(c) Dr. & Stud. 21. 5 H. 7. 41.
Fitz. Custom. 9. 9 Co. 76. a.
(d) By the custom of a town an infant may bind himself apprentice. 9 H. 6. 7. 8.
Bro. Custom. 63. (e) Lamb. 624. (f) And. 193. Lamb. 625. (g) Lamb. 628. (h) Roll. Abr. 568. (i) Bendl. 33. pl. 52. Lamb. 627. (k) Bendl. 33.

625. (g) Lamb. 628. (h) Roll. Abr. 568. (i) Bendl. 33. pl. 52. Lamb. 627.

Moor, 123. It is a good custom in a copyhold manor, that a feme covert, Godb. 14. 143. with or without the consent of her husband, may devise (a) her 3 Leon. 81. copyhold land to her husband, or whom she pleases. 83. 2 Brownl. 218. [Vide *supra*, Vol. i. 726.] (a) But of such a custom as to freehold lands, Q. & vide 4 Co. 61. b. And. 152. Roll. Abr. 563. pl. 6.

(C) Of such Customs as are against the Rules of the Common Law, yet, not being unreasonable in themselves, are good, and, from the Convenience of them, bind in particular Places.

Dav. 32. b. **E**VERY custom ought to appear to have had a reasonable commencement, and that at first it was voluntarily agreed to, for the better promoting of trade and commerce, the suppression of fraud, the greater security of men in their estates and possessions, &c., and in such cases, though the custom be contrary to the common law, or against the interest of a particular person, yet it shall be good. Commons, chusing constables, church-wardens, &c. the several heads.

21 E. 4. 28. As, a custom, that a man, in ploughing his own ground, may Bro. Custom, turn the plough on the ground of his neighbour; for this is for 51. Roll. Abr. the general good, being in favour of husbandry and tillage, 560. Dav. 32. although a particular person receive prejudice thereby. b. S. C.

5 Co. 84. So, a custom to dry nets upon the land of another; for this is in favour of fishing and navigation.

Dav. 32. b. So, a custom to build bulwarks on the lands of another for the Dyer, 60. b. safety of the kingdom, is good.

Dav. 32. b. So is a custom to pull down the house of another, to prevent the spreading of fire.

Wigglesworth v. Dallison, [It is a good custom, that tenants, whether by parol, or deed, Dougl. 201. (b) shall have the away-going crop after the expiration of their term; for it is for the benefit and encouragement of agriculture. (b) For the custom in such case does not alter or contradict the agreement in the deed: it only superadds a right which is consequential to the taking. *Ibid.* In Doe v. Snowden, 2 Bl. Rep. 1225. it is said by the court, that if there is a taking from old Lady-day (5th April), the custom of most countries would entitle the lessee to enter upon the arable at Candlemas (2d Feb.), to prepare for the Lent corn, *without any special words for that purpose* in the lease.

Lewis v. Harris, Cor. Skynner, C. B. Hereford, So, a custom that the tenant may leave his away-going crop in the barns, &c., of the farm for a certain time after the expiration of the lease, and his quitting the estate, is good. Summer Assizes 1778. Beavan v. Delehay, 1 H. Bl. 5.

Eastcourt v. Weekes, 1 Lutw. 799. A custom, that the executors and administrators of every customary tenant for life, if he should die between *Christmas* and *Lady-day*, shall hold over till the *Michaelmas* following, seemeth to be good.]

Mod. 202. It is a good custom in a manor, that the homage have used Vangton and Atwood, yearly to chuse two surveyors, to take care that corrupt victuals are not sold within the manor, and to destroy such as they find exposed

exposed to sale there; for the preservation of men's health is designed thereby, and it is at the peril of the surveyors if they destroy any meat that is not so. 2 Mod. 56. S.C.

A custom in *Ipswich* to chuse yearly two burgesses, who used yearly to make a feast, and to fine those who, being elected, refused to make a feast, and to imprison them till paid, was allowed a good custom, upon an *habeas corpus*, and the prisoner remanded. Cro. Ja. 555. Wallis's case.

It is a good custom, that every man of the town that hath an house next adjoining, and abutting to the high street, may sell all merchandizes in his shop within the said house in the time of the market, which is held in the high street. Roll. Ab. 560. But vide 8 Co. 127.

A custom in *Exeter*, that every woman taken in adultery shall be (a) whipped, is good. 8 Co. 126. [No mention is made of such custom in the book referred to.] (a) That a skimington, or riding, where a woman cuckolds her husband, is a custom against law, vide 3 Keb. 578. Raym. 401.

A custom, that a feoffment by tenant in tail with warranty shall not be a discontinuance, is good; although this is against the (b) rule and maxim of the common law. 30 Ass. pl. 47. (b) So, that a woman shall not have dower where she has received, during the coverture, part of the money for the sale of the land. Bro. Customs, 53. — So, that a widow, who marries, shall not have dower. Roll. Abr. 562. — But a custom that the wife of a tenant in fee shall not have dower, is void. Dav. 46. b. — So, that the wives of *Irish* lords shall, during coverture, have the sole property of certain goods, to dispose of them without the assent of the husband. Dav. 50. b. Roll. Abr. 563.

¶ A custom in a manor, that the grantee of a customary estate (which will pass either by surrender, or deed and admittance) must be admitted during the life of the grantor, is good. Fenn v. Marriott, Willes's Rep. 430.

But every custom which appears to have been unreasonable in (c) itself, as being against the good of the commonwealth, or injurious to a multitude, though beneficial to a particular person; or to owe its commencement to the arbitrary will and oppression of a powerful lord (d), and not to the voluntary agreement of the parties, is void; nor can any continuance of such a custom give it a sanction, or make that good which was void in its creation. Dav. 32. b. 6 Mod. 124. Salk. 203. (c) That a custom against the law of reason, is void, vide Moor, 588. Bridg. 11, 12. 1 Leon.

217. 314. 3 Leon. 41. (d) [Upon this principle, a custom for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals upon the land near such pits, such land being customary tenement, and parcel of the manor, there to continue, and to lay and continue wood there, for the necessary use of the pits, and to take coals so laid away in carts, and to burn and make into cinders coals laid there, at their pleasure, was adjudged to be void. It was also adjudged void for uncertainty, the word *near* being too vague and loose to support such a claim. Broadbent v. Wilkes, Willes's Rep. 360. affirmed in B. R. 1 Wils. 63. 2 Str. 1224.]

A custom within a parish, that all lambs fallen and bred upon one tenement in the same parish, though belonging to several owners, shall be reckoned together, as if but one man's; and the tenth, so counted together, paid for tithes, is void and unreasonable; for by this means it might happen that a man might have but one lamb, and that should be taken for tithe; and he that had more should pay nothing. Hob. 329. Barker and Cocker, adjudged.

Owen v. Stainoe, Skin. 45. 2 Jon. 199. S. C. A custom to elect a supernumerary before any vacancy, to be admitted upon the death of the next prebendary, is ridiculous and void.

Richards v. Dovey, Willes's Rep. 622. || A custom, that every man inhabiting within the parish of *A.* who marries by licence in another parish, shall pay 5*s.* to the rector of *A.* for and in regard of the said marriage, as if it had been solemnized in *A.* is bad.

Naylor v. Scott, 2 Ld. Raym. 1558. A custom, that a person shall pay the churching fee, though the ceremony be not performed, is bad.

Fuller v. Say, Willes's Rep. 629. But a custom, that every inhabitant of a parish of the age of 16, (of whatever religious sect,) shall pay 4*d.* yearly as an *Easter* offering, is good. ||

Roll. Abr. 560. Dav. 32. A custom that no commoner shall put his cattle into the land before the lord, is void; for a custom that leaves it to the arbitrary will of the lord, whether the tenant should ever enjoy any benefit by the common or not, can never be presumed to have had a reasonable commencement.

Lit. § 46. Dav. 33. a. So, a custom that the lord of the manor shall detain a distress taken upon the demesnes till a fine at his will is paid for the damage, is void.

Lit. § 209. (a) But that every tenant (though his person be free) daughter to whom he pleases. A custom, that every tenant of a manor that marries his daughter without the licence of the lord, shall pay a fine, is against reason, and void; for every (a) freeman may marry his daughter to whom he pleases. that holds in bondage, the freehold being in the lord, shall pay such fine, is good. Co. Lit. 140. a.

Co. Lit. 59. b. But for this vide tit. Copyhold. If the lord of a copyhold by custom claims to have a fine of the copyholder, upon every alteration of the lord, be it by alienation or otherwise, this is a void custom as to the alteration or change of the lord, by the act of the lord himself; for by such means the copyholders might be oppressed by the multitude of fines by the act of the lord.

Palm. 211. White and Sayer, adjudged. A custom, that the lord shall have common in all the lands of his tenants for life or years lying fresh, is void; for it is against law that the lessor shall have common against his own lease, because it is part of the thing demised. *Aliter*, of an heriot, which is collateral.

Roll. Abr. 561. 2 And. 153. (b) So, where the custom is not good. A custom that the lord may take for his heriot (b) the beast of a (c) stranger, levant and couchant upon the land of the tenant,

was laid, that if the tenant hath none, or the best beast is esloigned, the lord has used to take the best beast levant and couchant upon the land. Moor, 16. N. Bendl. 112. adjudged.— But that the cattle of a stranger may be distrained for an heriot, but not seised, vide N. Bendl. 302. pl. 294. Dals. 61. Ow. 146. March, 165. (c) A custom that the lord shall have the best beast of every person dying within his manor, which is found there, is naught; for between the lord and a stranger it could have no lawful commencement, though between the lord and his tenants it may be good. Cro. Eliz. 725. adjudged. Roll. Abr. 266.

43 E. 3. 32. 2 Inst. 56. (d) But, if this A custom, in a town, for a lord to enter into the (d) lands of his tenant till an agreement made for the arrears, when the tenant

tenant ceases for two years, is not good; for it is an ill usage to oust a man of his inheritance without action or answer.

towns it had been good. 43 E. 3. 32. Roll. Abr. 559.

A custom that the lord of the manor shall have 3*l.* for every pound-breach, of every stranger, is not good; (a) but it is good against the tenants of the manor.

Roll. Abr. 561. Dav. 33.

(a) So, of a custom, that

if a manor makes a rescous, or drives his cattle off the land when the lord comes to distrain, that he shall be amerced by the homage, &c. Godb. 135.

[A custom, that the inhabitants of a manor shall grind all their corn, grain, and malt, which by them, or any of them, shall be used or spent ground within the manor — at certain mills, is good. But if it were, that they should grind — all their grain whatsoever by them spent or sold — at certain mills, it would be void.

Cort v. Birkbeck, Dougl. 218. || Higges v. Gardener, 1 R. Abr. 559. pl. 4. S. P. 2 Bulstr. 195. S. C. Drake

v. Wiglesworth, Willes's Rep. 654. S. P. Harbin v. Grene, Moor, 887. S. P. Hob. 189. S. C. ||

A custom in a parish, that every parishioner shall bury his relations in the church-yard as near as possible to their ancestors, is bad.]

Fryer v. Johnson, 2 Wils. 28.

As to particular customs relating to the proceedings in inferior courts, such as have prevailed time out of mind, and are in furtherance of justice, seem to be good; but such as are in delay of justice, and tend to oppression and injustice, and are against the general rules of law and reason, have always been held void.

Roll. Abr. 564. Cro. Eliz. 185.

Hence it is, that a custom in an inferior court, that when any man comes to the grand distress in any plea, and it is returned that he is distrained by his goods, & *quod nihil habet ulterius per quod distringi potest*, that his goods shall be delivered to the plaintiff, finding security, that if the suit passes for the defendant, that he shall have again his goods; and that if it passes for the plaintiff, that he shall have them, has been held good.

Roll. Abr. 564. in Maidstone, in Kent.

So, a custom in the county palatine of *Chester*, that if judgment be given in a base court there, and thereupon a writ of error be brought before the chief justice there, and he reverse the first judgment, costs shall be given to him at whose suit it is reversed, is good.

Roll. Abr. 564.

So, it is a good custom in an inferior court, that in an action of debt, if the defendant does not deny the debt, but *petit quod inquiretur de vero debito secundum consuetudinem*, that a jury may be returned that shall try it, and if they find it to be a true debt, that the plaintiff shall have judgment thereupon.

Roll. Abr. 564. Cro. Eliz. 894. Roll. Rep. 193. Mod. 96. S. P. adjudged and said by

Hole, Ch. Just. that this cause prevented a suit in chancery.

But a custom in an inferior court, upon a judgment in the same precept, in the nature of a *capias ad satisfaciendum*, to give a warrant to the bailiff to take the principal in execution, if he may be found, and in his default to take the bail, is not good; for

Roll. Abr. 563.

(a) For this reason a custom in an inferior court, which is not within the statute of 32 H. 8. to grant a *tales de circumstantibus*, is void. Roll. Abr. 463. 564.—So, to award a *capias* in debt before any summons. Roll. Abr. 563. 780. (b) That the custom of *London* to take the bail without a *scire facias*, is void. Cro. Car. 561. Palm. 567. Cro. Eliz. 185. 2 Leon. 29.

Roll. Abr. A custom in an inferior court to try issues by six jurors, is not 564. Tredin- good, though many courts have used it, and many judgments wick and Pery- depend thereupon. man, adjudged,

ia a writ of error upon a judgment in *Bodmyn* in *Cornwall*. Cro. Car. 259. S. C. adjudged; and said by *Jones*, that although in some parts of *Wales* there be such trials by six only, it is by reason of the statute of 34 & 35 H. 8. c. 26. which appoints, that trials may be by six only, where the custom hath been so. 1 Sid. 233. S. P. *per Cur.*

9 H. 6. 44. b. A custom in a leet, that if the petit jury make any (c) false presentment, and it is found false by the grand inquest, that the petit jury shall be amerced, is void; for this is against common right and extortion. (c) But a custom that, if they conceal any thing that ought to be presented, they shall be amerced, is good. 9 H. 6. 44. Roll. Abr. 560.

Roll. Abr. If there be a custom in an inferior court, that if a man brings 564. Burges an action against another there, and the defendant appears and pleads to issue, and, at the day of trial, the defendant, being and Spark, solemnly called, does not appear, nor find pledges *qui eum manucapere voluerint*, to have his body from court to court, at every court there after to be held, till the plea be determined, as he reversed accord- ought by the custom, but in contempt of the court *recessit & defultam fecit*; and judgment is thereupon given; yet this is not a good custom, but utterly unreasonable; but they ought according to law to take the inquest by default; for if he had appeared and staid in prison without finding pledges, yet they ought not to have given judgment against him if he would have pleaded to issue.

Moor, 603. It is no good custom in *Sandwich*, that, if the goods of a free- pl. 834. Para- man of *Sandwich* come into the hands of a freeman of *London*, mour and Ve- the mayor of *Sandwich* shall write to the mayor and aldermen of ral, 2 And. *London*, to call the party before them, and take order for the 151. S. C. & restitution; and if they refuse, or return no answer to the mayor vide Moor, and jurats, the mayor of *Sandwich* shall write *alias & pluries*, and 588. Palm. 56. after give judgment of *Withernam* against the mayor and com- 2 Inst. 204. monalty of *London*; which shall be signified to the mayor of *London*: and if he make not restitution in fifteen days, then those of *Sandwich* may retain the body of any *Londoner* that comes there, till restitution. Sid. 355.

Cro. Ja. 357. A custom in an inferior court, to give a day to one that hath adjudged. (d) made default, is void and against law. (d) So, a custom to give judgment in a personal action upon four defaults before appearance, is void. Style, 124.

(D) Where from the Benefits accruing from them they shall bind.

WHEREVER the party bound by a custom has some benefit by it, or the party, who claims the advantage of it, is at some charge thereby, the custom is good.

Hence it is, that a custom, that the parson of the parish should find a bull and a boar for the use of the parish, and in consideration thereof should have the tenth of the increase, has been held good.

So, a custom, that whereas *J. S.* is seised in fee of the manor of *T.*, and all the tenements in the said town are held of the said manor, that he and all those, &c., have had, time out of mind, &c., a bakehouse, parcel of the said manor, maintained at their charge, and that this bakehouse was sufficient to bake bread for all the inhabitants, and for all passengers through the said town; and the bread there baked had used, &c., to be sold at reasonable prices, and that no other person within the said town had used to bake any bread to sell to any person; this is a good (*a*) custom, though it restrains other men to exercise their trades within a certain place, for this might have a reasonable beginning to bind his own tenants, as it only does.

in *Winchester*, that none shall exercise a trade there who is not free of the city, or brought up apprentice there; *Q.* if good. *Salk.* 203. & *vide* 8 Co. *Wagonner's case*. * It may be good if founded on some consideration. *Vide* *Mod.* 342. *Sty.* 111. 2 *Lev.* 210. 3 *Lev.* 241. — A custom, which restrains trade *sub modo*, may be good: and therefore the custom of foreign bought and foreign sold, whereby a man not free of a city, &c. will be restrained from buying or selling goods to other foreigners within such city, &c. is good. *Dy.* 279. b. *R. Jon.* 162. *Adm.* 2 *Roll. Abr.* 202. c. 45. — A custom, that none shall use a trade there, unless he be free of the guild *R.* in *London*, 8 Co. 125. *Dub.* Whether good in another city. 1 *Salk.* 204. *Mod. Ca.* 21. — [In the case of the city of *Oxford*, it was ruled, upon the authority of *Wagonner's case*, 8 Co. 25. b. that a custom in that city, by which every person not being a freeman of the city, who exposes goods to sale in the city, except in fairs or markets, is liable to a penalty, is good, notwithstanding there were no exception of victuals; and that a custom to distrain for the penalty was also good. *Moir v. Munday*, *Say. Rep.* 181.] — A by-law, that no one shall use a trade in a borough, not free there, where the by-law is founded upon a custom to such intent, though the custom be not confirmed by parliament, is good. *Adm. Lot.* 564. *Adm. Godb.* 254. 8 Co. 125. a. Now every day's experience warrants this doctrine.*

A custom, that every inhabitant of an ancient messuage held of the bishop in the city of *S.*, have ground at the bishop's mill all their grain spent in their houses, and that the bishops, in consideration thereof, have time out of mind kept servants to grind and carry, &c. is good, because mutual considerations and mutual actions will lie.

559. 2 *Bulst.* 195, 196. *Hard.* 67. *Lev.* 15. *Vent.* 168. 2 *Saund.* 117. 2 *Lev.* 27. *Carth.* 193.

A custom, that the corporation of *Litchfield* have had a market there time out of mind, &c., and that the corporation ought to repair the way to it, and to appoint a bellman, who ought to sweep the market-place, and in recompence thereof, the said bellman,

6 *Mod.* 124.

Cro. Eliz. 569.
Moor. 355.
Roll. Abr.
559. *S.C.*

Cro. Eliz. 203.
Sir George
Farmer and
Brook, ad-
judged. *Leon.*
143. *S.C.* de-
bated. *Owen,*
67. *S.C.* ad-
judged. *cont.*
8 Co. 125.
3 *Bulst.* 61.
2 *Bulst.* 195.
Roll. Abr. 559.
S.C. cited.

(a) A custom

or brought
up
apprentice
there; *Q.*
if good. *Salk.*
203. & *vide*
8 Co. *Wagonner's case*. * It may be good
if founded on
some considera-
tion. *Vide*
Mod. 342. *Sty.*
111. 2 *Lev.*
210. 3 *Lev.*
241. — A
custom, which
restrains trade
sub modo, may
be good: and
therefore the
custom of foreign
bought and foreign
sold, whereby
a man not free
of a city, &c.
will be restrained
from buying or
selling goods to
other foreigners
within such city,
&c. is good. *Dy.*
279. b. *R. Jon.*
162. *Adm.* 2
Roll. Abr. 202.
c. 45. — A
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8 Co. 125. *Dub.*
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Mod. Ca. 21.
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being a freeman
of the city, who
exposes goods to
sale in the city,
except in fairs or
markets, is liable
to a penalty, is
good, notwith-
standing there
were no excep-
tion of victuals;
and that a cus-
tom to distrain
for the penalty
was also good.
Moir v. Munday,
Say. Rep. 181.]
— A by-law,
that no one shall
use a trade in a
borough, not free
there, where the
by-law is found-
ed upon a cus-
tom to such in-
tent, though the
custom be not
confirmed by
parliament, is
good. *Adm.*
Lot. 564. *Adm.*
Godb. 254. 8
Co. 125. a. Now
every day's ex-
perience warrants
this doctrine.*

Roll. Abr.
561. But for
this *vide* *F. N.*
B. 271. *Reg.*
153. *Hob.* 189.
Moor. 887.
Style. 421.
Roll. Abr.

Roll. Abr.
561. *Hill and*
Hawks. Moor,
835. *S.C.* ad-
judged, and

that the custom was good, though the corn was not sold, but brought in to be sold.

2 Bulst. 201.

206. Roll. Rep. 1, 2. 44. 46. S. C. adjudged.

bellman, time out of mind, &c., from those that brought their grain to the said market, and untied their sacks there to sell it, had used to take a pint of grain if it was but one bushel or under, but if it was above a bushel, then a quart, to the use of the said corporation; this is a good custom, for the men that are charged by it have a reasonable benefit thereby.

Vent. 71.

Mod. 47. Haspart and Wills, S.C. that there would have been some reason for it, if it had appeared that they cleansed the river. Sid. 454.

It is no good custom, that the city of *Norwich* hath time out of mind maintained a quay for unlading goods brought up the river to the city, and that every vessel passing through the river by the quay hath paid a certain sum; for the vessels that unlade not at the quay or other place in the city, have no benefit from the maintenance of the quay.

2 Lev. 96, 97.

Prideaux and Warn, Raym. 232. Mod. 104. S.C. adjudged.

If a lord of a manor, which extends itself upon the banks of part of a river only, hath time out of mind maintained a quay for the lading and unlading of goods, and there kept a bushel within the manor for the measuring of salt and other merchandizes; he cannot prescribe *ratione inde* for a bushel of salt of every ship sailing in the river; for the repairing of the quay and keeping a bushel within the manor cannot warrant the taking of toll out of the manor, for goods not brought to the quay within the manor, though brought to another place upon the same river.

3 Lev. 37.

It is a good custom, that the mayor and commonalty of *London* have had of every master of a ship 8d. per tun, in the name of weighage, for every tun of cheese brought from any place in *England* to the port of *London*; for the liberty of bringing it into the port, which is a place of safety, is a sufficient consideration; and the mayor and commonalty have the view and correction of the river *Thames*.

3 Lev. 424.

[Crisp v. Bellwood, Colton v. Smith, Cowp. 47. S. P.]

(a) For this vide 2 Roll.

Abr. 522.

Cited by Holt,

C. J. 1 Ld.

Raym. 386.

The lord of a manor may prescribe to keep and repair a wharf within the manor, & *ratione inde* to have toll of all goods landed within the manor, though not upon the wharf; for the landing upon the soil is an easement; and all the lands in the manor were the lord's originally, and this is in nature of a (a) toll traverse.

[The corporation of *Malden* in *Essex* prescribed in a *que estate* "that they and all those, &c., time whereof, &c., had used to "repair the port, in consideration whereof, they had used time "whereof, &c., to receive for all lands sold within the precinct "of the borough, a certain rate of 10d. in the pound out of the "purchase money:" it was adjudged a good custom; and this is what they call *land-cheap*; for the land-holder reaps a benefit by the trade coming to the town, by reason of the port.]

3 Lev. 307.

Simpson and

It is a good custom within a manor adjoining to the sea, that in case of any shipwreck of any ship cast upon the manor *inter*

fluxum & refluxum maris, the lord shall take care of the sick and wounded, and burial of the dead, and keep the goods there cast for the use of the proprietors; and in consideration thereof, shall have the best anchor and cable of the ship; for though charity obliges the lord so to do, yet it is not unreasonable that he should have a recompence of his charity and charge:—
But Q.

For where in trover the jury found a special verdict, that within the manor of *Beeching in Sussex*, adjoining upon the sea, there was this custom, that if any ship navigating and floating upon the sea should happen to strike upon the land, parcel of or within the manor, and should there happen to perish; or, if a ship so striking should happen to get off, that in both cases the lord of the said manor used to have the best anchor and cable belonging to the said ship; and the custom was held unreasonable in both cases; for there is no consideration to ground such a custom upon; for if there be a trespass upon the lord's soil, it is involuntary, and by the act of God, where it is by stress of weather; and therefore not to be punished as a voluntary trespass; as, if the house of my tenant for years be burnt with lightning, I shall never have an action of waste against him, for it is the act of God, which does no man an injury. Besides, it is very unreasonable for so (a) small a damage done to the lord, as striking upon his soil, that he should have so great a satisfaction as the best cable and anchor. *

Bithwood,
adjudged.

Hil. 34 Car.
Bear and
Ballingsham,
3 Lev. 85. S.C.
(a) That a
custom al-
leged by a lord,
that whoever
broke his
pound should
pay him 3*l*.
is a void cus-
tom as to
strangers; for
this, among
other reasons;
because there
is no propor-
tion betwixt
the damage
and the re-
compence.

21 H. 7. 40.—But a custom alleged in *Bucks*, that if any swan cometh upon the land of any man adjoining upon the *Thames*, or upon any water running into the *Thames*, and there lays and hatches cignets, that the owner of the land shall have one, was held a good custom; and yet the damage which the owner of the land sustains is but very small. 2 R. 3. 15, 16. 7 Co. in the case of swans. — * This case is very different from the preceding.

11 H. 7. 13, 14.
the land of any
man, and there lays
and hatches cignets;
and yet the damage
which the owner of
the land sustains is
but very small. 2 R.
3. 15, 16. 7 Co.
Carth. 357.
Vinkinstou
v. Ebden,
adjudged.
5 Mod. 359.
Salk. 248. S.C.
1 Ld. Raym.
384. S.C.
12 Mod. 216.
S.C.

By special verdict it was found, that by a custom in *Newcastle*, time out of mind, &c., a toll of five pence for every chaldron of coals there shipped off, was due to the corporation, in consideration of their charge in maintaining the port, which they were bound to do, and had done time out of mind; and that the custom was to distrain (for non-payment of this duty) any goods of the owner of such ships, which were distrainable by law; and it was held, that the charge of maintaining a port was a sufficient consideration, and that the finding that the corporation are bound to repair, &c. was sufficient, without finding that it was then in repair.

(E) *Where, from the Certainty or Incertainty of them, they shall be deemed good, or void.*

EVERY custom ought to be certain, or such as may be reduced to a certainty, for an uncertain thing cannot be supposed to have had a reasonable commencement; and the uncertainty of a custom destroys the supposition of its continuance and duration time out of mind.

Roll. Abr. 565.
Dav. 33. Skin.
249.

Hence

Dav. 33. a. Hence it is, that a custom that when an infant is of such an age that he can count twelve pence, or measure an ell of cloth, 4 Leon. 82. that he may make a scoffment, is void for the uncertainty.
Hob. 225. S.C. cited, and said, that such custom is not good, but that it ought to be at a certain age, that it may appear to be an age of discretion.

Roll. Abr. 565. So, a custom, that the tenant of the manor who first comes
Dav. 33. a. to such a place, &c., shall have all the windfalls there, is void for uncertainty.

Dav. 28. b. to So, of the custom of *tannistry* in *Ireland*, which was, that the
42. lands of that nature of which a man died seised, should descend *seniori & dignissimo viro sanguinis & cognominis* of him that died so seised; it was held void, both for the uncertainty of the person and the estate.

Fitzgib. 55. So, a custom alleged and found by verdict to pay ten pence to
2 Id. Raym. the vicar at the usual time of churching women, was held void for
158. uncertainty.

2 Stra. 1145. So, of a custom for 24 parishioners, &c. to make a rate, and a certain proportion to be levied on such an hamlet.

Selby v. Robinson, 2 T. [A custom for *poor and indigent householders* living in *A.* to
Rep. 758. cut and carry away rotten boughs and branches in a chase in *A.* is bad, the description of *poor householders* being too vague and uncertain.

Roe v. Lees, A custom, that "when a tenant took a farm, in which there
2 Bl. Rep. "was any open field, more or less, for an uncertain term, it
1171. "was considered as a holding from three years to three years," was holden to be void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of 100 acres of land inclosed.

Bennington But a prescription for so much money for setting up a stall in
v. Taylor, a fair, and for ground *near* the stall, is certain enough, for the
2 Lutw. 1517. quantity of ground near a stall may be determined by the usage
See Wilkes v. Broadbent, of the fair.
supra.

Sargent v. So, a prescription to take "three *Winchester* bushels of barley
Read, 2 Str. "out of and for every ship's cargo of barley brought upon a
1228. 1 Wils. "quay to be exported *in any ship*," is sufficiently certain, for
91. The pre- the word *cargo* is a mercantile term, and very intelligible when
scription in referred to a ship.]
Mr. Nolan's MSS. report
omits the words in italicks. See Nolan's edit. of Sir J. Strange's Reports.

Millechamp v. || A custom for all the inhabitants of a town for the time being
Johnson, to have and enjoy the liberty and privilege of playing at any
Wilkes's Rep. rural sports or games in a particular close every year, at all
205. note. times of the year, at their will and pleasure, was objected to,
1st, as too general and uncertain, in not specifying what rural sport or game: 2dly, as illegal and unreasonable, not being confined to reasonable or legal times of the year: and 3dly, because there could have been no consideration for it, and it could not have had a legal commencement. The court were of opinion that the custom, as extending to any rural sports, was too general

neral and uncertain: but they thought that there was not much weight in either of the other objections; for that "all times of the year" must be taken to mean, "legal and reasonable times of the year;" and that this did not take away all the profits of the land; and that it might have had a legal commencement.

But a custom for all the inhabitants of a parish "to play at all kinds of lawful games, sports, and pastimes in the plaintiff's close, at all reasonable times of the year, at their will and pleasure," was holden to be a good custom.

Fitch v. Raw-
ling, 2 H. Bl.
393.

A custom (a) for all the inhabitants of a town to dance at all times of the year, for their recreation, in the plaintiff's close, was holden to be good.

Abbot v.
Weekly, 1 Lev.
176. (a) It is
stated in the
it as a custom.

pleadings as a prescription, though the court in judgment speak of

A custom, that all the customary tenants of a manor *having gardens, parcels* of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, digged, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, *for the purpose of making and repairing grass-plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used, at all times of the year, as often and in such quantity as occasion hath required,* is bad in law, as being indefinite and uncertain, and also destructive of the common. And so is a similar custom for taking and applying such turf *for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences* of such customary tenements.||

Wilson v.
Willes, 7 East,
121.

(F) How to be construed; and to what Things a Custom shall be said to extend.

EVERY particular custom, that is derogatory from the common law, is to be construed strictly, because as far as the particular custom hath not derogated from the law, the general custom of the whole kingdom ought to prevail; and we are not to presume that the particular custom goes further than by notorious facts may appear.

Roll. Abr. 567,
568. 11 Mod.
160. *Vide tit.*
Gavelkind.

If the inhabitants upon a common have used, time out of mind, &c., to dig clay in the said common of their lord, for the reparation of their houses standing upon the said common, and a stranger digs clay in the common, the inhabitants cannot take this clay from him, for this is not (b) within their custom.

Roll. Abr. 567.
Cro. Eliz. 434.
Moor, 411.
S.C. adjudged.
(b) Where in-
habitants have
used to have

common to their houses, this extends not to a new house. Owen, 4.

If the custom of a manor be, that if any copyholder in fee surrenders out of court, and he to whose use it is surrendered does not come in at the court to take his copyhold, after three proclamations made, that then the lord may seize the copyhold as forfeited; and a copyholder in fee surrenders to the use of another

Roll. Abr. 568.
Cro. Eliz. 789.
Yelv. 1. Noy,
42. Raym. 404.

other for life, the remainder over in fee, and the tenant for life does not come into court to take his copyhold, after three proclamations made, according to custom, upon which the lord seizes the copyhold as forfeited, and after *cestui que use* for life, dies, he in the remainder shall not be bound by the not coming in of the lessee; for the custom being in destruction of an estate shall be taken strictly, and shall be intended of tenant in fee in possession, and not of him in remainder, as in this case.

Cro. Eliz. 803.
adjudged.

If there be a custom in *London*, that none ought to inter-middle with the art of a weaver there, but only those who are free of the guild; if a stranger receive silk in *London*, and carry it to *Hackney*, and weave it there, and then bring it back again to *London*, and receive his pay for it, this is not any inter-meddling in *London* against the custom, though the contract was made in *London*.

Style, 409.
debated, but
no resolution;
& vide Roll.
Abr. 609.

If there be a custom in the town of *Newcastle* that the owners of houses in fee-simple there may devise them by parol, but not tenants in tail, and a man be seised of an house there in tail, remainder to himself in fee-simple, he may devise the remainder; for the word *owner* is general, and comprehends all ownerships.

Raym. 58.
Baker and
Berisford.

If there be a custom within a manor, that the wife shall be endowed of the moiety of all such copyhold lands as her husband was seised of, and a copyholder die, and his wife be endowed of a moiety, and his son and heir having the other moiety die, the wife of the son shall be endowed of the moiety of this moiety; for this is directly within the custom.

Cro. Eliz. 783.
Roll. Abr. 569.

If there be a custom within a town to have 2*d.* for every hide of every sheep, cow, or ox, that is killed or sold within the said town, and for non-payment thereof to seize the hides, &c., the party that is to have the 2*d.* cannot by this custom justify the tanning the hides and converting them into leather.

Ld. Raym. 499.
12 Mod. 271.
5 Co. 82. See
2 Jon. 204.

*General customs may be extended to *new things*, which are *within the reason* of those customs.

11 Mod. 160.
Fitzgib. 243.

It is a general rule, that customs are *not to be enlarged beyond the usage*, because it is the usage and practice that makes the law in such cases, and not the reason of the thing.*

(G) Custom, how destroyed.

Co. Lit. 114. b.

A TITLE gained by prescription or custom cannot be lost by interruption of *possession* ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of a rent or common and the land charged therewith, of an estate equally high and perdurable in both.

Dals. 23. Sid.
138. Style,
476.

If Gavelkind lands are held in socage, and the tenure is after changed into knights service, yet the custom is not altered, for that goes with the land, and not with the tenure.

Raym. 59. 76.
77. Sid. 77.
135. Lev. 79.

Lands in *Kent* were disgavelled by 31 H. 8. c. 3. and a private act made 2 & 3 E. 6. enacted, that the lands of Sir *Henry Isles* amongst

amongst others, should be from thenceforth to all intents, constructions, and purposes, as lands at the common law, any custom to the contrary notwithstanding; and the question was, whether these lands lost by these statutes all their other qualities or customs belonging to Gavelkind, as well as their partibility; and it was resolved that they lose only their partibility.

2 Keb. 288.
Hard. 325.
Cotton and
Wiseman. Fo
the reasons
hereof, *vide*
tit. *Gavelkind*

If lands of the nature of Gavelkind, or Borough-English, escheat to the crown, and are enjoyed in several descents, and are afterwards granted out by the crown in knight's service, yet they descend in Gavelkind or Borough-English; for the law of those places cannot be controlled by the king's charter, or altered without an act of parliament.

¶ Where a rectory in *Kent*, which formerly belonged to one of the dissolved monasteries, had been granted by *Henry VIII.* to a layman to be holden in fee by knight's service *in capite*; it was determined that the lands were descendible according to the custom of Gavelkind, but the tithes according to the common law; the ancient custom not attaching upon the tithes, because incapable of descent till the time of the dissolution of the monasteries.

Doe v. Bishop
of *Landaff*.
2 N. R. 491.

Where a custom obtains that all the householders in a parish shall grind at a particular mill all their corn, which shall be used ground within the parish; an occupier of one of such houses is not discharged of this obligation by the accident of one of our kings having been formerly *seised in his demesne as of feu* of such house and of the mill at the same time. But *quære* whether the obligation would not have been extinguished if the king had *inhabited* the house.¶

Drake v.
Wiglesworth,
Willes's Rep.
654.

(H) *Of the Manner of alleging and pleading a Custom.*

A CUSTOM of devising lands, Borough-English or Gavelkind, may be alleged in a city, borough, or manor, but not in an upland town, that is neither city nor borough; but a custom to have a way to the church, and to make by-laws for the reparation of the church, and well ordering of the commons, and such like things, may be alleged in an upland town, that is neither city nor borough.

of custom, or by way of prescription, *vide* 6 Co. 60. Hob. 113. Cro. Eliz. 441. Poph. 201. Style, 477. Lev. 176. Vent. 386. 3 Lev. 160. Carth. 192. 4 Mod. 342. 2 Lutw. 1317. *Supra* (A.)

Co. Lit. 110. b.
Hargr. n. (2).
But as to the
manner of laying
a custom,
and the difference
between alleging
a thing by way
of custom, or by
way of prescription,
see *supra* (A.)

¶ A custom, being in derogation of common right, cannot be alleged generally within the whole kingdom, or for all persons, for then it would be the common law. Hence, a custom for all executors to be sued by action of debt in the Mayor's Court in *London*, was adjudged to be bad. So, of a custom for all persons for the time being, being in a particular parish, to play at all kinds of lawful games, sports, and pastimes in the close of A. at all seasonable times of the year, at their free will and pleasure.¶

Shersom v.
Bostock, Fitzg.
51. *Fitch v.*
Rawling, 2 H.
Bl. 393.

Sid. 237. Keb. 836.

* The former way would do in a declaration. The latter is proper in a plea, &c.

A custom for a way was laid *quod talis habetur consuetudo quod quilibet inhabitans haberet, &c.*, and the court held it naught, for it should be laid by way of fact triable, *viz. tempore cuius contrarium, &c., usi fuerunt habere.* *

Co. Lit. 175. b.

(a) But as to such customs as are no part thereof, but merely collateral, they must be shewn

The law takes notice of the (a) customs of Gavelkind and Borough-English, and therefore it is sufficient to allege generally that the lands are of the nature of Gavelkind, &c. But other private customs must be set forth in pleading, that the judges may be apprized of them, and where they obtain, and so give their decisions with a proper regard to them.

in pleading, as that the lands are devisable. Lev. 80. Raym. 77. Sid. 77. 138. Cro. Car. 562.—So, if a man would entitle himself to be tenant by the curtesy, without having issue, or a woman to have dower of a moiety, it ought to be shewn specially, that time out of mind, &c. Sid. 77. 2 Sid. 154.

Godb. 183.

2 Mod. 104.

But for this vide Roll. Abr.

One prescription or custom may be pleaded against another, where they are not inconsistent, but a prescription pleaded against another is not good without a traverse. (b)

558. 565. Yelv. 215. Bulst. 115. 8 Co. 127. Cro. Car. 432. Jones, 375. (b) [One custom may be pleaded to another without a traverse, where the latter is not inconsistent with, but only a qualification of the former. Kenchin v. Knight, cited 2 Wils. 101.] ¶ If the lord set up a custom to have the best live or dead chattel as a heriot, *quare* whether the tenant may not modify that custom by pleading another, that the homage shall assess a compensation in lieu of the heriot. Parkin v. Radcliffe, 1 Bos. & Pull. 282.¶

9 Co. 59.

If one prescribes to have a way over the land of B., to his freehold, B. cannot prescribe to stop it.

2 Ld. Raym.

869.

* A custom ought not to be laid in the negative.

2 Ld. Raym.

1134.

In an action brought upon a custom, it *should be shewn what the custom is*, otherwise it is not maintainable.*

CUSTOMS OF LONDON.

3 Co. 127.

THE ancient city of London being the metropolis and chief town for trade and commerce within the kingdom, it was necessary that it should have certain customs and privileges for its better government; which, though derogatory from the general law of the realm, yet, being for the benefit of the citizens, and for the advantage of those who trade to, and therefrom, have not only been allowed good by the judgments and resolutions in the superior courts, but (c) have also been confirmed by several acts of parliament.*

(c) *Magna*

Charta, c. 2.

7 Rich. 2. &c.

— On a *certiorari* to the mayor and aldermen to certify a custom, the recorder certifies *ore tenus*, and then, on motion, delivers in the *certiorari*, with a written copy of the return annexed;

hexed; the writ is filed, and the return recorded. *Plummer v. Bentham*, 1 Bur. 248.—If it is not surmised in the pleadings, that a custom ought to be tried thus, it shall be tried by the county. *Ibid.* [When a custom has been once certified by the recorder, the courts must take notice of it. They cannot have it certified over again. *Per* Lord Mansfield, Dougl. 380. However, if they are dissatisfied with a certificate, they may send it to be re-considered. 2 Ves. 592.] ||The city cannot return, that it does not appear to them whether there is such a custom or not; nor may they send their books for the inspection of the court, leaving it to the court to determine the custom from precedents and cases. *Mosel*. 7.|| [As the recorder certifies the return *ore tenus*, he is, of course, not bound to sign the copy of it. 3 P. Wm. 17. If the certificate be false, an action lies against the mayor and aldermen, and not against the recorder; for it is their certificate by the recorder. *Hob.* 87.]

As these customs are of various and different kinds, I shall consider them under the following division.

(A) *Of the Customs of London in general.*

(B) *Of the Custom of London in respect to Orphans.*

(C) *Of the Custom of London in respect to a Freeman's Estate: And herein,*

1. *What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.*
2. *Of the Children's Part, and herein of Survivorship, Advancement, and bringing into Hotchpot.*
3. *Of the Wife's Part, and what shall bar her thereof.*
4. *Of the Legatory, or dead Man's Share.*

(D) *Of the Custom of London, as it relates to Feme Coverts.*

(E) *As it relates to Masters and Apprentices.*

(F) *As it relates to Landlords and Tenants.*

(G) *Of the Customs of London which are in furtherance of Justice, and for the more speedy Recovery of Debts.*

(H) *Of the Custom of Foreign Attachment: And herein,*

1. *Of the Nature of the Debt or Duty which may be attached.*
2. *In whose Hands, and at what Time the Attachment may be made.*
3. *Of the Form of the Proceedings in a Foreign Attachment.*

(A) *Of the Customs of London in general.*

IF a freeman forestalls fish coming to a market within the city, and upon complaint to the court of aldermen, he appears there and confesses the fact, and they order that he shall desist,
P p 2
Vent. 115.
The City of
London and
Coates, ad-
judged,

(a) Custom to and he will not promise to obey, &c. they may (a) commit him commit for refusing to serve until he signifies to the court that he will conform; and this is a good custom.

on the livery good. 2 Lev. 200. Raym. 447. Mod. 10. 2 Keb. 555. 5 Mod. 156. 319. — [So, a custom to exhibit an information by the common serjeant for opprobrious words spoken of an alderman, and on conviction to fine and imprison, is good. 1 Vent. 327. 2 Lev. 200. 2 Salk. 425. 2 Ld. Raym. 777. 7 Mod. 28. But a custom to commit in such case in the first instance, is void. Cro. El. 689.] So, a custom to disfranchise for contemptuous words spoken of an alderman, is void. 2 Lev. 200. 2 Salk. 426. — To imprison for disturbing the election of a warden of a company, and for not promising not to disturb again. Style, 78. *dubitatur*. — To imprison until he takes the oath of an alderman of London, a good custom. March, 179.

Roll. Abr. 556. By the custom of London, a freeman or citizen might, even Several cases before the statute of wills, devise his lands and tenements, of to this purpose. Moor, at this time devise the same in mortmain, notwithstanding the 136. 8 Co. statute of mortmain, &c. 127. S. P.

7 H. 6. 32. b. By the custom of London, no attaint lies for a false verdict Roll. Abr. 557. given in London. S. C.

S. P. C. 180. A citizen of London, upon an appeal brought by him, shall Fitz. Coron. not be obliged to wage battle. 411.

Roll. Abr. 557. It is a good custom in London, that the mayor of London & vide Moor, may take recognizances of any persons, being of full age, or 871. Chamberlain and women unmarried, (b) (for he is a judge of record,) although the Thorp; but debt was contracted out of London. vide Cro. Eliz. 186. and Leon. 130. S. C. [where *Gawdy*, J. held the custom not good, because it extended as well to strangers as to citizens.] (b) And the courts above will take notice hereof. Leon. 284.

Roll. Abr. 557. It is a good custom in London, that they, time out of mind, (c) A custom have had the (c) measuring of coals *infra portum London*, which that all foreigners (d) extends from *Staines Bridge* to *London Bridge*, and from weigh at the thence to *Gravesend*, and from thence to *Yenland* and *Yendale*. city beam, good. Lev. 14, 15. — And a by-law founded on the custom of London, which directs that no freeman shall, under a certain penalty, sell his goods unless weighed at the city beam, is good. Salk. 352. 5 Mod. 156. 6 Mod. 123. 177. 1 Ld. Raym. 498. (d) For this vide 4 Inst. 250. Sid. 148.

Roll. Abr. 550. By the custom of London whores are to be carted, and therefore if a person calls a woman (e) whore (f) in London, an action (e) Note, that it hath been often adjudged of late, on the case lies in respect to the punishment they are subject to by the custom. But the party (g) cannot be proceeded against that calling one bastard, in the spiritual court for defamation; for that would be punishing him twice for the same offence.

or son of a whore, or calling the husband cuckold, was, by implication, calling the mother or wife a whore. (f) If laid in London, when spoken elsewhere, the defendant may plead the words were spoken at, &c., and traverse the speaking in London; and if the plea is refused, may have a prohibition. Lev. 116. — That the action must be brought in the courts in London. Carth. 75. (g) Whether in such a case a prohibition may be granted after sentence? Carth. 213. [It cannot, unless the want of jurisdiction appear on the face of the proceedings. *Blacquiere v. Hawkins*, Dougl. 378. In the case of *Argyle v. Hunt*, the court could not judicially take notice of the custom in London, for an action to lie for the word "whore;" probably,

bably, because it never had been certified by the recorder. And in *Stainton and wife v. Jones*, which came on to be tried before Lord *Mansfield*, at the sittings after M. 23 G. 3. at *Guildhall*, in an action on this custom for calling *Stainton's* wife a whore, the plaintiffs were nonsuited, not being able to prove the custom to cart whores in *London*. A book from the town clerk's office was produced, but it contained no account of such custom. Lord *Mansfield* said, that he could not take notice of the custom unless proved. It was stated on that occasion, that the custom had never been proved in such a manner as to maintain an action in *Westminster Hall*; that in the city court, the action is maintained, because they take notice of their own customs without proof. Dougl. 380. notes (95, 96.)]

There (a) is a custom in *London*, that when a chaplain keeps any woman in his chamber suspiciously, a man may come to his chamber with the beadle of the ward, and enter the chamber and search. 2 H. 4. 12. b. Roll. Abr. 557. S. C. (a) The custom of *London*, that if a villain abides in *London* for a year and a day, that he shall not be taken nor put out by writ *de nativo habendo*, nor by any process thereupon issuing, is good. 7 H. 6. 32. 2 H. 6. 3. Roll. Abr. 557. S. C. Moor, 2. pl. 4. S. P. adjudged.

By the custom of *London*, if a man put a horse to livery to an hostler, and the horse remain so long there that he eats as much as he is worth, in that case the hostler may call in four of his neighbours, who shall appraise the horse, and value also the meat; and if they think that the meat amounts to the worth of the horse, or more, the hostler may detain him as his own (b); which is a custom arising from the abundance of traffick with strangers, who could not be known so as to charge them with actions. Moor, 876. 3 Bulst. 271. Yelv. 67. Roll. Rep. 449. (b) But if a man leaves several horses with an inn-keeper in *London*, and takes them all away except one, the inn-keeper cannot retain the horse so left till he is satisfied for the keeping of the other horses, unless there was an agreement to that purpose. Bulst. 207. — So, if A. put the horse of B. to livery to an hostler in *London*, and he eat out his head, yet cannot the hostler sell him; for all customs being derogatory to the common law, are to be taken strictly; and there is no custom of *London* that hath gone so far as this case, to authorize one man to sell and convey the property of another. 2 Roll. Abr. 85.

It was (c) anciently insisted upon, that by custom all indictments and proceedings for any cause, except felony, should be tried and determined in *London*, and not elsewhere. But (d) it seems to be now admitted, that a *certiorari* lies to remove any indictment from *London*; but (e) it is said that, by the (f) city charters, the tenor of the indictment only shall be removed, and not the indictment itself. (c) Cro. Car. 128. (d) Raym. 74. 3 Mod. 230. Hard. 409. 6 Mod. 246. & vide 5 & 6 W. & M. c. 11. (e) Keb. 252.

Sid. 155. (f) That by the city charters the mayor shall be a principal in every commission. 3 Inst. 72. 2 Rich. 3. 11. a.

Besides these and several other customs, there is a general (g) What ordinances, by-laws, &c. made by virtue of this custom, are good, &c. vide 8 Co. 126. Waggoner's case, Skin. 371, &c. — That none but a freeman shall exercise

exercise a trade, and that a freeman bred up to one trade may exercise another of the same nature, *vide* Cro. Car. 516. Roll. Rep. 10. Saund. 311. Sid. 427. 4 Mod. 145. *Vide* tit. *By-Laws**. — * By various charters the citizens of *London* are free from toll, &c. throughout the kingdom, are excused from juries, &c. out of the city. [But this exemption from toll can be claimed by *resident freemen* only. Rex v. Hanger, 3 Bulst. Hargr. Law Tracts, 128. Corporation of London v. Corporation of Lynn, 4 T. Rep. 130.] And a jury of citizens may waive their privilege, and consent to be sworn on a trial at bar in *Middlesex*. Lockyer v. East India Company, 2 Wils. 136. — As to the erection of edifices, a man may heighten his old messuage, or house, or re-build on the old foundation to what height he pleases, but of no other erection or building, so as to stop his neighbour's lights. Plummer v. Bentham. 1 Burr. 248. — [And he cannot stop ancient lights by an erection upon a new soil, or beyond the old foundation. Priv. Lond. 56. For the repair of his house, a man may, by custom in *London*, set his poles and ladders upon the soil, or house of another adjoining. But he cannot break the house or soil. *Id.* 59.] — As to the buildings see further 11 G. 1. c. 28. & 14 G. 3. c. 78. — [The former statute is confined to party-walls between houses, and does not extend to party-walls between stables. Rex v. Pratt, 4 Burr. 2298.] — With respect to trade, it is a good custom that the portorage of corn, roots, &c. belongs to the city, from *Staines Bridge* to *Yendal* in *Kent*, and the by-law is good, that none but the company of free porters shall carry it, on penalty of 20s. Fazakerly v. Wiltshire, T. 7. G. Ludlam v. Bradley, P. 13 G. in C. B. Robinson v. Webb, T. 2 G. 2. B. R. 1 Stra. 462. — It is a good custom that persons to be admitted to the freedom be obliged to swear on the New Testament. Rex v. Bosworth, 2 Stra. 1112.

(B) Of the Custom of *London* in respect to Orphans.

Hob. 247. Roll. IF any freeman or freewoman die, leaving orphans under age
 Abr. 550. S. C. unmarried, the custody of their bodies and (a) goods, by the
 (a) Though custom of *London*, belongs to the city, and their executors or
 given them as administrators must exhibit true inventories of all their goods
 a legacy by and chattels, and must (b) bind themselves to the (c) chamber-
 other freemen. Hutt. 30. — lain to the use of the orphans, to account for the same upon
 Or in a foreign oath; which if they refuse to do, they may be committed: also,
 county. Vent. (d) if the ecclesiastical court will compel them to account there,
 180. (b) Al- against this custom, a prohibition lies.
 though they have already
 acknowledged a judgment at common law for the securing, &c. Roll. Abr. 550. Hutt. 30.
 S. P. — So, although they have given security in the prerogative court, yet they may be
 compelled to give new security to the chamber of *London*. Roll. Abr. 550. (c) For which
 purpose he is a corporation, and such securities shall go to his successor, who may sue the
 same. Cro. Eliz. 464. (d) 4 Inst. 249. S. P. But an infant may waive the benefit of suing
 in the court of orphans, and file a bill against one for the discovery of the personal estate.
 March, 107.

Roll. Rep. 316. If a freeman of *London* leaves *London*, and resides in the
 Sid. 250. Vent. country, yet his children, though born out of *London*, shall be
 180. Mod. 80. orphans, and subject to this custom.
 2 Vern. 110.
 S. P.

Sid. 250. If such orphan is taken out of the custody of such person, to
 Raym. 116. whom he is committed by the court of orphans, they may im-
 Lev. 162. prison the offender till he produces the infant, or is delivered by
 course of law.

2 Lev. 32. The Also, by this custom, if (e) any one, without the consent of
 King and Har- the court of aldermen, marry such orphan (f) under the age of
 wood. 1 Vent. twenty-one, though out of the city, they may fine and imprison
 178. S. C. him for non-payment thereof; for if the custom should not
 1 Mod. 77. extend

extend to marriages out of the city, their power would be but in vain. 79. S.C. (c) Though not a freeman.

Vent. 178. Mod. 79., and the above authorities. (f) Whether the marriage was before or after twenty-one, the husband is fineable, and may be committed if he had not the licence of the court of orphans. Peced. Chan. 537.

The orphans' money in the chamber of London is not a mere depositum, but in nature of a debt, or chose in action, which does not vest in the husband by the marriage of such orphan, nor can he bequeath it by will. 2 Vent. 340. [The chamberlain pays interest for the money. 1 Ch. Ca. 182. S.C.]

By 5 & 6 W. & M. c. 10. a perpetual fund is established for the payment of interest at 4l. per cent. to the orphans and other creditors of the city of London; which fund, from the year 1694 to 1712, had been deficient for that purpose, but since that time there had been a surplus: it was holden, that the surplus should not go to the city, but should be applied to make good the deficiencies of the former years. || Lad v. Mayor, &c. of London, Mosel. 99.

(C) Of the Custom of London in respect to a Freeman's Estate: And herein,

What shall be esteemed such an Estate as will be subject to the Custom, and what Disposition a Freeman may make thereof.

HERE it is necessary, in the first place, to take notice, that by the custom of London, if a freeman of London dies, leaving a widow and children, his personal estate, after his debts paid, and the customary allowance for his funeral, and the widow's chamber being first deducted thereout, is, by the custom of the said city, to be divided into three equal parts, and disposed of as follows, viz. One-third part to the widow, another third part to the children unadvanced by him in his life-time, and the other third part such freeman may dispose of by his will as he pleases; but if a freeman of London has no wife, but has children, the half of his personal estate belongs to his children, and the other half the freeman may dispose of; so if the freeman has a wife and no children, half of his personal estate belongs to his wife, and the other half he may dispose of. F.N.B. 122. 2 Inst. 33. Lit. Rep. 324. 2 Lev. 130. Chan. Ca. 285. Hetl. 158. Godb. 49. Latch. 134. 2 Leon. 29. Cro. Eliz. 185. Abr. Eq. 150. 2 Salk. 426. [In the case of Biddle v. Biddle, 18th March, 1718, before Lord Parker, it was

said, that the widow is entitled to the furniture of her chamber; or in case the estate exceeds 2000l. then to 50l. instead thereof. Vin. Abr. tit. Customs of London, (B. 2. p. 2.)]

This custom extends only to the personal estate of the freeman, for when it first began, the citizens of London had no regard at all to a real estate, for they did not suppose any freeman of London would purchase such estate, but would employ his whole fortune and stock in trade for the benefit of commerce. Abr. Eq. 150.

But, if a freeman of London has a mortgage in fee, this shall be counted part of his personal estate, and will be subject to the custom. Chan. Ca. 285. [A mortgage shall be paid

out

out of the personal estate, in preference to the customary or orphanage part; because the custom of *London* cannot take place till after the debts are paid. 2 P. Wins. 335.]

2 Chan. Ca. But a lease for years waiting on the inheritance shall not be
160. Vern. 2. reckoned part of a freeman's personal estate, but shall, together
104. S. P. de- with the inheritance, descend to the heir at law.
creed.

1 Vern. 61. [Neither shall receipts in chemistry, physick, &c. be reckoned
part of his estate.]

Anmand v. Also, if a freeman of *London* agrees to lay out money in the
Honeywood, purchase of lands, and to settle the same on his eldest son, &c.
Vern. 345. this shall not be reckoned part of the freeman's personal estate.
2 Chan. Ca.

118. S. C., for by the agreement the money is to be looked upon as lands in equity, and therefore not subject to the custom.

Ab. Eq. 151. On the marriage of *B.*'s daughter with *A.*, a freeman of *Lon-*
between Grice don, *B.*, the father, settles a term for years in trust, that *A.*, the
and Gooding, husband, shall receive the rents and profits till such time as *D.*
decreed. and *E.*, or the survivor of them, should otherwise appoint, and
then such persons as they should appoint; and for want of such
appointment, for such persons as the said *A.* by will should ap-
point; and for want of such appointment, then in trust for the
executors and administrators of *A.* The trustees having made
no appointment, the question was, Whether this term should
go according to that appointment, or be looked on as part of
A.'s personal estate, who was a freeman of *London*, and so go
according to the custom? and the court was of opinion, that it
was not to be looked upon as part of *A.*'s personal estate, because
it was never in him, but was settled by his wife's father, and
therefore not subject to the custom.

Chan. Ca. 310. If a freeman of *London* is made both executor and residuary
per Lord legatee, and he dies before he has made his election, whether he
Chancellor. will take as executor or legatee, yet the legacy must be considered
as such, and will be subject to the custom of *London*.

Lev. 227. By this custom a freeman could (a) not by will dispose of such
2 Vern. 277. part of his personal estate as belonged to his wife or children;
Chan. Ca. 199. and (b) even dispositions by him in his life-time have been holden
(a) It is said void, especially when they appeared to have been made in fraud
that this cus- of the custom, and with a view to defeat it.
tom of the

city of *London*,
that a man could not give away any part of his estate without the consent of his children, is
the remains of the old common law, and is so taken notice of in *Bracton*; but it being found
extremely inconvenient and hard, it was by the tacit consent of the whole nation abrogated
and grown into disuse; for what law has ever been made to repeal it? but in the city of
London, where the mayor and aldermen had the care of orphans, they, by that sole authority
and power, had preserved this part of the common law in *London*, which is disused every-
where else. Pr. Ch. 596. (b) But for this vide 2 Lev. 130. 2 Vern. 98. 202. 612. 685. Lev.
227. Pr. Ch. 17. 50. Ab. Eq. 152.

But now by the 11 G. 1. c. 18. § 17. it is enacted, "That it
" shall and may be lawful to and for all and every person and
" persons, who shall, at any time from and after the first day of
" June 1725, be made or become free of *London*, and also to
" and for all and every person and persons who are already free
" of

“ of the said city, and on the said first day of *June* 1725 shall
 “ be unmarried, and not have issue by any former marriage,
 “ (c) to give, devise, will, and dispose of his and their personal (c) [If there
 “ estate and estates, to such person and persons, and to such were issue of
 “ use and uses as he or they shall think fit.” the first mar-
 riage living at
 the time of the second, the death of such issue afterwards will not prevent the custom from
 attaching, and bar the widow from claiming under it. *Dansen v. Hawes*, *Ambl.* 276.]

Provided nevertheless, “ That in case any person, who shall,
 “ at any time or times from and after the said first day of *June*
 “ 1725, become free of the said city, and any person or persons
 “ who are already free of the said city, and on the said first day
 “ of *June* 1725 shall be unmarried, and not have issue by any
 “ former marriage, hath agreed, or shall agree by any writing
 “ under his hand, upon or in consideration of his marriage, or
 “ otherwise, that his personal estate shall be subject to, or be
 “ distributed, or distributable, according to the custom of the
 “ city of *London*; or in case any person so free, or becoming
 “ free as aforesaid, shall die intestate; in every such case the
 “ personal estate of such person so making such agreement, or
 “ so dying intestate, shall be subject to, and be distributed and
 “ distributable, according to the custom of the said city; any
 “ thing herein contained to the contrary in any wise notwith-
 “ standing.”

[*A.* being about to marry an orphan of the city of *London*,
 agreed with the court of aldermen, in consideration of the mar-
 riage, and of their giving their consent thereto, to take up his
 freedom within a certain time, which time he survived, but died
 without performing his agreement. It was decreed, that he was
 in equity to be taken as a freeman, and therefore his personal
 estate was to be distributed according to the custom, notwith-
 standing he had by will made a different disposition of it. It
 was said by the chancellor, that the agreement being entered
 among the orders and proceedings of the court of aldermen,
 and that court being a court of record, it became matter of
 record.

Frederick v.
Frederick,
 1 P. Wms. 710.
 4 Br. P. C. 7.
 S. C.

If a freeman disposes of his property in such manner as not to
 take place till after his death, it is a fraud upon the custom, and
 the property shall be subject to it.

Smith v. Fel-
lows, 2 Atk.
 62. 377.

So, if, several years before his death, he purchases a leasehold
 estate for 40 years, in the joint names of himself and wife, it is
 a fraud upon the custom, and the estate shall be applied as the
 rest of his property.

Coomes v.
Elling, 3 Atk.
 676.

A freeman of very advanced age, ill of the gout, two days be-
 fore his death, by deed of the same date with his will, assigned
 part of his personal estate in trust for the separate use of his
 daughter, and directed that she should not have power to give
 it to her husband. She had married without consent, but the
 father had been reconciled to her and her husband. The deed
 was not delivered to the daughter. Lord *Hardwicke* held it to
 be a testamentary disposition in fraud of the custom, and that it
 was competent to the husband to dispute it; but he would not
 allow

Tomkins v.
Ladbroke,
 2 Ves. 591.

allow him to take the wife's customary part, without making a settlement upon her.]

Turner v.
Jennings,
2 Vern. 612.

|| A freeman, while he was languishing on his death-bed, assigned by deed executed his personal estate in trust for himself for life, and then for the benefit of his grandchildren. The deed was set aside as to a moiety, because he had not entirely dismissed himself of the estate in his life-time; and because being made so recently before his death, it was merely a *donatio mortis causâ*, and in its nature a testamentary act, though in form a deed.

Fairebeard v.
Bowers,
2 Vern. 202.
Pr.Ch.17.S.C.

A voluntary judgment given by a freeman, payable three months after his decease, shall not prevail as to the widow's customary part; but after payment of debts, it will bind the legatory part.||

2. Of the Children's Part; and herein of Survivorship, Advancement, and bringing into Hotchpot.

It has been already observed, that the children of a freeman of *London* are entitled to the third part of his personal estate, in case he dies leaving a wife, and to a moiety in case he dies leaving no wife: but (a) this custom does not extend to grandchildren; and, therefore, if a freeman of *London* has two sons, and the eldest dies, leaving a son; the grandchild, though in law a representative of the son, shall have no part by the custom.

(a) 2 Salk. 426.
Vern. 397. S.P.

Abr. Eq. 154.

But a posthumous child shall come in with the rest of the children for a customary share of a freeman of *London's* personal estate.

(b) 2 Salk. 426.
Pr. Ch. 207.
So certified by
the recorder.
Pr. Ch. 537.
S. P.—2 Vern.
559. S. P. See
3 Will. Rep.

If a city orphan dies before twenty-one, his orphanage part survives to the other orphans, and he can make (b) no disposition (c) by will to contradict it; but, if he dies after twenty-one, at which time he might by will have disposed of it, there, though he die intestate, it shall go according to the statute of distributions, between his mother and surviving brothers and sisters.

318. in a note S. C. cited. Although he devises it away at the age of 17. (c) But, if a man marries an orphan, who dies under twenty-one, her orphanage part shall not survive to the other children, but shall go to the husband. Vern. 88. But *vide* Pr. Ch. 537. *cont.* — [If a man marries an orphan, and dies; his representatives are not entitled to any part of what was his wife's customary share, but the whole belongs to the wife. Vin. Abr. tit. Customs of London, (B. 10.) 18.]

Abr. Eq. 156.
pl. 8. Loeffes
and Lewen,
Gilb. Eq. Rep.
32. Pr. Ch.
370. 372.

But, if a freeman of *London* dies, leaving two daughters and a wife, and one of the daughters dies before twenty-one, though after a division and partition of the personal estate, yet the surviving sister shall have the whole of the orphanage part.

Pr. Ch. 537.

But this custom of survivorship holds only with respect to the orphanage part belonging to such child; and therefore if he by survivorship hath the part of any other brother or sister, such part shall go according to the statute of distributions.

If

If the daughter of a citizen of *London* marries in his life-time, against his consent, unless the father be reconciled to her before his death, she shall not have her orphanage share of his personal estate; and it would be unreasonable to take the custom to be otherwise.

Foden v. Howlett, Vern. 354. Said by Lord Chancellor. Yet in *Hill v. Blacket*, Cases temp. Finch.

248., it is said, the recorder certified that there was no such custom. || But in *Harvey v. Aston*, 1 Atk. 361. and Com. Rep. 749., the custom is referred to by Lord Hardwicke and Mr. Justice Comyns.||

By the laws and customs of the city of *London*, if any freeman's child, male or female, be married in the life-time of his or her father, by his consent, and not fully advanced to his or her full part or portion of his or her father's personal or customary estate, as he shall be worth at the time of his decease, then every such freeman's child, so married as aforesaid, shall be excluded and debarred from having any further part or portion of his or their said father's personal or customary estate, to be had at the time of his decease, except such father, by his last will and testament, or some (a) other writing by him written, and signed with his name or mark, shall declare and express the value of such advancement (b); and then every such child, after the decease of his or her said father, producing such will or other writing, and bringing such portion so had of his or her father, or the value thereof into hotchpot, shall have as much as will make up the same a full child's part or portion of the customary estate his or her said father had at the time of his decease, notwithstanding such father shall, by any writing under his hand and seal, declare that such child was by him fully advanced. (c)

Abr. Eq. 154, 155. Certified accordingly in the case of *Chace and Box*, 1 Ld. Raym. 484. S. C. Vern. 61. 89. 216. 2 Salk. 426. S. P. Pr. Ch. 269. (a) It is said to be sufficient, if the father declare the same by any writing under his hand, although it be in an almshouse, or elsewhere. *Green's Privil. of Lond.* 53. In *Dean v. the father's*

Delevar, cited in 1 P. Wms. 642. it is said to be sufficient; though written by the father's book-keeper, or servant. But the reporter adds a *quære*. (b) The ground of requiring the value of the advancement to appear in this manner, is, partly by reason of the difficulty of taking an account after such a length of time, but principally because it cannot be known, what is to be brought into hotchpot; and if it does not appear what the sum was, the other children may be wronged. *Per Lord Hardwicke*, 1 Ves. 16.] (c) Where the husband and his wife, who was a city orphan, in consideration of 100*l.* executed a release of their customary share to the father, it was holden, that they were barred from demanding any further share, and that this release was no writing under the father's hand signifying the advancement. *Pr. Ch.* 594. — [So, where the daughter only, being of full age, had, upon her marriage, for a valuable consideration, released her customary share. *Lockyer v. Savage*, 2 Str. 947. — So, if the wife be under age, and the husband and she, in consideration of a marriage portion, covenant to release her orphanage share, the husband's covenant is considered in equity, on a bill against the husband and wife for a specific performance of the articles, as an absolute release, and will extinguish the wife's right. By an old law in the city, called *Judd's law*, a husband is authorized to agree with the wife's father, though she be under age. *Medcalfe v. Medcalfe*, 2 Atk. 63. But the release extorted by a father from his son, merely for the sake of maintenance, and not for his advancement in marriage or trade, is absolutely void, as a fraud upon the custom. *Heron v. Heron*, 2 Atk. 160. So, if a father who has children, some of age, some under age, take a release from those who are of age, the release is void; for if the infants do not consent when they come of age, they may engross the whole orphanage part in exclusion of the rest. *Morris v. Burroughs*, 1 Atk. 399. Where a daughter accepts a legacy of 10,000*l.* left her by her father, who recommended it to her to release her right to her orphanage part, which she does accordingly; if the orphanage part be much more than her legacy, though she was told she might elect which she pleased, yet, if she did not know she had a right, first to inquire into the value of the personal estate, and the *quantum* of the orphanage part before she made her election, this is so material that it may avoid her release. *Fusey v. Desbouvrie*, 3 P. Wms. 316.]

Abr. Eq. 155.
Bright and
Smith, de-
creed. [Where
a child, though
an only child,
is advanced,
and the *quan-
tum* of the ad-
vancement
does not ap-
pear, he shall
be deemed
fully advanced.

A freeman of *London* having advanced his daughter with a portion, and intending to exclude her from any farther share (on some displeasure taken against her) made his will, and there- by reciting that he had advanced her with 300*l.* and (a) upwards, gave her 5*s.* and no more, and died: yet after his death, the daughter on a bill brought to have the said 300*l.* made up a moiety of his estate (he having no other child, and the custom not extending to grandchildren) had a decree accordingly; for the words, and upwards, are *certum in incerto*, and not to be re- garded, though it was objected it might be 1000*l.* or 2000*l.* or any other sum above 300*l.*

Cleaver v. Spurling, 2 P. Wms. 527. **Fawcner v. Watts, 1 Atk. 406.** **Elliot v. Collier, 3 Atk. 526.** **1 Vés. 15.** **S. C. 1 Wils. 168.** **S. C.** And advancement in marriage with a first husband who died in the father's life-time, is a bar to a second husband. **1 Atk. 406.]** (a) Where the father by his will declared that he had given 1000*l.* to one of his children, 1000*l.* to another, &c. in full of their orphanage part by the custom, such declaration is sufficient to let them into their full customary shares, on bringing these sums into hotchpot; but it seems that the parties concerned are not so far concluded by this declaration, but may give in evidence that more was received by the children than thus expressed. **Pr. Ch. 470. 471.** — [Parol evidence of the father's declarations with respect to the advancement, can in no case be received: but declarations of the husband, or of the wife during the coverture of the first husband, are admis- sible. **1 Atk. 407.]**

Chan. Ca. 160. A (b) settlement of a (c) real estate on a child, is no advance- (b) A devise of ment, nor to be brought into hotchpot.
the real estate

to a child, does not bar such child of the customary share. **2 Vern. 753.** [But, where a free- man by will charged 1500*l.* on his real estate for his daughter; and gave her a share of his per- sonal estate; the court would not allow her to take the sum charged on the real estate, and also claim an orphanage, but put her to abide entirely by the will, or by the custom. **Cowper v. Scot, 3 P. Wms. 119.]** — (c) Or money agreed to be laid out in the purchase of lands. **Vern. 345.** **2 Chan. Ca. 118.** **Abr. Eq. 153.**

Abr. Eq. 250.
Feast and
Feast.

If upon a marriage treaty A. a freeman of *London*, covenants to leave his wife 2000*l.* at his death, 2000*l.* to his eldest son, and 1000*l.* a-piece to his younger children, and dies, leaving several younger children; the 1000*l.* a-piece to the younger children being due only by covenant, is a debt on the personal estate, and not being to be paid till after the father's death, is no pro- vision or advancement within the custom of *London*, to bar them of their customary or distributory shares.

Car v. Car,
2 Atk. 277.

[If a freeman by will gives 200*l.* to his son, and in his life pays him 20*l.*, and takes a receipt in full for what was intended him by the will, this shall be considered as an advancement, and brought into hotchpot.

Weyland v.
Weyland,
2 Atk. 632.

Where a father, upon the marriage of his son, settled 5000*l.* S. S. annuities upon himself for life, remainder to his wife for life, remainder to his son for life, remainder to his son's wife for life, remainder to the issue of the marriage; it was holden, that the son, to entitle himself to a share of the father's personal estate, must bring the whole 5000*l.* and not the value of his estate in it for life only, into hotchpot.

Cowper v.
Scot, 3 P.
Wms. 119.

If a man makes an executor in trust, and devises his personal estate among his seven children, and four of them are advanced by him in his life-time, and one of them dies before the testator; the

the children advanced shall have their share of this seventh part, without bringing what they have received into hotchpot.]

If a freeman of *London* advances a child in part, by a portion which is to be brought into hotchpot, such portion or advancement must be brought into the orphanage part only.

Vern. 345.
2 Vern. 281.
2 Salk. 426. S.P.

And therefore if there be but one child, who has been in part advanced by the father in his life-time, such child shall not bring his part into hotchpot, there being none in equal degree with him.

2 Vern. 234.
630. and 2
Vern. 754. S.P.
For if it were
to be brought

in, it must fall again into the child's part. [2 P. Wms. 526. Ambl. 189. S. P. See *City v. City*, 2 Lev. 130. *semb. contr.* But see also Lord *Hardwicke's* remark on that case in 2 Ves. 595.]

[Sums of money, however small, if given as advancement, must be brought into hotchpot; but trivial sums given as presents shall not.

Morris v.
Burroughs,
1 Atk. 399.

So, small sums given occasionally, or maintenance money or allowance, at the university or for travelling, shall not be deemed part of a child's advancement, nor shall money given with him as apprentice.

Hender v.
Rose, 3 P.
Wms. 317.

A gold watch, or wedding clothes, are no advancement, nor a gift of 5*ol.* in money, where the orphanage share is considerable. Neither is consent to a daughter's marriage any bar to her, where the *quantum* does not appear under the father's hand.

Elliott v. Col-
lier, 3 Atk. 526.
1 Ves. 15.

Where a freeman had two daughters, *A.* and *B.*, and on *A.*'s marriage gave 200*ol.* and a bond for 200*ol.* more at his death, and afterwards gave her 428*l.* to buy a house, which was done; and *B.* married without his consent, but he was afterwards reconciled to her, often stayed weeks with her, and gave her presents from time to time to about 500*l.* but no advancement; it was decreed, that *A.*'s 200*ol.* and 200*ol.* should be brought into hotchpot, but not her 428*l.* nor *B.*'s 500*l.*

Hume v. Ed-
wards, 3 Atk
45*c.*

If a father buy an office, though but at will, or a commission, it is an advancement.

Norton v. Nor-
ton, 3 P. Wms.
317. note O.

So, if, some years after the marriage of a freeman's son, the parents on both sides meet, and agree to advance 200*l.* a-piece to lie by till they can purchase a commission in the army for him, this is an advancement, and bars him of his orphanage share.]

Hearne v. Bar-
ber, 3 Atk. 213.
In this case it
was said, that
Judd's law
which was an

act of common council in the time of *Henry* the 6th, does not make it a bar unless it was an advancement upon marriage.

3. Of the Wife's Part, and what shall bar her thereof.

The widow of a freeman of *London*, by the custom, is entitled to her widow's chamber, and to a moiety of his personal estate if he leaves no child, and to a third part in case he leaves any child or children.

Hetl. 158.
Vern. 132.
Abr. Eq. 156.

But, if a woman, upon her marriage, accepts a settlement out of the (*a*) freeman's personal estate (*b*), such compounding, as it is called, shall (*c*) bar her customary share.

Pr. Ch. 325,
326, &c. Abr.
Eq. 157.
(*a*) Although
the

the composition or sum to be paid her was part of her own fortune. Pr. Ch. 327. (b) Though no notice was taken of the custom. Abr. Eq. 159. (c) Where she shall take by the custom, and likewise by her husband's will. 2 Vern. 110. But vide Pr. Ch. 353.

Abr. Eq. 159. But though such composition shall bar the wife of her customary share, yet she is not thereby precluded from demanding the benefit of any gift or devise the husband may think fit to make her.

Pr. Ch. 327. Also, if a freeman, whose wife has been thus compounded with, dies intestate, his widow shall have such part of the legatory, or dead man's share, as she is entitled to under the statute of distributions, especially, if there were no express words in the agreement to exclude her.
 || Vide infra
 Lewin v.
 Lewin, and
 vide Pickering
 v. Lord Stamford, 3 Ves. 336. contr.||

Abr. Eq. 158. If a freeman of *London* makes a jointure on his intended wife, and the same is expressed to be in bar only of her dower, or thirds of lands, tenements, and hereditaments, this shall not bar her of her customary share of his personal estate.

[But, if a freeman, before marriage, settles some part of his personal estate upon his intended wife, to take effect after his death, this will bar her of her customary part, though no mention be made of the custom.]

Lewin v.
 Lewin, 3 P.
 Wins. 15.
 Pettifer v.
 James, Bunb.
 16.
 If a wife be divorced *a mensâ et thoro* for adultery, she forfeits her right to her moiety and widow's chamber under the custom.]

4. Of the Legatory, or dead Man's Share.

2 Salk. 426. The legatory or dead man's share is the third part of a freeman's personal estate, in case he has a wife and (a) children, which the freeman might always have disposed of by will, and which for want of such disposition is under the direction of the statute of distributions, and not at all under the control of the custom of *London*.
 Vern. 6.
 2 Vern. 559.
 Skin. 41. pl.
 11. Pr. Ch. 499.
 (a) But, where there are no children,

the custom of *London* gives no directions, therefore the personal estate must be wholly governed by the statute of distributions. But the custom of the province of *York* extends to give such moiety to the next of kin to the intestate. Pr. Ch. 327, 328. But note, that the custom of the city of *London* in the distribution of an intestate's estate, shall prevail against the custom of *York*. 2 Vern. 48.—As if a freeman of *London* dies in *York*, his heir shall come in for a share of the personal estate, though by the custom of *York* he is debarred thereof, for the custom of *London*, which follows the person, shall be preferred to that of *York*, which is only local. 2 Vern. 82.

Abr. Eq. 160. If a freeman of *London* makes his will, and devises legacies to his children more than their orphanage part would amount unto, without taking any notice whatsoever of the custom; these legacies shall be a satisfaction of their orphanage shares, to which they were entitled by the custom in the nature of a debt, and the legacies shall not come (b) out of the testamentary or dead man's part, for it would be unreasonable that they should take both by the will and the custom.
 & vide 2 Vern.
 111. 754. S.P.
 (b) Where it was holden, that 100l. devised for mourning should come out of the testamentary, and not out of the whole personal estate. 2 Vern. 420.

But, if such legacies are less than their orphanage shares, they shall not *pro tanto* be a satisfaction, but in such case the legatees shall take both, especially, if none of the devises in the will are thereby disappointed.

Abr. Eq. 160.
per Lord
Chancellor;
but in this
case he sent it
to the Recorder to certify the custom.

[So, if he devise no more than his testamentary part, the children shall have both their legacies, and their customary shares; but, if he devise his whole estate, they must make their election.

Wilson v.
Philips,
Bunb. 195.

If a freeman devise all his estate, orphanage and testamentary, and some of the children abide by the custom, others by the will, the shares of the latter shall not go among the others, but shall accrue to the testator's estate, and go according to the will.

Morris v.
Burrows,
2 Atk. 627.

Although neither the father, nor the orphan, can devise either the orphanage part or contingency of the benefit of survivorship, or the part which accrued by survivorship; yet, if the father make a disposition by his will inconsistent with the custom, the children must make their election to abide by the will or the custom; for they cannot abide by the will in part, and have the benefit of the custom also.]

Harvey v.
Desbouverie,
Ca. temp.
Talb. 130.
See also
Hanbury v.
Lord Bateman,
2 Atk. 63.

If a loss happens to a freeman of London's estate by the insolvency of his executors, such loss shall be borne out of the testamentary part of his estate only, and not out of the whole personal estate, for the wife and children of a freeman are in the nature of creditors, and shall have two parts in three of the personal estate he died possessed of, although his legatees are thereby defeated of their legacies.

Pr. Ch. 409. de-
creed between
Read and
Duck, al-
though it was
certified that
there was no
custom in
London which

directed how such loss should be borne. [2 Ld. Raym. 1328. S. C. by the name of Redshaw v. Brasier.] Vin. Abr. tit. Customs of London. (B. 9.) pl. 4. S. C. [But the funeral expences of a child dying after his father, shall be paid out of the orphanage share. 3 Atk. 676. And if a father maintains his daughter after her husband's death, his executor shall be considered as a creditor for so much as the maintenance amounted to, which shall be deducted out of the daughter's customary share. 3 Atk. 526. 1 Ves. 15.]

[Where the wife's right to the orphanage part is extinguished by the release of the husband, the estate is left as if it had never been charged with it, and it is considered as part of the testator's general personal estate, and does not go wholly to the executor of the father, as part of the dead man's share.]

1 Atk. 64.

¶ The effect of advancement is not to increase the legatory part, but only to remove one child out of the way, and increase the shares of the others.]

Folkes v.
Western.
9 Ves. 460.

(D) Of the Custom of London as it relates to Feme Coverts.

BY the custom of London, if a feme covert, the wife of a free-man, (a) trades by herself in a trade, with which her husband does not (b) intermeddle, she may (c) sue and be used as a feme

Cro. Car. 69.
Hetl. 9. Lit.
Rep. 31. S. C.

Leon 131. feme sole, and the husband shall be named only for conformity;
 2 Brownl. and if judgment be given against them she only shall be taken
 218. S. P. in execution.
 (a) Need not Show. Rep. 184. (b) But if the wife uses the same trade that her husband
 be in a shop. does, she is not within the custom. Mod. 26. (c) But it must be in the courts of the city.
 Moor, 135, 136. Cro. Eliz. 409. [Cawdell v. Shaw, 4 T. Rep. 361. Beard v. Webb,
 2 Bos. & Pull. 93.]

Show. Rep. If the wife of a freeman, who is a sole trader, contracts a
 183. Fabian debt and dies, and afterwards the husband promises to pay it,
 v. Plant. yet such promise is not sufficient to maintain an *assumpsit* against
 the husband, for as he was not originally liable, the subsequent
 promise was without any consideration.

Roll. Abr. A recovery suffered by baron and feme of the lands of the
 556. feme shall as effectually bind the right of the feme by the custom
 of *London*, as a fine at common law.

(E) Of the Custom of *London*, with respect to Masters and Apprentices.

Moor, 135. AN infant unmarried, and above the age of 14, may (a) bind
 pl. 28. 2 Bulst. himself apprentice to a freeman of *London* by indenture with
 192. 2 Roll. proper covenants, which covenants by the custom of *London*
 Rep. 305. shall be as (b) binding as if he were of full age.
 Palm. 361.
 Mod. Rep. 271. pl. 22. 2 Keb. Rep. 687. pl. 14. 2 Vern. 492. pl. 445. (a) Custom of
London to put over an apprentice to another, is good. March, 3. (b) And for a breach an
 action may be brought in any other court as well as in the courts in the city. Moor, 136.

2 Roll. Rep. If the indentures be not enrolled before the chamberlain with-
 305. Palm. in the year, upon a petition to the mayor and aldermen, &c. a
 361. & vide *scire facias* shall issue to the master to shew cause why not en-
 Mod. 271. rolled; and if it was through the master's default, the apprentice
 Boh. Priv. may sue out his indentures; otherwise, if through the fault of
 Lond. 175. the apprentice; as, if he would not come to present himself be-
 338. fore the chamberlain, &c. for it cannot be enrolled unless the
 infant is in court and acknowledges it.

6 Mod. 69. This custom does not extend to one bound apprentice to a wa-
 12 Mod. 415. terman under 21, for the company of watermen are but a vo-
 luntary society, and being free of that does not make one free of
London.

(F) As it relates to Landlords and Tenants.

2 Sid. 20. BY the custom of *London* a tenant at will under the yearly rent
 of 40s. shall not be turned out without a quarter's warning;
 and such tenant paying above 40s. yearly rent, shall not be
 turned out without half a year's warning.

Palm. 212. But a custom that tenant for years shall hold for half a year
 after his term ended, is not good.

(G) Of

(G) Of the Customs of *London*, which are in furtherance of Justice, and for the more speedy Recovery of Debts.

BY the custom of *London* a creditor may, before the day of payment, arrest his debtor, and oblige him to find sureties to pay the money on the day it shall become due.

Hob. 86.
Vent. 29.
5 Mod. 93.
8 vide Roll.
Abr. 555.
Cro. Eliz.
409. Noy, 53.
Roll. Abr.
557.

If a contract be entered into by two citizens, and one of them, who is thereby obliged to pay a sum of money, die intestate, his administrator shall be obliged to pay it in the same manner as if it were a debt by obligation.

If *A.* and *B.* are bound as sureties for and with *C.* to *D.*, and *D.* recovers against *A.* in *London*, and has execution against him, *A.* may there sue *B.* for contribution *ut uterque eorum oneretur pro rata* according to the custom of *London*; and therefore where such action was removed in *B. R.* by writ of privilege, the same was remanded, because otherwise the plaintiff would be without remedy, for by the course of the common law no action lies.

Leon. 166.
Moor, 126.
S. P.

¶ There is in *London* a customary action of debt upon simple contract on a *concessit solvere*; the form of declaring in which is, that the defendant, in consideration of divers sums of money, &c. before that time due and owing from the defendant to the plaintiff, and then in arrear and unpaid, *granted and agreed to pay*, (*concessit solvere*) to the plaintiff, the said *l.* when and where the same should afterwards be demanded; yet, &c. And this general form of declaring has been holden good upon a writ of error (*a*).

Williams's
Note (2) Tur-
bill's Case,
1 Saund. 68.
Pascall v.
Sparing, Sty.
198. In Bro.
London, 15.
it is said, that
it was agreed
for law, that
in debt in

London upon a *concessit solvere* by the custom, the declaration shall be, *chandizes to him before sold* he granted to pay *10l.*, so that the merchandize must be mentioned. (*a*) 1 Ro. Abr. tit. Customs (I) pl. 21. Story v. Atkins, 2 Ld. Raym. 1432.

By the custom, the defendant cannot wage his law in this action; and therefore it lies in these courts against an executor or administrator upon a contract made with the deceased (*b*).¶

Gunn v.
Mackhenry,
1 Wils. 277.
(b) The city
Eliz. 409. S. C.

of *London's* case, 8 Co. 126. a. Snelling's case, 5 Co. 82. b. Cro.

(H) Of the Custom of Foreign Attachment: And herein,

1. Of the Nature of the Debt or Duty which may be attached.

BY the (*c*) custom of *London*, if *A.* is indebted to *B.*, and *C.* is indebted to *A.*, *B.* upon entering a plaint against *A.*, may attach the debt due from *C.* (who is called the garnishee) to *A.*, and this (*d*) custom of foreign attachment is to no other purpose but

(c) Roll. Abr.
551. (d) Carth.
25.

(a) For the year and day *disrationare debitum, vide* to compel an appearance of the defendant in the action; for if he appear within (a) a year and a day, and put in bail to the action, the garnishee is discharged (b).

Cro. Eliz. 713. Roll. Abr. 551. (b) || If he appear and put in bail, (for the appearance alone will not be accepted without bail) the attachment is at an end, though it be after judgment and execution against the garnishee, if satisfaction be not entered upon the record. Anderson v. Clerke, Carth. 26. So it is, if the defendant surrender himself at any time before satisfaction acknowledged. Com. Dig. tit. Attachment (E.) ||

Pain's Case, The garnishee may plead this custom of foreign attachment to an action brought against him by his creditor, but then the plaintiff may traverse the cause thereof, (c) and that he was not indebted to him who attached it.

Roll. Abr. 551. Cro. Eliz. 598. S. C. by the name of Paramour v. Pain. Moor, 703. S. C. but S. P. does not appear. 1 Ro. Rep. 106. S. C. cited by Coke C. J. for S. P. Coke v. Brainforth, Cro. Eliz. 830. || (c) *Qu.* of this point; for in both these cases of Paramour v. Pain, and Coke v. Brainforth, the attachment was by the defendant of his own debt in his own hands; and the existence of the debt was alleged in the plea. There is no issue on the plaintiff's debt in the mayor's court, when the defendant does not come in and defend; and the only way in which that can come in issue between them is, by the garnishee appearing and putting in bail for the defendant; which he is not bound to do, as he must thereby make himself responsible to the bail to pay the debt at all events in case it should be found for the plaintiff; for the bail are answerable for the debt, and not merely for the defendant's appearance. Where therefore a regular return of *non est inventus & nihil* appeared on the face of the proceedings in the mayor's court, which shewed that the party was not there forth-coming, and had nothing whereby he could be attached to answer; it was adjudged, that the garnishee might protect himself under those proceedings upon *non assumpsit* in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below, who attached the money in his hands; though bail not having been put in, the plaintiff had not been obliged to prove that debt to entitle himself to recover against the garnishee. McDaniel v. Hughes, 3 East, 367. ||

17 E. 4. 7. b. 'Such goods cannot be attached, of which the party had no property at the time of the attachment.

Roll. Abr. 551. S. C. So, if *A.* be indebted to *B.*, and *J. S.* a stranger take by tort certain goods of *A.* as a trespasser, *B.* cannot by the custom attach these goods in the hands of *J. S.* for the debt of *A.*, because the property is out of *A.* at the time, and he had only a right in him.

Roll. Abr. 551. Noy, 115. S. P. A legacy cannot be attached in the hands of an executor by foreign attachment; because it is uncertain whether, after debts paid, the executor may have assets to discharge it.

Roll. Abr. 551. Spink and Tenant. Roll. Rep. 106. S. C. *Vide* Fisher v. Lane, 3 Wils. 297. 2 Bl. Rep. 834. S. C. If *A.* be indebted to *B.* by obligation, and *B.* be indebted by contract to *H.*, and *B.* die, and his administrator demand the debt upon the obligation of *A.*, who promises him that, if he will forbear him for a month, he will pay him then, but he does not pay him accordingly, and after *H.* bring debt in London against the administrator upon the contract (as he may there by the custom) the debt of *A.* due by the obligation may be attached in the hands of the administrator; for, notwithstanding the promise broken, the debt continued due by the obligation, and a recovery upon the obligation will be a bar of the action upon the promise, in which all should be recovered in damages.

Roll. Abr. 552. If *A.* lends *B.* 100*l.* to be repaid him upon the death of his father, and after the death of the father of *B.* this 100*l.* is attached

tached by force of a foreign attachment, and after *A.* brings an action upon the case against *B.* for this money, this foreign attachment will be a good bar thereof, though the custom be to attach debts, and this is an action upon the case, in which damages only are to be given, because this is a debt, and he might have an action of debt thereupon; and therefore, inasmuch as this is well attached, he shall not defeat it by bringing an action upon the case.

If *A.* sells certain stockings to *B.* upon a contract, for which *B.* is to give 10*l.* to *A.*, and if he sells the stockings again before *August*, after that he shall give twopence more for every pair of the stockings, the 10*l.* is attachable by foreign attachment, because an action of debt lies for it, but the twopence for every pair of stockings is not attachable, because this rests only in damages, to be recovered by an action upon the case, and not by action of debt, because it is made payable upon a possibility.

If there are several accounts, &c. between *A.* and *B.*, and *A.* dies, and his executor and *B.* submit to the award of *J. S.*, and he awards that the executor shall deliver certain goods, of which *A.* died possessed, to *B.*, and that *B.* shall pay the executor 300*l.*, this money cannot be attached in the hands of *B.* for the debt of *A.*; for upon the matter the executor being liable to a *devastavit*, ought to have remedy in his own right for the sum awarded.

If *A.* is indebted to *B.*, who is indebted to *C.*, and *B.* assigns the debt of *A.* to *C.* in satisfaction of his debt; now the debt due from *A.* is become the right and property of *C.*, and *B.* hath nothing but in trust for *C.*, and therefore it ought not to be attached for any debt of *B.*, and upon the special matter shewn the lord mayor ought to give relief.

In an action of debt for tobacco, in the detinet, a debt cannot be attached within the custom, in satisfaction thereof, because it does not (a) appear of what value this tobacco was, so that it might appear that the debt is but a satisfaction to the value, which cannot be supplied by a plea in bar made in another action against him, in whose hands the debt was attached.

might have been well attached in this action. Roll. Abr. 554. & vide Jon. 406.

A debt due by specialty may be attached by the custom of *London*, because the attachment may be pleaded if an action be brought for it in the courts at *Westminster*, but a debt (b) recovered in any court in *Westminster* by (c) a judgment cannot be attached by the custom of *London*, because the party has then no time to plead it.

debt for which the action was brought cannot be attached in *London*, for the inferior court cannot attach a debt in a superior court. Roll. Abr. 552. — So, after imparlance to an action of debt in *B. R.* Roll. Abr. 552. Cro. Eliz. 157. 3 Leon. 232. — So, if a writ returnable in *B. R.* be purchased before the attachment. Cro. Eliz. 101. 593. 691. 3 Leon. 210. Roll. Abr. 552. — [So, a sum of money directed to be paid by *A.* to *B.*, by the master's *allocatur*, cannot be attached in *A.*'s hands. Coppel v. Smith, 4 T. Rep. 312. So, a sum of money

judged upon a foreign attachment in *Exeter*, where the custom is the same as in *London*.

Roll. Abr. 552. Read and Hawkins.

Vent. 112. Horsam and Target. Lev. 306. S. C.

Lewis v. Wallis, Sir T. Jones, 222.

Roll. Abr. 553. (a) But, if the value of the tobacco had been averred in the record of the attachment, the debt

Roll. Abr. 552. 4 Leon. 240. Cro. Eliz. 63. Leon. 29. 264. (b) After issue joined in an action of debt in *B. R.* the

awarded

awarded under a rule of court cannot be attached. *Grant v. Hawding*, E. 7 G. 3. B. R. *ibid.*] (c) So, if levied upon a *feri facias*, and in the sheriff's hands. 1 Leon. 30. 264.—So, if a suit be begun in equity, the effect thereof shall not be prevented by a foreign attachment. 2 Chan. Ca. 233.

Cro. Eliz. 593.
Lewknor and
Huntly, 712,
713. S. C. re-
solved also
upon a writ of
error, though
the judgment
was reversed
for another
reason.

If *A.* is indebted to *B.* and *C.* is indebted to *A.*, and *B.* brings debt in *B. R.* against *A.* pending this action, *B.* may affirm a plaint in *London* against *A.* for the same debt, &c. and attach the debt in the hands of *C.*; for though a debt in *London*, for which there is a suit depending in *B. R.* cannot be attached, yet he that hath brought an action in *B. R.* may, notwithstanding according to custom, attach the debt of the party, for the debt in question in *B. R.* is not touched by this attachment.

Carth. 344.
Masters and
Lewis. 1 Ld.
Raym. 56. S. C.
Skin. 516. S. C.
5 Mod. 75. 92.
S. C. Comb.
347. S. C.

A. is indebted to *B.*, and *C.* is indebted to *A.* by simple contract; *A.* dies intestate, and *B.* enters a caveat against his widow's taking out administration; pending which, he enters a plaint in the sheriff's court of *London* against the archbishop of *Canterbury*, and thereupon attaches the debt due from *C.*, after which the widow has administration granted to her, who brings an action against *C.*, who insisted on the matter *supra*. It was holden, that this pretended custom, in this case, was unreasonable and void, because the archbishop had no right to the debt, nor any means to recover it. Besides, hereby every creditor would be his own carver, and the goods of the intestate wasted without any remedy.

2. In whose Hands, and at what Time, the Attachment may be made.

Roll. Abr. 554.
Cro. Eliz. 186.
(a) Whether a
debt owing to a company is attachable for the debt of the company. Mod. 212. *dubitatur*.

If *A.* recovers a debt against *B.* in *London*, *B.* may attach this debt in his (a) own hands for so much due to him.

Garth. 25.
Vent. 236. &
vide Roll. Abr.
554.

By this custom a debt contracted without the jurisdiction of the city may be attached, if the debtor is found within the jurisdiction, for every debt follows the person of the debtor.

Roll. Abr. 553.
3 Leon. 236.
S. C.

An obligee, before the debt is due by obligation, cannot by the custom attach a debt for it, because he cannot affirm a plaint for the first debt before it is due.

Roll. Abr. 553.
3 Leon. 236.
& vide Cro.
Eliz. 184.

But, if *B.* is indebted to *A.*, and *C.* is bound to *B.*, but the day of payment is not yet come, *A.* may attach this debt in the hands of *C.* (b) before it is due to *B.*

Roll. Rep. 105.
Cro. Eliz. 713.
Noy, 68.—And the judgment shall be, that he shall be paid when it becomes due. Roll. Abr. 553. Sid. 327. || That *debita in presenti solvenda in futuro* are within the custom seems to be now settled; but whether it extends to debts as between the garnishee and the defendant below, (not being of that particular description,) which have not become actually due at the time of the attachment laid, *Qu. & vide* 3 East, 367., where the point was made in the argument of counsel, though left untouched by the judgment of the court. ||

(b) But the custom so to do must be specially alleged. Roll. Abr. 553. Noy, 68.—And the judgment shall be, that he shall be paid when it becomes due. Roll. Abr. 553. Sid. 327. || That *debita in presenti solvenda in futuro* are within the custom seems to be now settled; but whether it extends to debts as between the garnishee and the defendant below, (not being of that particular description,) which have not become actually due at the time of the attachment laid, *Qu. & vide* 3 East, 367., where the point was made in the argument of counsel, though left untouched by the judgment of the court. ||

So, if *A.* lends money to *B.* to be repaid upon the death of the father of *B.*, and after, an action is brought by *C.* against *A.*, and after the father of *B.* dies, the money due by *B.* to *A.* may after be attached in the hands of *B.*, though it was not due at the time the plaint commenced against *A.*, inasmuch as it became due before the time that by custom the process is to be granted against him in whose hands it is attached.

If in debt upon an obligation of 100*l.* conditioned for the payment of 50*l.* at a day, the defendant pleads, that before the day of payment of the 50*l.* it was attached in his hands by a creditor of the plaintiff, &c. and that after the day, upon a *scire facias* against him, according to custom, he paid it; this is a good bar of the (a) whole, because the attachment being made before the day of payment, it became a debt to the creditor, and the obligee could take no advantage of a breach of the condition afterwards.

vide Godb. 196. Owen, 2. Moor, 598.

¶ If the garnishee has a lien on money or goods in his hands, the plaintiff in a foreign attachment cannot take them from him without discharging the lien.¶

3. *Of the Form of the Proceedings in a Foreign Attachment.*

By this custom the plaintiff must swear that the debt is *bond fide* due to him; but it is not sufficient to allege that he swore that the debt was a true one, by himself or his attorney; for the attorney's swearing is not according to the custom.

If *A.* affirms a plaint against *B.* and upon *nil* returned it is surmised that *C.* hath money in his hands due to *B.* &c. and the money is attached in the hands of *C.*, who appears upon the attachment, and pleads that he owes nothing to *B.*, though this be found against *C.*, and thereupon there is judgment against him, yet he shall not pay any costs, for there are no costs recoverable in a foreign attachment.

By this custom, if *A.* sues *B.* in *London*, &c. and *C.* is indebted to *B.* in the same sum, and *C.* is condemned there to *A.* according to the custom, and judgment given against him accordingly; yet, if no execution be sued against *C.*, *A.* may resort to have judgment and execution against *B.* his principal debtor, and *B.* may sue *C.* for his debt, notwithstanding the unexecuted judgment.

In bar of an action brought in *B. R.* if the defendant pleads a judgment in a foreign attachment in bar, and alleges the custom to be, that if the plaintiff in the court hath process against the defendant, and upon a *nil* (b) returned makes a surmise that *B.* is indebted in so much to the defendant, and upon his prayer to attach it in his hands by process, and he does it accordingly; and if (c) the defendant makes default at four courts after, that, by the custom, at the last of the said four courts, the plaintiff may

Ro. Abr. 553.

Sid. 327. Robbins and Standard.

(a) If the attachment had been of 20*l.* only, it might have been pleaded in bar of so much.

Sid. 327. &

Nathans v. Giles, 5 Taunt. 558.

Roll. Abr. 554.

Cro. Eliz. 713.

Jon. 406.

2 Lutw. 985.

Cro. Eliz. 172.

Leon. 321.

Roll. Abr. 555.

Roll. Abr. 555.

22 H. 6. 47.

(b) Godb. 401.

Latch. 228.

(c) A custom for a foreign attachment before some default in the defendant is

naught. Vent. 236. may pray process against *B.* to come in and shew cause wherefore the judgment should not be against him at the next court after, and when he comes to apply this custom to his case, he shews that there were four defaults, and that at the fourth default the plea was continued for several courts, and then process went against *B.*, and then after judgment against him; (*a*) this is not warrantable by the custom, inasmuch as he shews by the custom, it ought to be at the next court after the four defaults.

(*a*) Moor, 570.
S. P.

Carth. 282.
Lawrence
and Atherton,
adjudged.

If in debt the defendant pleads that *J. S.* entered a plaint, &c. against the plaintiff in *London*, and upon process against him *non est inventus* was returned, and thereupon a suggestion was made that he had so much money in the hands of the defendant, and that the defendant was attached by the said money; this is an ill plea, for it ought to have been that the plaintiff was attached by so much money in the defendant's hands; for so is the custom.

Fisher v. Lane,
2 Bl. Rep. 834.
3 Wils. 297.
S. C. but the
ground of the
decision not
so correctly
stated.

¶ If it do not appear upon the proceedings, that the defendant below was summoned, or that a *nil* was returned, or that information was given to the court of the money being in the hands of the garnishee, the judgment is void, as not warranted by the custom, which it has not pursued in its necessary and material parts.

Wells, v.
Needham,
2 Lutw. 995.
1 Ld. Raym.
180. S. C.
Brook v.
Smith, 1 Salk.

In *assumpsit* the recovery and execution in the foreign attachment may be given in evidence under the general issue; and though it may be pleaded, (*b*) yet this would seem to be the better and safer course. But in debt upon bond, (*c*) it must be pleaded.

280. Fisher v. Lane, 3 Wils. 297. 2 Bl. Rep. 834. S. C. *Savage's case*, 1 Salk. 291. *Palmer v. Hooke*, 1 Ld. Raym. 727. *Briat v. Gyll*, Skinn. 639. *Nathans v. Giles*, 5 Taunt. 558. (*b*) *Morris v. Ludlam*, 2 H. Bl. 362. (*c*) Co. Entr. 139. b. 142. a. Lib. Plac. 160. pl. 113. 2 Lib. Intrat. 164.

Banks v. Self,
5 Taunt. 234.

In pleading it is not necessary to aver the custom that the plaintiff below shall swear to the debt, or the fact that he did swear to it; nor that a writ of *scire facias* issued against the garnishee; it is enough that "he was warned to shew cause." Neither is it necessary to aver, that the plaintiff in the principal case was indebted to the plaintiff below within the jurisdiction of the mayor's court; for it is not necessary that the debt should arise, or the defendant reside within it, or that he should be actually summoned.

Harington v.
Macmorris,
Id. 228.

Smith v.
Ridges, Sir T.
Jones, 165.
Hatton v. Ise-
monger, 1 Str.
641. *Morris v.*
Ludlam, 2 H.
Bl. 362. (*d*) *Anon.* 2 Show. 373.

But, if the plea do not pursue the custom, as it lays it, it will be bad. And great care should be taken to plead properly; for if the defendant fail for want of a proper plea, (*d*) it is said, that he must pay the money over again, and has no remedy in law or equity.

Nathans v.
Giles,
5 Taunt. 558.

A foreign attachment pending is no bar to an action until judgment be recovered in the attachment.

If money be attached in an attorney's hands by foreign attachment, he shall not have his privilege, because in this case the plaintiff would be remediless; for the foreign attachment is by the particular custom of *London*, and does not lie at common law; so that if the attorney should have his privilege, the plaintiff should be without his redress. ||

Gillb. Hist.
C. P. 209.
Turbill's Case,
1 Saund. 67.
Ridge v. Hard-
castle, 8 T.
Rep. 417.
Carth. 25.

After a *dilectur* entered by the garnishee in the sheriff's court, which is in nature of an imparlance, he cannot plead to the jurisdiction of the sheriff's court.

It was ruled, That if *A.* brings debt in *London* against *B.*, and attaches goods of *B.* in the hands of *C.*, from whose possession the goods are not removed; and *B.* by certiorari brings the cause into *K. B.* and puts in bail, the attachment is at an end, and *C.* ought to deliver the goods to *B.*, which if he do not, *B.* may have *trover* or *replevin*.

12 Mod. 213.

DAMAGES.

DAMAGES are a compensation given by the jury, [or assessed by the court,] for an injury or a wrong done the party (a) before the action brought.

Co. Lit. 257.
10 Co. 116.
(a) The ex-
pences the

party has been at in obtaining his right, such as the moderate fees of counsel, attornies, &c., are termed costs; and these are given by the court, and taxed by their officer. || Costs are a consequence by the statute of *Gloucester* of detaining the debt, and are part of the damages. In contemplation of law the word *damages* emphatically includes costs. It is so considered by Lord *Coke*. Costs, therefore, properly fall under the *nomen generale* of *damages*, and where, for instance, 2*l.* is given for damages, and 1*l.* for costs, the whole may be stated as for damages, *quæ quidem damna in toto attingunt ad triginta libras*. Co. Litt. 257. a. 2 Inst. 288. 10 Co. 115. b. 1 Lutw. 640. Cro. Ja. 420. 7 Vin. Abr. 296. pl. 12. 2 Wils. 91. 9 East, 304. 1 Lill. Pr. Reg. 527. ||

(A) In what Actions the Party shall recover Damages.

(B) What Persons are entitled to, or shall recover Damages.

(C) Against whom Damages shall be recovered.

(D) Of assessing the Damages: And herein,

1. Of the Quantum of the Damages the Jury may give.
2. Whether they may give more than the Plaintiff has declared for.
3. Must be assessed pursuant to the Plaintiff's Right, or the Injury he has received: And herein of assessing entire Damages.
4. Where to be assessed jointly or severally, where there are several Defendants.

- (E) Where the Court may increase or mitigate the Damages.
- (F) Of the Manner of assessing and recovering Damages.

(A) In what Actions the Party shall recover Damages.

10 Co. 116. a.
2 Inst. 284.
Co. Lit. 257.
19 H. 6. 27.
2 Roll. Abr.
350. 11 Co.
52.

AT common law no damages were recovered in any real action; for the detention of the possession, &c. being the cause of damages, till the right to the land was determined, the party could not be said to suffer any wrong: also, the burden of the feudal duties lay upon the tenant in possession, and, consequently, he was to receive the mesne profits until some other made out a better right, who after recovery might have maintained an action of trespass.

2 Co. 50. a.
10 Co. 116.
a. (a) But in
a writ of entry
there were no damages; for such writ only demanded the freehold, and was not mixed with the personality. 2 Inst. 289. Booth, 175. Nor in a writ of admeasurement of pasture. 2 Inst. 368.

For the exposition of this statute, vide 2 Inst. 287.

But in an assize, which is (a) a mixed and compendious action, the disseisee not only recovered his possession, but also the mesne profits in damages.

By the statute of *Gloucester* made 6 E. 1., whereas before damages were not awarded in *Mortdancetor*, unless upon a recovery against the chief lord, they shall be awarded in all cases where a man recovers in *Mortdancetor*; so in cosinage, aiel and besaiei; and further, every one shall render damages where the land is recovered against him, upon his own intrusion or his own act.

Vide tit. *Dower*, letter (1.)

By the statute of *Merton*, c. 1., damages are given on the possessory action of dower, *unde nihil habet*.

Comp. Incumb. 292. &c.

In a *quare impedit* or *darrein presentment*, he, for whom the judgment is given, shall recover as well his damages as his presentment and advowson.

(b) In detinue the thing is to be recovered in specie, or damages for it. Roll. Abr.

In all actions *ex delicto*, which are either trespasses founded on force, or upon fraud, in the not performing of contracts, damages shall be recovered; and these are (b) such actions as are said to sound only in damages.

574. In debt the same is to be restored in *numero*, but there are damages for the detainer, vide *Vaugh.* 101. Damages shall be recovered in an *audita querela*, 26 E. 3. 73. In a writ of ward of the body and land damages shall be recovered, Roll. Abr. 575. But in writs of execution no damages shall be recovered, Roll. Abr. 575. 50 E. 3. 23., nor in a *scire facias*. 2 H. 6. 15.

Vide tit. *Prohibition*, and vide Roll. Abr. 575. Jon.

If, after a prohibition to the spiritual court, the party proceeds in such court, the plaintiff upon his declaration upon the prohibition, or upon an attachment, shall recover damages.

477. Cro. Car. 559. 2 Jon. 128. Raym. 387. Vent. 348. 350. 3 Lev. 360.

(B) What

(B) What Persons are entitled to, or shall recover Damages.

IF lessee for years be ousted, and he in the reversion disseised, ^{15 H. 7. 4. b.} and he in the reversion recover in an assise, yet he shall not ^{2 Inst. 285.} recover damages.

So, if, after the ouster, he in the reversion enter upon the ^{Roll. Abr.} disseisor, (as he may by law, to save a descent), and after the ^{569.} disseisor re-enter upon him, and he recover in an assise, yet he shall not have any damages; for the re-entry of him in reversion reduces the estate to the lessee, and then the damages for the profits belong to him.

If tenant for life, and he in reversion join in a lease for life, ^{Co. Lit. 42. a.} they may join in an action of waste; and tenant for life shall recover the place wasted, and he in reversion damages.

In debt by baron and feme, upon a bond made to the feme ^{Cro. Eliz. 259.} *dum sola*, they shall recover damages (a) jointly. ^{(a) In an assise by baron}

and feme, if it be found they were disseised, they shall recover damages of the issues in common, ^{11 H. 4. 16. b. Roll. Abr. 570.}—In trespass by baron and feme, for imprisoning the feme till a fine paid, for all the trespass, but the fine, they shall recover damages in common. ^{Bro. Damages, 51. Roll. Abr. 571.}

So, in trover by baron and feme, executrix of *A.* for goods of *A.* they shall recover damages jointly; for the possession of the wife, as executrix, was also the possession of her husband, and the damages recovered shall be to the estate of the testator, and so may concern them both. ^{Styl. 48.}

If two jointenants bring an assise, and the one is severed, if ^{11 H. 4. 17.} it be found that the other had goods taken upon the land, he ^{Roll. Abr.} shall recover sole damages for them†. ^{57L. † The owner of the goods may maintain an action alone, for them.}

(C) *Against whom Damages shall be recovered.*

BY the statute of *Gloucester*, made 6 E. 1., c. 1. “Whereas ^{(b) Owen, 112.} heretofore damages were not awarded in assises of *novel* ^{Hob. 98.} *disseisin*, (b) but only against the disseisors; it is provided, that ^{(c) So, if disseised, for, by equity, it extends to all that come under the disseisor by right or wrong.} “if the disseisors (c) alien the lands, (d) and have not whereof “damages may be levied, (e) they, to (f) whose hands such “tenements shall come, shall be charged with (g) the damages, “(h) so that (i) every (k) one shall (l) answer (m) for his “time.”

^{2 Inst. 284.}—So, if the lord distrains for rent, and a stranger rescues, though the stranger is only a disseisor in an assise against him and the tenant; if the stranger is found insufficient, the tenant shall answer in damages, though he claims not from the disseisor. ^{2 Inst. 284.} (d) The tenant shall be charged only where the disseisor is insufficient; but, if able to pay part, but not the whole, both shall be charged; therefore the judgment is always given generally against both. ^{2 Inst. 284.} (e) Lands held *in capite* were aliened to *J. S.* who died, his heir within age; and the king committed the custody to *B.*, who took the profits: the heir was no tenant within the statute. ^{2 Inst. 284.} *Secus*, if aliened to an infant, who took the profits, or if, coming in as heir, he had been out of ward. ^{2 Inst. 284.} (f) Yet these general words shall not charge those with damages who have an estate cast upon them by law, unless they consent thereto, as the heir of the alienee, by refusing to take the profits, may discharge himself

himself of the damages. 2 Inst. 284. So, if disseisor enfeoffs *A.* and *B.*, and makes livery to *A.* only, and *A.* dies, if *B.* never assented, he may waive the possession, &c. Co. Litt. 360. 2 Inst. 286. (g) And where by subsequent statutes double or treble damages are given in an assise, they shall be answered by every mesne tenant accordingly, and for their insufficiency by the tenant. 2 Inst. 285. (h) In an assise, but not in a writ of entry, for that is to be brought against the tenant only, and this clause refers only to the assise. 2 Inst. 286, 287. (i) If named in the assise; otherwise, if the disseisor is found insufficient, the tenant shall be charged with the whole. 2 Inst. 285. But, if found, that the disseisor is insufficient, and that he enfeoffed *A.* who enfeoffed *B.*, who enfeoffed the tenant, and that *A.* had it one year, and *B.* another, and the tenant another, the tenant shall be charged for his own time only, and the plaintiff shall lose his damage against *A.* and *B.*, because not named in the writ. 2 Inst. 285. (k) Tenant for years, or by statute, &c. is no mesne occupier within the act, unless the assise is brought by tenant by statute, &c. 2 Inst. 284. (l) If they have sufficient, otherwise the tenant must answer for the whole. 2 Inst. 285. (m) Yet several judgments shall not be given, but one judgment entirely against all, according to the usage; but the sheriff upon the execution may use such indifferency as justice requires. 2 Inst. 285. If the sheriff returns that the disseisor is insufficient, process shall issue to levy it of the tenant. 2 Inst. 285.

(a) This extends not to his heirs. “It is provided also, that the (a) disseisee shall recover damages in a writ of entry upon *novel disseisin*, (b) against (c) him that is found (d) tenant after the disseisor.” 2 Inst. 186.

But by a subsequent clause in this act, where he recovers the land against the disseisor, he shall have damage. (b) Extends not to him that has an estate by law cast upon him, if he waives the possession. Co. Litt. 360. 2 Inst. 286, 287. (c) If brought against two joint-tenants, and one disclaims, and the other takes upon him the whole tenancy, and pleads, &c., he shall answer the whole damages. 2 Inst. 287. (d) The disseisor enfeoffs *A.* who enfeoffs *B.*, and in a writ of entry in the *per* and *cui* vouches *A.*, who pleads and loses, judgment shall be given against the vouchee, because he is found tenant in law. 2 Inst. 287.

2 Inst. 289. In a writ of partition by one coparcener against the other, no Noy, 68. *Vide* damages shall be recovered, though the defendant hath not been tit. *Coparceners*. (e) If a at all times (e) ready to make partition. man will avoid the damages, because he hath been at all times ready to render the thing in demand, he ought to come at the first day. 17 E. 3. 71. In detinue against an executor, supposing it to come to his hands after the death of the testator, the defendant may come at the grand distress, and say, that he hath at all times been ready to deliver the writing after the time that it came to his hands, and thereby save damages against him. 22 Ed. 3. 9. Roll. Abr. 574.

(D) Of assessing the Damages : And herein,

1. Of the Quantum of the Damages the Jury may give.

Fide Moor, 419. 3 Leon. 150. Owen, 34. Vent. 267. **I**N all actions which sound in damages, the jury seem to have a discretionary power of giving what damages they think proper: for though in contracts the very sum specified and agreed on is usually given, yet, if there are any circumstances of hardship, fraud, or deceit, though not sufficient to invalidate the contract, the jury may consider of them, and proportion and mitigate the damages accordingly; as, in case upon a policy of assurance, which was a cheat, for an old vessel was painted, and goods of no value put in the vessel, and about 1500*l.* insured upon it; and then the ship was voluntarily sunk (f). So, on an action brought on a promise of 1000*l.* if the plaintiff should find the defendant's owl; the court declared, though the promise was proved, that the jury might mitigate the damages. . . . Also

Where money laid out in repairs shall be recovered in damages. Godb. 53. Where in trespass for breaking his close, &c. the court refused to grant a new

Also on demurrer, by which the promise is confessed, the jury may consider of the circumstances, and mitigate damages accordingly. writ of inquiry, because the damages were too small, the

suing forth the writ being the plaintiff's own act. 2 Leon. 214. But for this *vide tit. Trial*, and for what cause a new trial will be granted, *vide Mod. 2.* In trespass the jury gave the plaintiff half a farthing damages, and held good. 2 Roll. Rep. 19. Sir T. Jon. 138. (f) [But fraud vacates the policy, and therefore no such action would lie.]

The plaintiff declared upon an *assumpsit* to pay for an horse a barley-corn a nail, doubling every nail, and averred, that there were thirty-two nails in every shoe, which, doubling every nail, came to 500 quarters of barley; which being tried before *Hyde*, he directed the jury to give the value of the horse in damage, and accordingly they gave 8*l.* and held good. Lev. 111. James and Morgan, Kcb. 569. S. C. Thornborough v. Whitacre, 6 Mod. 305. S. P. 2 Ld.

Raym. 1164. S. C. 3 Salk. 97. S. C. 1 Wils. 295.

2. *Whether they may give more than the Plaintiff has declared for.*

In (a) personal actions, the plaintiff shall recover damages only for the *tort* done before the action * brought, and therein the plaintiff counts to his damage. 10 Co. 117. a. (a) But in a real action he recovers his

damages pending the writ, and therefore never counts to his damage, 10 Co. 117. a., and though damages be given by statute, yet the old form remains. 2 Inst. 286. — * In Foster and Bonner, B. R. E. 1776, the court, on argument, determined, that in an action, for carrying persons across the *Thames*, in prejudice to the *Gravesend* ferry, the plaintiff might give in evidence a *tort*, after suing forth the *latitat*, and before the day of exhibiting the bill, saying, in such case, the filing of the bill was the commencement of the suit.

Also, in personal actions the plaintiff shall recover no more than he hath counted for, although the jury give him more, for he best knows the measure of his wrong, and what he is entitled to †. 2 H. 6. 7. 8 H. 6. 5. 10 Co. 116. Owen, 45. S. P. per Cur. Kelw. 21.

Yelv. 45. Cro. Eliz. 544. Bulst. 49. Fitz. Damages, 16. S. C. Bro. 2. S. C. Cro. Ja. 297. S. C. — † If the jury give more, the plaintiff must relinquish the *extra* damages, for if he enters up the judgment for the whole, which the jury gave, it is error, and cannot be amended or helped, in any manner. So determined in *B. R. H. 1773*, Sandiford and Bean, Esq. Cheveley v. Morris, 2 Bl. Rep. 1300. S. P.

If the tenant vouches, the demandant shall not recover more damages against the vouchee than he hath counted of; for the vouchee comes in lieu of the tenant, and the judgment is given against the tenant. 8 H. 6. 11. Roll. Abr. 578.

But the plaintiff in *detinue* may recover more damages against the garnishee than he hath counted of; for his count is not against the garnishee, but against the defendant, and damages against him are for the delay after the count. 8 H. 6. 5. 11. Bro. Damages, 68. S. C. Roll. Abr. 578. S. C.

In trespass for rescuing a distress, to his damage so much; if the defendant justifies the rescous upon special matter, upon which it is demurred for the plaintiff, he shall have damages as he hath counted of; (b) for the defendant hath acknowledged the trespass, and hath not denied the damages. 21 E. 3. 40. b. Roll. Abr. 578. (b) In debt for 20*o*l. upon the 2 E. 6., for not setting forth tithes, if the

defendant pleads the 31 H. 8. c. 13. § 21., and that the lands were discharged in the hands of the prior of *B.* at the time of the dissolution, &c. and thereupon issue taken; and at the trial the

the defendant cannot make good his plea; the value shall be taken as confessed, because the issue is joined upon a collateral point; and the defendant took not the value by protestation. Allen, 88. Ruled upon a trial at bar, and a verdict given for 200*l*. *Vide* Roll. Abr. 572.

Yelv. 45. Where the jury find greater damages than the party declares
(a) [But a *re-mittitur* cannot be entered in a term subsequent to that in which the judgment is entered. Wray v. Lister, 2 Str. 1110. Cheveley v. Morris, 2 Bl. Rep. 1300.] of, the court may, to prevent error, give judgment for so much as is stated in the declaration, *nullo habitu respectu* to the rest, else the party may release the (a) overplus, and take judgment for the rest.

For this *vide* 10 Co. 115. b. Also, though the jury cannot regularly give the plaintiff more damages than he hath counted of, yet may they award him costs distinct and separate from the damages; and though such costs (b) exceed the damages laid in the declaration, yet shall the plaintiff recover both; for the damages are given for the wrong, for which the action is brought, and the costs for the charge of the suit; the one before the suit, and the other in and for the suit.
Cro. Eliz. 568.
2 Roll. Rep. 447. Cro. Ja. 69. Yelv. 70.
Roll. Abr. 578. but *vide* 2 Inst. 288. (b) Where the jury may give 10*l*. costs, though they give but 10*l*. damages on the statute 21 Ja. 1. c. 16. Salk. 207. and *vide* tit. Costs.

3. *Must be assessed pursuant to the Plaintiff's Right, or the Injury he has received: And herein of assessing entire Damages.*

10 Co. 117. If in a writ of entry *sur disseisin*, or in nature of an assise, a writ of inquiry of damages is awarded, the plaintiff shall recover his damages but from the time of the disseisin to the time of the award of the inquiry of damages, and not after, though the writ of inquiry be not served till seven years after; and if in such writ an issue is joined triable by verdict, he shall recover damages but from the time of the disseisin to the time of the verdict.

10 Co. 117. But in a *præcipe quod reddat*, of a rent of the possession of the demandant himself, he shall recover arrears as well (c) pending the writ as before *usque diem judicii reddit*.
(c) But in personal actions the plaintiff shall recover damages only for the tort done before the action brought. 10 Co. 117.

Co. Litt. 257. The disseisee, in an action of trespass, may recover damages for the first entry without any regress.

Co. Litt. 257. But after regress he may have trespass with a *continuando*, and therein recover for all the mesne occupation as well as for the first entry.
Vide 1 Roll. Abr. 550.

Co. Litt. 257. a. So, in an action upon 5 R. 2. c. 7. for entering into land, *ubi ingressus non datur per legem terræ*, the plaintiff shall recover damages for the first *tortious* entry only.

Co. Litt. 257. But in an action upon 8 H. 6. c. 9., where one enters by force; or enters peaceably and detains with force; or when one enters with force, or detains with force; the plaintiff without any regress shall recover treble damages, as well for the mesne occupation as for the first entry.

If in case for not grinding at the plaintiff's mill, the plaintiff derives his title under a lease made to him 11 Ja., and then sets forth, that the defendant at several times from 2 Ja. to 12 Ja. did grind his corn elsewhere, he cannot have judgment, though after verdict, because the damages are assessed for all that time, viz. from 2 Ja. to 12., whereas the plaintiff's lease commenced 11 Ja.; so that the damages are given to the plaintiff before he had any title.

Harbin and Green, Hob. 189. Moor, 887. S. C. Carth. 387. 1 Ld. Raym. 248. 12 Mod. 131. Comb. 442. 2 Salk. 663. S. P. and S. C. cited.

In case the plaintiff declared, that *J. S.* 19 Sept. 16 Car. 2., was retained as an apprentice to serve the plaintiff for nine years, and continued in his said service till the 31 Oct. 21 Car. 2., when the defendant procured the said *J. S.* to leave the plaintiff's service, (a) *per quod* the plaintiff *totum proficuum quod ratione servitii præd. J. S. per totum residuum termini recipere potuisset totaliter perdidit*; and (b) after verdict for the plaintiff, and general damages given, though it appeared the term was not expired, it was intended that damages were given for all the term, as well the time (c) to come as past; for the damages must be intended to be taxed according to the declaration; and if it should be intended otherwise, it would be uncertain to what time they were taxed, whether to the exhibition of the bill, or verdict given.

Hambledon and Veere, 2 Saund. 169. Lev. 299. S. C. Carth. 261. S. C. cited. (a) The plaintiff declared for a battery of his servant, 19 Jan. &c. *per quod* he lost his service for a long time, viz. for the space of six months then

next following, &c. After a verdict for the plaintiff, though the original bore *teste* before the end of the six months, yet the plaintiff had his judgment, for the *viz.* was more than needed, being not of the substance of the action, but for aggravation of damages only. Hunt v. Lawring, Hob. 284. Sims v. Gregory. Allen, 23. *per curiam*. || The declaration was of *Michaelmas* term of an assault on the 18th Oct. and an imprisonment from thence for twenty weeks. After verdict for the plaintiff, it was moved in arrest of judgment, that the action was brought too soon, and it appeared that damages had been given for an imprisonment long after the action was depending. But for the plaintiff it was argued, that the *continuando* in this case was laid under a *scilicet*, and therefore will not vitiate what is properly laid in time; and that this differs from all the cases where the time is affirmatively laid. Besides, it was laid, that he *did* imprison the plaintiff, and therefore respects a time past, and as to that only the evidence could be applied. And of this opinion was the court, and the plaintiff had judgment. Webb v. Turner, 2 Str. 1095. (b) In covenant against an apprentice for running away from his service before his time, whereby the plaintiff lost his service for the said term, which was not then expired, the plaintiff demurred; and by Twisden J. though it has been adjudged to be naught after verdict, yet being on demurrer, it may be helped; for the plaintiff may take damages for the departure from the service only, and not for the loss of service during the term, and then it will be well enough. Horn v. Chandler, 1 Mod. 271. — (c) In trespass, assault, and false imprisonment, the plaintiff declared, that the defendant on the 1st Feb. in the 8th of W. 3. with force and arms, &c. Upon not guilty pleaded, the plaintiff had a verdict, and the *postea* being stayed, the question was, whether the plaintiff should have his judgment; the declaration being of *Easter* term then last, and he having declared of a trespass on the 1st Feb. 8 W. 3. which time was not then come. But by the court — There must be evidence given of a fact done before the action brought; the time is but a circumstance of a thing done; for when by a traverse it is made part of the issue, such traverse is never good. So the plaintiff had judgment. Blackwell v. Eales, 5 Mod. 286. Carth. 389. S. C. ||

In trespass, the plaintiff declared, that upon the second day of July, anno 5 W. 3. &c., and from thence to the time of the action, he was possessed of two meadows adjoining to a river: and that the defendant, Aug. 2. in the same year, exalted his mill-banks to that degree, that thereby the water overflowed his (the plaintiff's) meadows,

Prince v. Moulton, Carth. 386. 2 Salk. 663. S. C. Comb. 442. S. C. Ld. Raym. 248.

S. C. [Yalden v. Hubburb, Com. Rep. 231. 2 Ld. Raym. 1382.]

Bridges and Horner, Carth. 230.

meadows, *per quod* he lost the use and profit of his meadows, from the said second of *July* to the time of the action; and after verdict and entire damages, judgment was arrested; for it was impossible that he should lose the use, &c. before the fact was done.

But, where in trespass for erecting and continuing 300 perches of stone wall on the soil of the plaintiff 2 *April an.* 2 *W. & M. transgression. prædict. quoad continuation. mur. præd. a 20 die Feb. anno primo W. & M. usque diem exhibitionis billæ continuando*; it was objected, that the continuance being laid for one year before the commencement of the trespass, and entire damages being given, all was void; yet it was adjudged, that the continuance being for a time before the commencement of the action was senseless and void; and it cannot be intended that any damages were given for a matter which was void in itself.

Carter and Cawthrop, Carth. 261. 4 Mod. 152. S. C. 3 Lev. 345. S. C. 1 Show. Rep. 366. S. C. (a) [In trespass, tort, &c. new actions may be brought for matter subse-

In case, for stopping lights by erecting a new structure, the declaration concluded, that *occasione premissorum magna tenebri-tate obscurat. fuit & adhuc existit, &c.* after verdict and entire damages, it was objected, that by *adhuc existit*, the jury had given damages for a matter subsequent to the action, and that no damages can be given for a matter after the action commenced (a); because if another action should be brought for the same thing, the former action could not be pleaded in bar to it; but it was resolved, that the *adhuc* should (b) refer to the time of the plaint levied, and not to the time of the declaration.

quent to the depending suit, and therefore damages cannot be given for it: but it is otherwise where a duty or demand has arisen, pending the writ, for which no satisfaction can be had by a *new* suit, for there such duty or demand shall be included in the judgment upon the action already depending; as in the old writ of annuity; *assumpsit* for principal and interest, upon a contract obliging the defendant, the principal, with interest from such a time. *Robinson v. Bland*, 2 *Burr.* 1086.] (b) But in an action *de uxore abducta*, and keeping her from him *usque* such a day, which was some time after the exhibiting of the bill, judgment was stayed, for the jury shall be intended to have given damages for the whole time mentioned in the declaration. *Vent.* 103.—|| So, in trespass and false imprisonment, the plaintiff declared that the defendant imprisoned him the 1st *Oct.* 9 *W.* 3. and detained him in prison for four months; and after verdict for the plaintiff and entire damages, judgment was arrested, because the declaration being of *Michaelmas* term 9 *W.* 3. and the damages being entire, and given for the imprisonment of four months from the 1st *Oct.*, it appeared that the damages were given for imprisonment after the action commenced. *Brasfield v. Lee*, 1 *Ld. Raym.* 329. *Hanbury v. Ireland*, *Cro. Ja.* 618. *S. P.* And a judgment in *C. P.* was reversed in *K. B.* because the jury on the writ of inquiry had given damages for necessities provided after the action commenced, and to a time after the writ of inquiry was executed. *Baker v. Backe*, 2 *Ld. Raym.* 1382. ||

Roll. Abr. 576. But for this, and for what things the damages shall be said to be given, *vide* *Godb.* 343. *Moor*, 141. pl.

283. 708. pl. 987. *Cro. Eliz.* 329. 788. *Bulst.* 37. 3 *Bulst.* 283. *Cro. Car.* 237. 328. *March*, 48. *Sid.* 38. *Winch.* 33.—* But, if the declaration consists of several counts, all the words in some of which are not actionable, and there is not any special damage laid, or if laid, not found, and a general verdict is taken for the plaintiff, (except as to the special damage,

If an action upon the case be brought for speaking words all at one time; and upon not guilty pleaded, verdict be given for the plaintiff; though some of the words will not maintain the action, yet if any of the words will, the damages may be given entirely, for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation. *

damage, if any laid, and that is found for defendant,) the judgment will be erroneous, and may be avoided, by motion in arrest of judgment, or reversed, on error brought. — [It is the rule of the court of C. P. to award a *venire facias de novo* in such case, upon payment of costs, that the plaintiff may sever his damages. *Auger v. Wilkins*, Barnes, 478. *Smith v. Haward*, Id. 480.]

But, if the action be brought for several words spoken at several times, and the action will not lie for the words spoken at one time, but will lie for the words spoken at another time; and upon not guilty pleaded, a verdict be found for all the words, and entire damages given; this is not good. See *supra*, n.

If the plaintiff declares that he bought of the defendant *diversa bona & catalla*, viz. *unum fulcrum lecti* (*Anglice* a field bedstead) with a tester and curtains of say, *unum canopium* (*vocat.* a canopy), &c. and that the defendant assumed to deliver *bona præd.*, but had not, &c. and there is a verdict for the plaintiff, and general damages given, it shall not be presumed that any damages were given for the tester and curtains, which (a) were not alleged *positive*, but only *expositive*; and this exposition is too extensive, for *fulcrum* signifies the bedstead only.

If in an action upon a covenant divided into two (b) branches, the breach is assigned in one part only, &c. and the jury assess damages generally *pro fractione conventionis præd.* this shall have relation to that part only in which the breach was assigned.

inferior court for slandering him in his trade, by which he lost his custom, within the jurisdiction of that court & *alibi*; and it was held maintainable, notwithstanding the *alibi*. *Vent.* 104. cited by *Twisden* to have been adjudged.

If in debt upon 2 E. 6., for not setting forth tithes growing upon seventy acres of land, &c. the jury as to sixty-six acres give damages, &c. and as to the five acres residue, give damage, &c. whereas it ought to have been, as to the four acres residue; yet this being only (c) a miscounting of the jury, and no damage to any thereby, the plaintiff shall have his judgment.

quidem pecuniarum summæ attingunt ad 10l., whereas rightly computed, they came but to 9l., the jury gave damages less than 9l. and it was held good; but, if the verdict had been for 10l. it had been naught. *Vent.* 104. cited by *Twisden* to have been adjudged.

If in trespass for an assault, battery, and wounding, the defendant *quoad* the force, pleads not guilty; and *quoad* the assault and battery, that he was removing a market-cross to a more convenient place, and the plaintiff interrupted him, *per quod molliter manus imposuit*, &c., and thereupon they are at issue, and the jury find the defendant guilty *de injuriâ suâ propriâ*; and (d) so recite the entire declaration of the assault, battery, and wounding, (though the wounding was not in issue,) and assess damages *occasione transgressionis illius* to 20l., it must be intended, that the damages were given for all in the declaration, viz. the wounding, though not in issue, and the jury cannot find (e) more than the plaintiff has declared for, and assess damages for it.

they have not found. *Bulst.* 64.

Moor, 708.
Cro. Eliz. 329.
Bulst. 37.
3 *Bulst.* 283.
Cro. Car. 237.
328. *Hutt.* 131.
Roll. Abr. 576.

10 *Co.* 130.
a. 132. b.
(a) *Trover de uno risco*, (*Anglice* a trunk full of linen, &c.) and damages intended to be given for the trunk only. *Cro. Ja.* 665.

Steel and Spight, 2 *Roll. Rep.* 178.

(b) *A. brought an action in an*
Cressit and Burgis, *Styl.* 161. (c) *An action upon the sale of several things for divers sums of money, quæ*

Calvert v. Arnold, *Sid.* 96.
(d) But without such recital, it would not have been presumed that damages were given for what was not in issue. *Hob.* 187.
Cro. Ja. 353.
(e) Nor can they give damages for what

Sid. 98.
Lev. 99.

If in trover, *inter alia*, *de una salsura* (*Anglice a salting trough*), there is a verdict for the plaintiff and entire damages; the declaration as to the trough being merely in *English*, the damages shall be intended given for the other particulars; but, if the defendant had been acquitted of the other things, and expressly found guilty of this, it would have been otherwise.

Carth. 437.
Morrice and
Golder, ad-
judged, and a
remittitur en-
tered ac-
cordingly.

(a) Byars and
Newton, Trin. 28.

If in an avowry for rent due in money, and also for so many hens, it appears on the face of the avowry that the hens were not due at the time of the distress taken; although there are entire damages and costs, yet the plaintiff may release the damages and rent for the hens, and take judgment only for the rent in money (a), but need not release the costs.

(a) Byars and Newton, Trin. 28. Car. Rot. 728. S. P. said to be adjudged.

Roll. Abr. 570.

Roll. Rep. 423.

3 Bulst. 258.

S. C. the judg-

ment being

given on de-

murrer and

entire damages

assessed upon a writ of inquiry.

Moore, 707.

Cro. Eliz. 560.

Hob. 189.

10 Co. 130.

Moore, 281.

— So, in debt.

Brownl.

70. — So, in trespass.

Styl. 174.

1782. 399.

3 Leon. 213.

Cro. Car. 21.

Godb. 57.

— So, in covenant.

Cro. Eliz. 685.

Cro. Ja. 439.

Saund. 155.

— And for this *vide* 5 Co. 108. a.

10 Co. 130.

3 Bulst. 231.

Hetl. 51.

53. Lit. Rep. 61.

Styl. 198.

Cro. Eliz. 59.

Cro. Ja. 239.

Sid. 38.

Moore, 281.

[1 Stra. 621.

Fort. 376.

Andr. 21.

2 Ld. Raym. 1381.]

(c) So, where

the plaintiff alleges two breaches of an award, one of which is insufficient, and entire damages

are given. Leon. 170.

5 Co. 108.

10 Co. 131., but *vide* Yelv. 35. and tit. *Arbitrament*.

(d) Where entire damages shall hinder the plaintiff's judgment, *vide* 2 Roll. Abr. 99. —

(e) [But, if one of the promises be insensible, or impossible to be performed, and there be a

If an action upon the case is brought (b) upon two (c) promises, and both are found for the plaintiff, the jury may give entire damages for both, for this is at the peril of the plaintiff; but, if the action does not lie for one of them, the plaintiff (d) shall not have judgment for the other. (e)

(b) So, in other actions upon the case. Moore, 707. Cro. Eliz. 560. Hob. 189. 10 Co. 130. Moore, 281. — So, in debt. Brownl. 70. — So, in trespass. Styl. 174. 1782. 399. 3 Leon. 213. Cro. Car. 21. Godb. 57. — So, in covenant. Cro. Eliz. 685. Cro. Ja. 439. Saund. 155. — And for this *vide* 5 Co. 108. a. 10 Co. 130. 3 Bulst. 231. Hetl. 51. 53. Lit. Rep. 61. Styl. 198. Cro. Eliz. 59. Cro. Ja. 239. Sid. 38. Moore, 281. [1 Stra. 621. Fort. 376. Andr. 21. 2 Ld. Raym. 1381.] (c) So, where the plaintiff alleges two breaches of an award, one of which is insufficient, and entire damages are given. Leon. 170. 5 Co. 108. 10 Co. 131., but *vide* Yelv. 35. and tit. *Arbitrament*. (d) Where entire damages shall hinder the plaintiff's judgment, *vide* 2 Roll. Abr. 99. — (e) [But, if one of the promises be insensible, or impossible to be performed, and there be a general verdict for the plaintiff with entire damages, the judgment will not be arrested; because it is not to be intended, that any part of the damages was assessed as to such a promise. 1 Roll. Abr. 577. pl. 5, 6. But a distinction is made by Lord C. J. Vaughan, in *Nichols v. Reeve*, 1 Freem. 83. between a legal impossibility of performing a promise, and a physical one; that it is only with respect to the latter that the above rule holds: for in the other case, *non constat* to the jurors whether the promise be good or not in law, and therefore the presumption is, that they gave damages for it.]

Carth. 254.

Blackman and

Cobbet, ad-

judged, and

the judgment

of the Court

of C. B. in

which there

were entire

damages, re-

versed accordingly.

So, where an action against an administrator was laid as follows, *ss. In consideration that the plaintiff had sold a mare to the intestate, he promised to pay the plaintiff tantam denarium summam quantam equa prædict. rationabiliter habere meruit*, and then avers in fact, *quod equa prædict. rationabiliter habere meruit* 8l.; which last promise being void, it being absurd to say that the mare deserved to have so much money, makes the whole void.

4. Where to be assessed jointly or severally, where there are several Defendants.

11 Co. 6. b.

Cro. Eliz. 860.

Cro. Ja. 118.

384. Roll. Rep.

31. Hob. 66.

vide Bulst. 157.

The jury cannot regularly assess (f) several damages for one trespass, with which the defendants are jointly charged by the plaintiff's writ or declaration; for though in fact one was more malicious, and did greater wrong than the other, yet all coming to

to do an unlawful act, the act of one is the act of all the parties present. (f) For by finding them guilty *de præ-*

missis, they find them equally guilty, and it is a rule in law, that what the plaintiff had laid joint in his declaration, the jury cannot sever in their verdict. Carth. 20. *arguendo*. || On the trial of an action against two defendants *A.* and *B.*, it was proved, that the assault by *A.* was more violent than that by *B.* Lord *Ellenborough* C. J. told the jury, that the damages could not be severed, so as to give more damages against *A.* than against *B.*, but that they might give their verdict against both, to the amount which they thought the most culpable ought to pay. *Brown v. Allen and Oliver*, 4 Esp. N. P. C. 158. ||

But in trespass, if one defendant is found guilty at one time, and the other at another time, several damages may be (a) taxed. 11 Co. 6. b. Brownl. 233. S. C. (a) And the plaintiff hath election to take execution *de melioribus damnis*. 3 Mod. 102.

So, where they plead several pleas, as in an action of battery, if one pleads not guilty, and the other justifies, and both issues are found for the plaintiff; in such case he may enter a *nolle pros.* against one, and take judgment against the other, because their pleas are several. Walsh v. Bishop, Cro. Car. 239. 3 Mod. 102. S. C. cited.

If in trespass against two, one appears against whom the plaintiff counts *simul cum*, &c. who pleads, and is found guilty and damages assessed, and after the other appears and pleads, and is found guilty, he shall be charged with the damages taxed by the first jury. 11 Co. 6. b. Roll. Rep. 31. S. C. 10 Co. 119.

If in trespass against *A.*, *B.*, and *C.* for a battery and wounding, *A.* appears, and the plaintiff declares against him, *simul cum*, &c. and *A.* pleads not guilty, and a *venire* issues, &c. and after *B.* appears, and the plaintiff declares against him *simul cum*, and *B.* pleads not guilty, and a *venire* issues, and both these issues are tried at the same assises, *viz.* that against *A.* is first tried, and 200*l.* damages given; and after that against *B.* is tried, and 50*l.* damages given; and after *C.* appears and confesses the action, and a writ of inquiry is awarded upon the roll, but none issues; the (b) plaintiff at his election may have judgment for the damages given by the jury, and this shall bind all, for in judgment of law the several juries gave their verdict at the same time. Sir John Heyden's case, 11 Co. 5. b. 1 Ro. Rep. 30. S. C. *Johns v. Dodsworth*, Cro. Car. 192. Like point in an appeal of mayhem. (b) In trespass against *A.*, *B.*, and *C.*, *A.* and *B.* justify; to which the plaintiff replies, and then

they demur. *C.* pleads another plea, whereupon issue is joined, and the demurrer is adjudged against *A.* and *B.*, and upon writ of inquiry damages are given; and after, the issue is found for the plaintiff, and damages given: the plaintiff may have his election, which damages he will take. *Headley v. Mildmay*, Roll. Rep. 395. Cro. Ja. 350. S. C. adjudged upon a writ of error; and the first judgment affirmed accordingly, because the writ is entire, and the defendants are all charged with one battery, though the declarations are several. || In trespass against three, two of them pleaded, the other let judgment go by default; the jury, on trial of the issue, found for plaintiff, damages 35*s.* Afterwards, on the writ of inquiry against the other defendant, the jury assessed 2*s.* damages, and judgment was entered, that plaintiff do recover against two defendants 35*s.* and against the other 2*s.* On motion that the 2*s.* damages might be struck out, and judgment be entered against all three jointly for 35*s.*, the Court said, that plaintiff might take judgment *de melioribus damnis* where several damages are given, or enter a *remittitur*; but that taking damages for the whole makes the judgment bad in point of law, and that it is not amendable, not being the misprision of the clerk, but founded on the verdict. *Sabin v. Long*, 1 Wils. 30. ||

[So, where two defendants in *assumpsit* severed in pleading, and the one pleaded a bankruptcy, which, on issue joined, was found 89. Noke v. Ing-ham, 1 Wils.

found for him; it was holden, that the plaintiff might enter a *nolle prosequi* as to him, and still proceed to final judgment and execution against the other.]

Cro. Ja. 251.
And if the damages should be found severally, it would be double.

In trespass for an assault, battery, and wounding, the defendant *quoad* the battery and wounding pleads not guilty, and *quoad* the assault justifies, and both issues are found against the defendant, several damages shall not be found, for the assault is included in the battery and wounding.

Player v. Warn, Cro. Car. 54.

(a) So, in trespass, if one defendant is found guilty in part only, and the other in all, the damages shall be several.

If in trover and conversion of 2000 loads of coals, upon not guilty pleaded, the defendants are (a) found severally guilty for several loads of coals, and severally not guilty for the residue; the jury must assess several damages (b); adjudged upon a writ of error in the exchequer-chamber, and judgment against them severally for damages, according to the verdict, and entire costs.

Cro. Eliz. 860. Brownl. 233. Buls. 50. (b) But *vide* Carth. 20., where it is said that the contrary had been lately resolved in C. B. between Whorewood and Jackson. [And agreeably to that resolution the law is now settled. For where the count is of a *joint* trespass, and the jury find the defendants guilty of a *joint* trespass, or they all confess the trespass, the damages cannot be severed. Hill v. Goodchild, 5 Burr. 2790. Onslow v. Orchard, 1 Str. 422. Lowfield v. Bancroft, 2 Str. 910. Mitchell v. Milbank, 6 T. Rep. 199.]

Rodney v. Strode & al. adjudged in B. R. Pasch. 2 J. 2., and affirmed in the Exchequer-chamber, as also in the House of Lords, 1 W. & M. and a like judgment said to be lately given in B. R. between Trobarefoot and Greenway, Carth.

In trespass and false imprisonment, and imposing the crime of treason on the plaintiff, against A., B. and C., B. confessed the action, A. and C. pleaded jointly not guilty, and were found guilty; the jury assessed damages, *viz.* 1000*l.* against A. and 50*l.* against B. and C. each; and the plaintiff entered a *nolle prosequi* as to B. and C., and took judgment against A. only for the 1000*l.*: it was holden, that the defect of the verdict was (c) cured by the *nolle prosequi*; for as the plaintiff might have brought his action against them jointly or severally, so it is but reasonable that he should have the same election as to the damages; although it was objected that the plaintiff hath election *de melioribus damnis* only where the trials are at several times, and this was a fact of which they are all equally guilty, and that it was a contradiction to say that the plaintiff is injured by one to the value of 50*l.* only, and by the other to the value of 1000*l.*

19. 3 Mod. 101. S. C. Cro. Car. 243., like case; where it is said, though damages ought not to have been taxed severally, yet the plaintiff relinquishing his suit against the other, it is not material, no advantage being taken thereof. [Though if several damages be assessed in such case, and judgment thereupon entered up, it would be error, yet it is no ground to arrest the judgment. Carth. 19. 6 T. Rep. 199.] (c) For this *vide* Rast. Ent. 127. 583. 654. Roll. Abr. 784. Cro. Car. 54.

Tidd's Pr. 732. 5th edit. 11 Co. 5. Dicker v. Adams, 2 Bos. & Pull. 163.

[If there be judgment by default as to part, and an issue upon other part, or in an action against several defendants, if some of them let judgment go by default, and others plead to issue, there ought to be a special *venire*, as well to try the issue, as to inquire of the damages, *tam ad triandum quam ad inquirendum*, and the jury, who try the issue, shall assess the damages for the whole, or against all the defendants. In these cases, when the defendants who plead to issue are acquitted at the trial, the jury, in some instances, shall assess damages against the

the defendants who let judgment go by default, and in others not. In actions upon *contract*, as *covenant* (a), *assumpsit* (b), &c. (a) 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C. (b) Ca. Pr. C. B. 107. Pr. Reg. 102. S. C. 3 T. Rep. 662.

the plea of one defendant, for the most part, enures to the benefit of all; for the contract being entire, the plaintiff must succeed upon it against all or none; and therefore, if the plaintiff fail at the trial, upon the plea of one of the defendants, he cannot have judgment of damages against the others, who let judgment go by default. But in actions of *tort*, as *trespass*, &c. where the wrong is joint and several, the distinction seems to be this, that where the plea of one of the defendants is such as shews the plaintiff could have no cause of action against any of them, there, if this plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment or damages against those who let judgment go by default (c): but, where the plea merely operates in discharge of the party pleading it, there, it shall not operate to the benefit of the other defendants, but, notwithstanding such plea be found against the plaintiff, he may have judgment and damages against the other defendants. (d)

If there be a demurrer to part, and an issue upon other part; or, in an action against several, if some of them demur, and others plead to issue, the jury who try the issue shall assess the damages for the whole, or against all the defendants. Tidd's Pr. 732.

But, if in trespass, one defendant lets judgment go by default, another demurs, and a third pleads to issue, and is acquitted, the plaintiff may assess several damages against the others. 2 Str. 1140. 1222.

If there be a demurrer to one count, and an issue on the other, and the plaintiff be nonsuited on the issue, contingent damages cannot be assessed on the demurrer.] Snow v. Como, 1 Str. 507.

(E) Where the Court may increase or mitigate the Damages.

IN (e) all actions at *nisi prius*, where damages are the principal, as the court can have no certain conusance of the cause, either by record or other matter apparent, they can neither mitigate nor increase the damages. Roll. Abr. (e) In trespass for cutting his trees, upon not guilty pleaded, the court cannot increase the damages given by the jury, because it lies not in their conusance. 3 H. 4. 4. Bro. Costs. 7.—Nor can they diminish them, because the trespass is local, and it cannot appear to them what the damages were. Brownl. 204.—So, in case for words, though the court thought the damages excessive, yet they would not mitigate them. Palm. 314. And though at first they inclined to do it, yet upon great consideration they resolved to leave such matters of fact to the trial of the jury, who best know the quality and estate of the person, and the damages he hath sustained.

But in (f) battery *pro amputatione manus dextræ*, the court may increase the damages, for it is apparent to the court by the record and (g) view of the person. 22 E. 3. 11. b. 3 H. 4. 4. Roll. Abr. 572. Leon. 139., so done. (f) So, in an appeal of mayhem, upon view of the mayhem. 8 H. 4. 22. 3 Ass. 30. — In an appeal of mayhem the jury gave 20 marks damages, and upon view in court, and information of the surgeons there present, the court increased the damages to 100*l*. because

he lost the use of his hand. Roll. Abr. 572. Freeman and Trevers. (g) It is not sufficient that the justices of *nisi prius*, upon view thereof, certify that he had sustained damages to such greater sum; for the justices of the court, out of which it issues, cannot increase the damages without their view. 8 H. 4. 23. Roll. Abr. 572. 3 Salk. 115. Ld. Raym. 176. — But upon a view *in pais* by any of the justices of the court into which the *nisi prius* is returned, they may increase damages. 8 H. 4. 23. Bro. Damages, 74.

19 H. 6. 10.
adjudged.
Roll. Abr. 573.
Styl. 310. S. C.
adjudged.

(a) Judgment
in battery by
non sum infor-
malus, and
upon a writ of
inquiry of da-
mages found,
&c. And upon
a motion to
mitigate the
damages, the
court said,
that in such

cases they never alter the damages. Lit. Rep. 150. Hetl. 93. Ld. Raym. 176. (b) Otherwise, if the wounding be not particularly expressed in the declaration, that the court may judge thereof by the record; for it ought to appear that the wounding was by this battery, and the party is not to be viewed in court by a bare averment at the bar. Styl. 345. — So, in an appeal of mayhem, when the particulars of the mayhem are not expressed in the declaration, the court, upon view of the mayhem, cannot increase the damages, unless the judge of *nisi prius*, before whom tried, certify the particulars of the mayhem to the court; or where tried before a judge of the same court, who affirms that these are the mayhems that were proved upon evidence; otherwise *non potest constare curiæ*, that these are the same mayhems for which the plaintiff has declared. Latch. 223. Sid. 108. 177. [In Austin v. Hilliars, Hardr. 408. it was adjudged, that the damages may be increased, if the word *maihemavit* be in the declaration, though the better way is to express the manner of the maihem. And in another case, the court seemed to think a declaration that the defendant assaulted and maimed the plaintiff in his left hand, particular enough. Brown v. Seymour, 1 Wils. 6. If the wound be apparent, though it be not a maim, the damages may be increased by the court. Cook v. Beal, 1 Ld. Raym. 176.]

Lit. Rep. 51.

In trespass for an assault and battery against *A.* and *B.*, *A.* appeared, &c. and a verdict was given against him, and damages taxed to 30*l.* and the court upon view of the mayhem increased the damages to 40*l.* and after a verdict was given against *B.* and damages taxed; and then it was moved that the court, upon another view of the wound, would increase damages against *B.*, for that *A.* had murdered the officer that came to serve the execution upon him for the 40*l.*, so that possibly the plaintiff might recover nothing against *A.* But it was denied by the court, for that they could have the view but once in the same action; though if he had brought several actions, it would have been otherwise; but the court directed the plaintiff to stay till *A.* was hanged, and then they might have the view and increase the damages.

Burford v.
Dadwell, Sid.
433. 1 Mod. 24.
S. C. but not

In trespass *Quare insultum fecit et maletractavit* the wife of the plaintiff, *et equam*, upon which the wife rode, *percussit*; so that the wife was thrown, and another horse trod upon her,

per

per quod she lost the use of three fingers, &c.; there was a verdict for the plaintiff, and 8*l.* damages; and the court refused to increase the damages upon view of the mayhem and hearing surgeons, because there was no mayhem or wounding directly done by the party, but rather by accident, *viz.* by the coming, &c. of another horse, which, how he came, &c. or whether the wife might have avoided him, is matter of evidence.

¶ An inferior court may increase damages *super visum vulneris*, as well as a superior court; because the law is the same in the one court as it is in the other. ||

Ridge v. Pitt,
P. 33 Car. 2.
B. R. 1 Lill.
Pr. Reg. 534.

The courts have a general discretionary power, except in special cases, as (a) local trespasses, &c. either to increase or abridge the damages found by an (b) inquest of office.

Roll. Abr. 573.
(a) 27 H. 8. 2.
pl. 8. 19 H. 6.
10. pl. 28.

Brownl. 204. (b) In action for taking his goods, if the defendant avows, upon which it is demurred; and adjudged for the plaintiff, or upon default, and damages found upon the writ of inquiry of damages, the court may increase them; for the court (this being upon demurrer) might * have awarded damages without inquiry; and therefore the inquest is but for their information. 14 H. 4. 9. 3 H. 6. 29. b. Yelv. 152. Brownl. 214. — But, where on a writ of inquiry the court refused to mitigate damages, *vide* 3 Leon. 150. Godb. 135. Lit. Rep. 150. Hetley 93. — * *Qu. de hoc?* The constant practice is, to award a writ of inquiry to the sheriff who summons a jury, to assess the damages, which done, the inquest is returned to the court. ¶ “A writ of inquiry is an inquest of office to inform the conscience of the court, “ who, if they please, may themselves assess the damages.” So said by *Wilmot C. J.* on a motion to set aside a writ of inquiry for excessive damages, where judgment had gone by default, in an action of trespass for breaking and entering the plaintiff’s house, and opening and searching several boxes and drawers therein. *Bruce v. Rawlins*, 3 Wils. 61. So, where the plaintiffs obtained an interlocutory judgment in an action of *assumpsit*, and a writ of inquiry was awarded, it was said by the same Judge, “ that the taking of the inquisition and “ entering final judgment were only the conclusion and necessary consequence of the interlocutory judgment; for the court themselves, if they had so pleased, might, upon the “ interlocutory judgment, have assessed the damages, and given final judgment thereupon; “ and the inquisition is only a matter of course taken to inform the conscience of the court.” *Hewit v. Mantell*, 2 Wils. 372. So in *Thellusson v. Fletcher*, Dougl. 316., it was observed by *Buller J.*, “ that writs of inquiry are often sued out in cases where they are not necessary; as “ for instance, in actions of covenants for payment of a sum certain; as in *Holdip v. Otway*, “ 2 Saund. 107. *et infra* (F).” ||

In trespass for taking his goods to the damage of 20*l.* if the defendant pleads an arbitrament made in another county, and this is tried against the defendant, and damages assessed for the trespass; yet, in as much as this foreign jury could not have full conusance of the trespass, and the defendant hath not denied the damage to be according to the count, the court, with the assent of the plaintiff, may increase the damages, and to so much as the plaintiff hath counted. †

13 Hen. 4. 7. b.
vide Roll. Abr.
578. All. 88:
† *Qu. if this*
is law? The
plaintiff might
have produced
his evidence
before this as
well as before

another jury; and whether setting aside the verdict would not be more proper?

On the statute of West. 2. c. 12., which gives damages to an appellee on a false and malicious appeal; if the jury give too great damages, the court may abridge them; or, if they give too small damages, the court may increase them; for after the acquittal of the appellee, their inquiry as to damages is to be considered only as an inquest of office. Also, the (c) words of

2 Hawk. P. C.
c. 23. § 147.
(c) By the statute
3 E. 1.
c. 20. it is
enacted, that
if a trespasser

in parks and ponds is attainted at the suit of the party, great and large amends shall be awarded, according to the trespass; in the explanation of which statute, it is said, that if the damages are too small, the court hath power to increase them, for that the word *award* properly belonged to the court. 2 Inst. 200.

(F) Of the Manner of assessing and recovering Damages.

Yelv. 176. **I**F trespass is brought against overseers of the poor, &c. for any act done by authority of 43 Eliz. c. 2., and there is a verdict for the defendant, the jury shall assess the damages which shall be (a) trebled by the court. 2 Inst. 416. — So, on the statute 23 H. 6. c. 10. Cro. Car. 438.

(b) Roll. Abr. 220. 2 Roll. Abr. 83. Cro. Car. 531. (c) Notwithstanding the king, by his commission, erecting a new court, expressly directs, that the party shall recover his damages by such a prosecution. (b) No damages can be given to the party grieved upon an indictment, or any (c) other criminal prosecution; and where, by statute, damages are given to the party grieved by the offence intended to be redressed, they cannot be recovered on an indictment, grounded on such statute, unless such method of recovering them be expressly given by the statute (d); but they ought to be sued for in an action on the statute, in the name of the party grieved; yet the court may, by (e) virtue of a privy seal, give to the party injured part of the fine set on the offender, or (f) may induce a defendant to make satisfaction to the prosecutors, by giving an intimation, that on that account the fine to the king shall be mitigated. Cro. Car. 558. 2 Hawk. P. C. c. 25. § 3. (d) Jon. 380. Cro. Car. 438. 448. (e) 1 Keb. 487. — May give the third part of the fine assessed. 2 Hawk. P. C. *ubi supra*. (f) Said to be every day's practice. 2 Hawk. P. C. *ubi supra*.

10 Co. 119. Latch. 113. Roll. Abr. 272. 2 Roll. Abr. 112. Skin. 595. pl. 8. Salk. 205. pl. 3. In all actions in which the plaintiff is to be recompensed in damages, the jury must ascertain the damages by their verdict, nor can such omission or defect be supplied by writ of inquiry; for, if this were permitted, the party would be deprived of his remedy by attain against the jury for excessive damages; for no attain lies against them on a writ of inquiry, it being an inquest of office.

10 Co. 118. b. Cheney's case. (g) So, in detinue, where the jury gave a verdict, but omitted to inquire of the value of the goods. 10 Co. 119. b. But in Skin. 595. and Salk. 205., this point is said by Holt C. J. to have been otherwise determined, but, as he thought, contrary to law, being against Cheney's case. So, in a writ *de valore maritagii*, where issue was joined on the tenure, and the jury assessed 40s. damages, and 10s. costs, but did not inquire of the value of the marriage; it was holden, that this defect (g) could not be supplied by writ of inquiry.

Darrose v. Newbott, Cro. Car. 143. (h) Where there is a demurrer to part, If there be (h) a demurrer upon evidence, though the jury are thereby discharged of the issue, yet they may tax damages conditionally, *viz.* if judgment shall be given for the plaintiff; or when the demurrer is determined, it (i) may be done by (k) writ of inquiry, and the more usual course is where there is a demurrer

murrer to evidence, to discharge the jury without further inquiry. and issue to part. 2 Roll. Abr. 722.

(i) Where an omission of taxing damages by the jury cannot be supplied by writ of inquiry, but a *venire facias de novo* shall go. 2 Roll. Abr. 321. — Where the court will refuse a writ of inquiry, but will award a new *venire*. 22 E. 3. 5. Roll. Abr. 571. (k) Where upon a writ of inquiry the plaintiff is not bound to prove his property. Cro. Ja. 220. Yel. 151. Brownl. 214.

If in debt upon a bill obligatory, the plaintiff hath judgment (a) by default, the court, by the assent of the plaintiff, which is always entered upon record, may tax the damages *occasione de-tentionis debit*. (b); but, if he will not assent thereto, he may have a writ of inquiry. But this election is in the plaintiff, not in the defendant (c). Also, it is said to be the course and practice of both courts upon a judgment in debt (d), by default or confession, to tax damages as well as costs. HoldipandOt-way, 2 Saund. 106, 107. Sid. 442. S. P. Fitz. Bar. 283. (a) So, if a verdict is found for the plaintiff, and the jury do not

assess damages, &c. for the debt is certain, and the loss of the plaintiff apparent. Dyer, 105. in margine. — In replevin, the plaintiff is nonsuit; the court, without a writ of inquiry, may assess damages, because they accrue not in respect of any local matter, but it is the delay in the non-payment of the rent; *secus*, where judgment is given for the plaintiff, for he ought to recover for taking his cattle, and the damages may be greater or less, according to the value of the cattle and circumstances of taking. Ognell's case. 3 Leon. 213. (b) Cro. Ja. 415. (c) || Where, therefore, the plaintiff had sued out a writ of inquiry, the court would not set it aside at the instance of the defendant, holding, upon the authority of the case of Holdip v. Otway, that the election to proceed in this course was with the plaintiff and not with the defendant, and that having sued out the writ of inquiry he had made his election. Blackmore v. Flemmyng, 7 T. Rep. 446. But the mere award of a writ of inquiry is not conclusive on the plaintiff, but he may afterwards elect to have his damages assessed by the court. Gould v. Hammersley, 4 Taunt. 148. || (d) So, upon demurrer. Latch. 113. || In cases where the demand is certain, and it is perfectly clear to the court what the damages must be; they will, on the application of the plaintiff after interlocutory judgment, either themselves assess the damages, or direct them to be assessed by the proper officer. In debt on a judgment, it was moved for the plaintiff that the court should tax the damages, namely, interest, without a writ of inquiry, and, after some doubt made by the chief justice, it was at last referred to the secondary to tax the damages. Roo v. Apsley, 1 Sid. 442. 11 H. 7. 5. b. Bro. Default, 105. 1 R. Abr. 571. (J.) pl. 1, 2, 3. And it is now the constant practice upon interlocutory judgments in actions upon bills of exchange and promissory notes. Shepherd v. Charter, 4 T. Rep. 275. Rashleigh v. Salmon, 1 H. Bl. 252. Andrews v. Blake, *Id.* 529. Longman v. Fenn, *Id.* 541. — The like is done in actions of covenant for the payment of a sum certain; Thellusson v. Fletcher, Dougl. 316. Berthen v. Street, 8 T. Rep. 326. Byrom v. Johnson, *Id.* 410.; or on an award, Meggison v. —, K. B. *per cur.* Tidd's Pr. 568. 5th edit. So, in an action on a bail bond; Moody v. Pheasant, 2 Bos. & Pull. 446.; or on a replevin bond, Middleton v. Bryan, 3 Maule & Selw. 155. But, where the damages are not already determined, or the *quantum* is not ascertainable merely by figures, the inquiry must go to a jury. Where the defendant had suffered judgment by default in an action of *assumpsit* on a foreign judgment, the court of king's bench refused to order a reference to the Master, saying, that it was an attempt to carry the rule farther than had yet been done; and as there was no instance of the kind, they would not make a precedent for it. Messin v. Lord Masareene, 4 T. Rep. 493. Nor would they make such a reference in an action on a bill of exchange for foreign money, the value of which is uncertain, and can only be ascertained by a jury. Maunsell v. Lord Masareene, 5 T. Rep. 87. Bagshaw v. Playn, Cro. El. 536. Rands v. Peck, Cro. Ja. 617. Cuming v. Monroe, 5 T. Rep. 87. Nor on a motion to refer a bill of exchange to the officer to compute principal, interest, exchange, re-exchange, charges, expences, and costs, would the court of C. P. allow it as to the *charges and expences*. Goldsmid v. Taite, 2 Bos. & Pull. 55. And in a later case the court of K. B. would not direct the master to allow *re-exchange* in an action on a bill of exchange drawn in *Scotland* upon, and accepted by, the defendant in *England*. Napier v. Schneider, 12 East, 420. Nor can such a reference to the officer be had in *assumpsit* for a sum certain due upon an agreement; *Per Cur.* H. 37 G. 3. B. R. Tidd's Pr. 569. 5th edit.; nor in an action upon a bottomree bond; Palin v. Nicholson, E. 38 G. 3. B. R. *Id.*; nor where judgment has gone by default in an action of covenant upon a deed of indemnity, it being open to the defendant in such a case to enter into questions of collateral satisfaction before the sheriff's jury; Denison, v. Mair, 14 East, 622.; nor to ascertain the amount of the damages

damages in an action of debt on a judgment recovered on a bill of exchange; for a jury may possibly give no damages at all; *Nelson v. Sheridan*, 8 T. Rep. 395. Nor will a reference be made to calculate interest in any case where there is no express stipulation for the payment of it, except perhaps in the case of bills of exchange and promissory notes, the course of dealing in the mercantile world with respect to which is so universal to allow interest upon them, that it may be considered as in the contemplation of the parties at the time. 14 East, 626. Where there was a demurrer to one count on a bill of exchange, and judgment for the plaintiff, and a plea to other counts on which issue was joined, the court referred it to the master to see what was due on the former. *Duperoy v. Johnson*, 7 T. Rep. 473. In such case, however, a *nolle prosequi* must be entered on the other counts, *Heald v. Johnson*, 2 Smith, 46. which may be done at any time before final judgment. *Per Cur. H. 48 G. 3. K. B. Tidd's Pr. 369, 370. notes.* Where the original bill of exchange has been lost, and no tidings of it could be gained, the court have permitted a reference of this sort to the master upon the production of a copy verified by affidavit. *Brown v. Messiter*, 3 Maule & Selw. 281.||

Herbert v. Waters, Salk. 205. *Skin. 595.* S. C. adjudged. If in replevin, the defendant avows as overseer of the poor for a distress for a rate, upon the 43 Eliz. c. 2. and on the trial the plaintiff is nonsuit; if the jury omit to find damages, this omission will be supplied by writ of inquiry; for if the jury had inquired, they had inquired only as an inquest of office, on which no attain lies. || But in this case, as a ground for awarding a writ of inquiry, it is necessary to enter a suggestion upon the roll, that the defendant was overseer of the poor, and that the action was brought against him for something done by virtue of his office.||

Valentine v. Fawcett, Ca. temp. Hardw. 138. 2 Str. 1021. S. C. *Say. Rep. 214.* S. C. *Dewell v. Marshall*, 2 Bl. Rep. 921. 3 Wils. 442. S. C.

10 Co. 119. Also, the omission of the inquiry of the value of the church *Skin. 596.* S. P. in a *quare impedit*, may be supplied by a writ of inquiry. agreed.

|| *Sheafe v. Culpepper*, 1 Sid. 380. Sir T. Raym. 170. S. C. 1 Ventr. 40. S. C. 1 Lev. 255. S. C. 2 Keb. 409. 431. 536. S. C. and in *Herbert v. Waters*, 1 Salk. 205. & *Skin. 595.* S. C. cited and agreed to be law.|| But in an avowry for a rent-charge, according to the 17 Car. 2. c. 7. the omission of the jury cannot be supplied by writ of inquiry; for that statute expressly requires, that the same jury shall inquire of the rent arrear, value of the cattle, &c.

Kynaston v. Mayor, &c. of Shrewsbury, 2 Str. 1051. || So, where no damages are given on trying a traverse of the return to a writ of *mandamus*, the omission cannot be supplied by writ of inquiry.||

DEBT.

- (A) In what Cases an Action of Debt will lie.
 (B) At what Time it shall be said to have accrued.
 (C) Who may bring Debt : And herein, of the Privy of Contract and Estate.
 (D) Against whom it may be brought.
 (E) Where

- (E) Where Debt is the proper Action, and not Covenant Case, &c.
- (F) Of the Manner of bringing the Action, and where it must be brought in the *Debet & Detinet*, or *Detinet* only.
- (G) Of the Extinguishment of the Debt, and pleading in Bar thereof.

(A) In what Cases an Action of Debt will lie.

AN action of debt is said to be founded upon contract, either express or implied; in which the (a) certainty of the sum or duty appears, and therefore the plaintiff is to recover the same *in numero*, and not to be repaired in damages by the jury, as in those actions which sound only in damages; as *assumpsit*, *trover*, &c.

4 Co. 90.
Slade's case,
Vaugh. 101.
(a) Hence debt
due by specialty
can only
be recovered
by action of

debt. — If upon a submission to arbitration, the arbitrators award the payment of a certain sum of money, debt lies; but, if they award the doing of something advantageous to the party only, an action on the case. *Vide tit. Arbitrament and Award*. If one makes a bill to another in these words, *Memorandum, I owe to A. B. 20l. to be paid in watches*; an action of debt must be brought for the money, and not an action for the watches, for the number of watches is not certain. *And. 117*.

But, if in an (b) action, in which the plaintiff can only recover damages, there be judgment for him, he can afterwards bring an action of debt for those damages. *601*, several cases to this purpose. — [Debt will lie on a foreign judgment, without stating in the declaration, or proving the giving of the judgment. *Walker v. Whitter*, *Dougl. 1*.]

(b) As in
waste, 43 E. 3.
2., and *vide*
Roll. Abr. 600,

Also, if after judgment for the plaintiff in *B. R.* the defendant brings a writ of error in (c) *cam. scacc.*, an action of debt may be brought in *B. R.* upon the judgment, pending the writ of error; and the defendant cannot plead *nul tiel record*; for by the writ of error the transcript of the record only is removed.*

Sid. 236. Lev.
153. Raym.
100. S. C.
(c) So, after
writ of error
brought in
parliament.

Sid. 236. But for this *vide* *Style*, 124. *Mod. 121*. 3 Lev. 397. 2 Vent. 261. 3 Keb. 330. and title *Error*. — * But the court, on motion, will stay the suit, the defendant giving judgment, and make a rule to stay execution till the writ of error on the principal judgment is determined.

Debt lies in the *Marshalsea*, or any other court, upon judgments in *C. B.* or *B. R.*, and upon *nul tiel record*, the issue shall be tried by *certiorari*, and *mittimus* out of chancery.

Salk. 209.
per Cur.

Every contract must be legally (d) entered into, and the (e) consideration thereof must be lawful, otherwise an action of debt will not lie.

For this *vide*
head of *Obligations*.

by deed acknowledges that he hath so much money of *J. S.*'s due to him, in his hands, though here is no contract of borrowing between them, yet *J. S.* may have an action of debt against him. 11 H. 6. 39. (e) As marriage, work, soliciting a cause, &c. *vide* *Roll. Abr. 593*, several such instances.

(d) If a man
hands, though
action of debt
against him

If a sheriff levies a certain sum of money on a *levari facias*, at the suit of *J. S.*, and returns the writ (f) served, *J. S.* may have

Hob. 206.
Moor, 886.
Browl. 5. And

where it will lie against the executor of the sheriff, *vide* *Sheriff*, and *tit. Executors and Administrators*. (f) Otherwise, where he returns, that he hath taken goods into his hands to such a value, which remain *pro defectu emptorum*. Cro. Ja. 514. 2 Roll. Rep. 57. Godb. 276. And *vide* March, 13. — But, if he returns, they were rescued from him, he shall be charged; for he might have taken the *posse comitatus*, &c. Mildmay v. Smith, 2 Saund. 343. Sly v. Finch, Cro. Ja. 514. Godb. 276. S. C. Clark v. Withers, 2 Ld. Raym. 1075.

Roll. Abr. 598. If (a) a statute prohibits the doing of a thing under a certain (a) As 14 H. 8. c. 5, against practising physic without licence. — 2 & 3 Ed. 6. c. 13., which gives the treble value for not setting forth tithes. Roll. Abr. 598., and which is now the common practice.

Roll. Abr. 598. An action of debt lies by a sheriff upon the statute of 28 Eliz. Latch. 17. 51. c. 4., for his fees given by the statute, for an execution served by him; though the statute does not say that he shall have his fees, or any action for them, but only says, that he shall not take, for (b) any execution served, any consideration or recompence besides that thereafter in the said act mentioned, §c. (b) The sheriff brought debt for his fees of executing an *elegit*; and held by *Holt* that it lay; for it is all the execution the plaintiff in the original action can have on this judgment; and he may enter on the land extended, if he can, without force. Salk. 209. *vide* Cro. Car. 286.

Co. Lit. 162. a. The action of debt is a proper remedy which the law gives for (c) Also, the grantee for years of an annuity may have an action of debt for the arrears. Cro. Eliz. 268. 895. (d) But, if there had been tenant for life of a rent, and he died, the rent being in arrear, his executor, by the common law, might have an action of debt for the arrears, because there was no other remedy. 4 C. 49. a. the recovery of rents reserved upon leases for (c) years; but this extended not to (d) freehold rents; the reason whereof, and how it is now remedied by 8 Ann. c. 14. *vide* title *Rents*.

Carth. 161. If a lessee for years assigns over his whole term by indenture, Newcomb and Harvey, adjudged. reserving rent, the lessee, by the name of rent, may recover in an action of debt upon the (e) contract; although it was objected, that the lessee having no (f) reversion, it was to be considered as a sum in (g) gross, and therefore not recoverable until the term was expired. (e) Also, debt would lie against a second assignee.

Carth. 162. *per Curiam*. (f) Husband possessed of a term in right of his wife, makes a lease for half the term, and dies; his executors shall have debt for the rent, and yet the feme shall have the reversion. Dyer, 227. (g) If a termor surrenders to the lessor without deed, rendering rent, this is recoverable as a rent, and is not as a sum in gross. Vent. 272. 2 Lev. 80. adjudged.

Cro. Ja. 243. If a man lend goods as a security for money, and the borrower Yelv. 179. tender the money, and recover the goods in an action of Bulst. 29. 31. trover, yet the pawnbroker may have an action of debt for his (h) So, if a man lend pe- money (h); because, though the security ceases, yet the duty remains,

remains, inasmuch as the money lent is not paid back to the party from whom it came. The same law as to land. rishable goods as a pledge, and they decay, yet the person to whom they are pledged may have an action of debt for his money, because the duty continues. Yelv. 179. Co. Lit. 209.

The conuzee of a statute-merchant, as also the conuzee on the 23 H. 8. c. 6., the statute and recognizance having the seal of the conuzors, as well as the seal of the king, may bring an action of debt, and waive the execution given by the statute; *secus*, of a statute-staple; because the king's seal only, without that of the party, is affixed to it. Bro. Statute Merchant, 16. Moor, 405. Cro. Eliz. 461. 494. 544.

[Debt lies against an officer entrusted with the custody of a prisoner, against whom judgment has been obtained, for his escape, whether voluntary or negligent, in which the very sum for which the party is charged in execution is to be recovered. But against his executors the suit is not *originally* maintainable. (a) Bonafous v. Walker, 2 T. Rep. 126. || Albert v. Eyles, 2 H. Bl. 108. Hawkins v. Plomer, 2 Bl. Rep. 1048. ||

(a) 41 Ass. pl. 15. Dy. 322. a. b. 1 Roll. Abr. 921. — This action in Saund. 218. is referred to the common law; but in 2 Inst. 382. and 2 T. Rep. 129., to stat. Westm. 2. 13 E. 1. c. 11. and 1 R. 2. c. 12.

If an indenture of covenant contain a stipulated penalty for non-performance, the remedy is by an action of debt for such specifick sum. By the same method the arrears of an annuity or rent-charge may be recovered. (b) 3 Wooddes. 96. (b) Co. Entr. 119. a. b. 120. a. Hardr. 332.

Debt may be brought by the assignees of bail (c) and replevin (d) bonds, under particular statutes. (c) Stat. 4 Ann. c. 16. § 20. (d) Stat. 11 G. 2. c. 19. § 23.

|| Debt may be brought by the payee against the maker of a promissory note expressing a valuable consideration upon the face of it. Bishop v. Young, 2 Bos. & Pull. 78.

(B) *At what time it shall be said to have accrued.*

IF a man enters into a bill obligatory for the payment of (e) several sums of money at several days, an action of debt will not lie till the last day is past. Co. Lit. 47. b. 292. S. P. * — * In 292. b. it is more fully

explained, viz. there it is said, "If a man be bound in a bond, or by contract to another, to pay 100*l.* at five several days, he shall not have an action of debt before the last day be past. — But, if a man be bound in a recognisance to pay 100*l.* at five several days, presently after the first day of payment, he shall have execution upon the recognisance for that sum, and shall not tarry, till the last be past, for that it is in the nature of several judgments." 3 Co. 22. a. 128. b. Cro. Ja. 505. Cro. Car. 241. (e) If to pay 20*l.* in manner following, viz. 10*l.* at one day, and 10*l.* at another day, debt lies not till after the last day, because one entire duty; but, if a man binds himself to pay *J. S.* 10*l.* at one day, and 10*l.* at another day; after the first day, debt lies for 10*l.* because it is in itself a several duty. Owen, 42. [Coates v. Hewit, 1 Wils. 81. acc.] So, if *A.* makes a bill to *B.* for the payment of 20*l.*, viz. 10*l.*, &c., and thereby covenants and grants with *B.* that if he makes default in either of the said payments, that he will then pay what of the whole shall be unpaid, after default at the first day, debt lies for the whole. Leon. 208. adjudged.

Co. Lit. 292. So upon a contract, debt lies not till all the days of payment
 3 Co. 22. 4 Co. are past, for where there is but (a) one contract, there can be
 94. 5 Co. 51. but one debt, and, consequently, but one action of debt for the
 S. P. [Rudder recovery of it.
 v. Price, 1 H. Bl. 547.] (a) But the law is otherwise of a covenant or promise to pay money, &c. at several
 days, for as often as the money is not paid, according to the covenant or promise, so often is
 there a breach of the covenant or promise, and consequently so often an action lies. Co.
 Lit. 292. b. [Cooke v. Whorwood, 2 Saund. 337. See too 1 H. Bl. 552.]

Co. Lit. 47. b. If a man leases lands for years, reserving yearly 20l. at four
 292. b. S. P. (b) quarters, debt lies for one quarter before the others are past;
 (b) So, if re- for it is reserved for the lessor's maintenance in lieu of the
 serving week- profits, and shall be considered as several contracts.
 ly, during the term, nine quarters of wheat. Roll. Abr. 601.; but for this *vide* Plowd. 172. Allen, 57.
 Raym. 222. 2 Lev. 80. Vent. 242. 272. Carth. 161., and title *Rent*.

Vide title Election. If one enters into an obligation or contract to pay money, &c.
 on two several contingencies, the obligee may have an (c) action
 (c) As in debt of debt on the happening of either of them; for the putting in,
 on an obliga- that he shall pay at the one or the other, must be taken to have
 tion, that if a been inserted for the benefit of the obligee; and the rather, be-
 ship put to sea, cause every contract is to be construed most strongly against the
 and either the obligor.
 goods or the obligor came
 safe, he should pay such a sum over and above the use allowed by the statute; although the
 obligor dies, yet an action of debt lies against his executor on the happening of the other
 contingency; for the law supplies the words, *which should first happen*. Lev. 54. Sayer and
 Gleane.

(C) Who may bring Debt: And herein, of the Privy of Contract and Estate.

Vide head of *Rent*. 11 H. 6. A T common law, if the lessor, who had reserved rent-service,
 15. 19 H. 6. had died, and there had been rent-arrear, neither his heir
 41. b. Co. Lit. nor (d) executor could maintain an action of debt for them; not
 162. a. the heir, because he had nothing to do with the personal con-
 (d) But, if a tracts of his ancestor; not the executor, because he could not
 woman had represent his testator as to any contracts relating to the freehold
 been endowed and inheritance.
 of a rent, or a
 rent had been granted for life, and the tenant had attorned; and after rent had been arrear,
 and then the particular estate in the rent had determined by death, the executors of the
 tenant in dower, or of the grantee for life, should have had debt by the common law; be-
 cause by possibility the testator might have had debt; as, if he had surrendered his estate to
 the reversioner, he should have had debt for the arrears incurred before; and these particular
 estates, with the attornment of the tenant, or when the law supplies an attornment, amount
 to a real contract in law; which realty, when the freehold is determined, resolves itself to
 the personalty. 4 Co. 49. a. b. Keilw. 47. Executor may bring debt for the arrears of
 annuity due to his testator upon the deed.

11 H. 6. 15. But the executor might have maintained an action of debt for
 Roll. Abr. 596. (e) relief fallen in the life-time of the testator.
 4 Co. 49. S. P.
 Noy, 43. S. P. adjudged; and said, that in such action, seisin of the services need not be
 alleged; otherwise, where the party himself avows. Dalt. 17. Because it is now become as
 a flower fallen from the stock, and they have no other remedy. Co. Lit. 162. b. S. P. For
 it

it is no rent, but a casual improvement. (e) Debt will lie for an administratrix for a fine of a copyholder; and *per Holt Ch. Just.*, it is the proper action; but three judges held, that an *assumpsit* likewise will lie. *Carth.* 90, 91. 3 *Mod.* 239. *Show.* 35. 3 *Lev.* 262. [*Evelyn v. Chichester*, 3 *Burr.* 1717. *acc.*]

And now by 32 H. 8. c. 37., reciting, For as much as by the common law, executors or administrators of tenants in fee-simple, tail, or for (a) life, of rents (b) service, charge and seck, and fee-farms, had no remedy to recover such arrears as were due to their testators in their life; it is enacted, That the executors and administrators of such person to whom (c) such rent or fee-farm shall be due, and not paid at his death, may have debt for such (d) arrearages against the (e) tenant or tenants that ought to have paid the said rents or fee-farms, so being behind in the life of their testator, or against the executors or administrators of the said tenants; and further, that it shall be lawful for such executor or administrator of such person, to whom (f) such rent or fee-farm shall be due, and not paid at his death, to distrain for the (g) arrears, and all such rents and fee-farms upon the lands, &c. charged with the payment of such rent or fee-farms, and chargeable to the distress of the testator, so long as the said lands, &c. continue in the seisin or possession of the tenant in demesne, who ought immediately to have paid the said rent or fee-farm so behind to the testator in his life, or in the seisin or possession of any other claiming (h) only (i) by (k) and (l) from the same tenant (m) by purchase, gift, or descent, (n) in like manner as their testator might or ought in his life, and shall make avowry upon the matter aforesaid.

or second, third, &c. year, but work days, or other corporal service, is not within the act. *Co. Lit.* 162. (e) Whether the lessor, lessee, or occupier. *Lit. Rep.* 93. The tenant is not charged, but he is under a necessity to pay it, to save the distress. *Allen*, 62. (f) This extends not to the grantee of a rent-charge for years, if he lives so long. *Cro. Car.* 171. adjudged; for the statute hath provided only where the testator dies seised of a rent in fee, or for life, and the executors have no remedy, & *vide* 2 *Sid.* 62. (g) But it extends not to the arrears of a *nomine pœnæ*, relief, aid *pur fair fitz chivalier* or *file marrier*. *Co. Lit.* 162. b. (h) Of *cestue que use* of a feoffment, though he claims not only by the feoffor, but by the statute also. 4 *Co.* 50. b. — So, if the tenant makes a gift in tail, and the donee dies, a distress may be taken upon the possession of the issue in tail, though he claims *per formam doni*, as well as by descent. 4 *Co.* 53. b. 2 *Leon.* 153. 3 *Leon.* 59, 60. (i) The tenant leases for life, the remainder in fee, and the tenant for life pays not his rent to the lord, and the lord dies, and the tenant for life dies, the executors of the lord cannot distrain upon him in remainder, for he claims not by or from the tenant for life. *Co. Lit.* 162. b. 5 *Co.* 118. a. — So, in case of a reversion. *Co. Lit.* 162. (k) And not paramount, as the lord by escheat. *Co. Lit.* 162. *Leon.* 303. Or one that is remitted to an ancient title. 4 *Co.* 50. b. (l) The feeoffee, and lessee of the feeoffee, &c. *in infinitum*, are within the act. 4 *Co.* 50. a. b. *Leon.* 303. 2 *Leon.* 153. (m) But tenant in dower, or by the curtesy, shall not be charged, for they claim not by the party only, but by law also; *Leon.* 303. *per Curiam.* 3 *Leon.* 263. *per Curiam.* (n) So, that if after rent is arrear, the lord grants away his seignory, his executors shall have no remedy, for the act gives none, where the testator had none at his death.

By § 3., if any man, in right of his wife, hath any estate in fee-simple, tail, or for life, in rents, or fee-farms, which shall be unpaid in the wife's life; such person after the death of his wife, his executors and administrators shall have debt for the (o) arrears against the tenant of the demesne that ought to have paid the same, his executors or administrators, and he may distrain

(a) Intended of tenants *pur auter vie*, so long as *cestui que vie* lived. *Co. Lit.* 162. a. (b) Reserved upon a lease for life, or gift in tail within the act. *Co. Lit.* 162. (c) Extends not to a quit-rent issuing out of a copyhold. *Yelv.* 135. But *vide Carth.* 91. where, by *Eyre Just.* this is doubted. (d) Whether money, corn, cattle, &c. or other profit to be delivered or yielded, whether annual, (e) Extends to such as incurred before marriage; for

as to those in- for the arrears in like manner as he might have done if his wife
 curr'd during had been then living, and avow upon the matter aforesaid.
 marriage, he
 might have had debt by the common law. 4 Co. 51. a. b. Co. Lit. 162. b. Co. Ent. 119.
 Bendl. 263. Kelw. 214.

By § 4., if one hath rents or fee-farms for the life of another, which shall be unpaid, and *cestui que vie* dies; after his death, such person, his executors or administrators, may have debt against the tenant in demesne that ought to have paid the same when first due, his executors or administrators; and also (a) distrain for the same arrears upon such lands, &c. (b) out of which payable, in such manner as he ought or might if *cestui que vie* had been living.

(a) But, if upon a judgment against tenant for life of a rent-charge, a moiety thereof is extended upon an *elegit*, and after rent being arrear, the tenant for life dies, the tenant by *elegit* cannot distrain for the arrears by this act; for coming in by an act of parliament, he is in the *post*. Pool and Neal, 2 Sid. 28. 62. adjudged. (b) If a rent is granted to A. for the life of B., and after the land out of which, &c., is let to C. for life, the remainder to D. in fee; and rent being in arrear, B. dies, and after C. dies, A. may distrain upon D. in remainder for all the arrears. Co. Lit. 162. b. Edrich's case. 5 Co. 118. adjudged, & vide Moor, 625. Cro. Eliz. 805. S. C. Debt is given in lieu of the distress.

Roll. Abr. 598. If a man leases for years, rendering rent, and after devises the rent to another, and dies, the devisee may have an action of debt for the rent, though it is become a rent-seck, because by the original creation thereof debt lay.

Leon. 315. So, if the lessor grants over the rent, and the lessee attorns, 2 Leon. 1. vide for the attornment creates a privity; and there is no case where
 Dyer, 140. a thing may be transferred or assigned over, but the remedy
 Cro. Eliz. 895. shall go along with it; and the law (c) favours remedies for
 (c) Husband possessed of a rents.
 term in right of his wife, makes a lease for half the term, and dies, his executors shall have debt for the rent, and yet the feme shall have the reversion. Co. Lit. 46. — Rent granted for life, tenant dies, debt will lie, because there is no other remedy. Dyer, 227.

Cro. Eliz. 268. If a man grants an annuity for years, an action of debt may
 adjudged. be brought for the arrears during the years, for being a grant
 Bulst. 151. for years, it is by the deed as a contract.
 said to be ad-
 judged. Yelv. 208. and Bulst. 151. Lucas and Fulwood, S. P. seems to be admitted; but
 the plaintiff could not recover, because his plaint was of debt, and his count of annuity;
 but vide Dyer, 140. Cro. Eliz. 3. 9 H. 7. 17. cited in 7 Co. Lillington's case, 45 E. 3. 8.

4 Co. 49. a. If the father grants a rent-charge to the son in fee, and the rent being arrear, the father dies, and the land descends to the son, by which the rent is extinct, the son may charge the executors of the father in an action of debt for the arrearages incurred in the life of the father; for though no action lies for them, as for the arrearages of a rent, [yet for the arrears of an annuity it is maintainable; and though by the descent of the land to the grantee, being heir to the grantor, as well the annuity as the rent was determined, and the original election was annexed to an inheritance, yet inasmuch as the inheritance of both was determined by act of law, (which will do no wrong to any) his election shall remain as to the arrears.]

[By

[By stat. 8. Ann. c. 14., an action of debt is given for the recovery of rents upon leases for a life or lives *during their continuance*, which the common law denied: on which statute Mr. Serj. *Hawkins* queries, whether it doth not extend to leases of incorporeal hereditaments?

Hawk. Abr.
Co. Lit. 73.

By stat. 5 Geo. 3. c. 17. § 3., which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, debt is given for the recovery of rent on such leases.]

(D) *Against whom it may be brought.*

IF a feme, lessee for life, takes husband, and dies, debt lies against the husband for (a) rent issuing out of the land, incurred during coverture; for he took the profits out of which the rent issued.

his executors, for the arrears of a rent-charge incurred during such time as he took the profits. 4 Co. 49. b.

10 H. 6. 11.
26 E. 3. 64.
Roll. Abr. 592.
(a) Also it lies
against him or
as he took the

If lessee for years assigns all his interest to another, yet the lessor may have debt against the (b) lessee for the arrears incurred after the assignment; for the privity of contract remains, and the lessee by his own act shall not prevent the remedy of the lessor against him upon his contract.

Walker's case,
3 Co. 22.
Moor, 351.
S. C. adjudged.
Cro. Eliz. 556.
S. C. cited. 715.
S. C. cited, and

denied by three judges to be law. Sid. 266. S. C. cited, and agreed to be law, though several of the cases there put, as there reported, were denied to be law. Latch. 260. S. C. cited, and said it was not adjudged, as appears by the book of entries. Poph. 120. seems to be the S. C. cited, & vide Dals. 16. (b) Or assignee, at his election. 4 Leon. 17. 3 Co. 24. — But, if he once accepts the rent from the assignee, he shall not after charge the lessee for rent due after the assignment. 3 Co. 24. b. Marrow and Turpin. Moor, 600. 2 And. 133. & vide Sid. 402. — For in the acceptance of the rent from the assignee, notice of the assignment is implied. March and Brace, Cro. Ja. 334. adjudged, 2 Bulst. 152. adjudged, & vide Roll. Rep. 366. — But, though he refuses to accept the assignee as his tenant, yet he may after charge him in an action for the rent, if he pleases. Devereux and Barlow, 2 Saund. 181. — Where covenant, against the lessee, after assignment of his term, brought upon an express covenant for non-payment of rent, and held good, and that the accepting the assignee as tenant did not hurt. Edwards and Morgan, 3 Lev. 233. Carth. 178.

But, if after such assignment of the lessee the lessor grants over his reversion to another, the grantee shall not have debt against the lessee; for the privity of contract holds only between the lessor and lessee.

3 Co. 22. b.
per Cur. Poph.
55. S. P. ad-
judged.
Brownl. S. C.

Cro. Eliz. 556. cited. Moor, 351. cited; but vide Cro. Eliz. 636. and 3 Lev. 233.

If *A.* leases three acres to *B.* rendering rent, and *B.* assigns all his estate in one acre, and after *A.* grants the reversion of three acres to *C.*, he may have debt against (c) *B.* for the whole rent, for the entire estate remaining in part, the entire privity and action for the whole remains against the first lessee.

Cro. Eliz. 633.
3 Co. 24. a.
S. C. cited,
and vide Lit.
Rep. 53.
(c) Cro. Ja.
411. said the

lessor in such case may have a joint action against the lessee and assignee. — For arrears of a rent-charge for life, after determination thereof, debt lies not against him alone that received the profits of part of the land charged, but against all that received the profits of any part thereof. *Duppa v. Mayo*, 1 Saund. 284.

2 Lev. 231.
Gamon and
Vernon, ad-
judged. Sir T.
Jones, 104.
S. C.

If lessee for years assign his whole term in the moiety of the land, the lessor may have an action against the assignee for the moiety of the rent; for the assignee having the entire estate in the moiety of the land, he hath a sufficient privity of estate to be charged by the lessor, if he pleases, with the moiety of the rent.

(a) So, where the administrator of the lessee assigns. Marrow and Turpin, Cro. Eliz. 715. adjudged. Moor, 600. adjudged. *per totam curiam*.

If a prebendary leases for years rendering rent, and this is confirmed by dean and chapter, and the lessee dies, and his (a) executor (b) assigns over the term, and after the prebendary resigns, and a new prebendary is made, he shall not have debt against the executor of the first lessee for the rent due after the assignment; for the successor was no party to the contract, but privity in law only, (c) and by the assignment of the term, the cause of the charge is removed. Adjudged between (d) Overton and Syddal, Cro. Eliz. 555.

2 And. 133. adjudged. Latch. 260. cited, and said no judgment was ever given, as appears by the roll; but Q. Vent. 210. cited, and said that the acceptance of rent from the assignee was pleaded, &c. 3 Mod. 326. cited, and said the late resolutions had been contrary. 4 Mod. 76. cited, and denied to be law; for the executor shall be still liable to the contracts of his testator, so long as he hath any assets to satisfy them. (b) By the report of the case in Popham the lessee assigned. (c) That the executor is liable notwithstanding, Ironmonger and Nusam, Noy, 97. Latch. 261. 2 Vent. 209. cited to have been so resolved. Helyar and Cashord, Sid. 240. 266. adjudged. Lev. 127. adjudged. But by this report the action was brought against an administrator. (d) Poph. 120. S. C. and the court divided. Gouls. 120. adjudged by three judges *cont.* Popham, who held the contrary, and that the successor was privity to the contract of the predecessor. 3 Co. 24. a. S. C. cited to have been adjudged by Popham C. J. and all the court, whether the assignment were by the lessee himself or his executor; yet *vide* the report of the case in the books before. Sid. 266. S. C. cited from 3 Co. 24. and denied to be law, as there cited. Lev. 127. S. C. cited to have been adjudged, because the privity of contract did not go to the successor more than to the heir, and the heir of the lessor shall not have debt against the lessee after assignment, because the privity of estate only descended to him. Latch. 262. S. C. cited, and said that the lessor being a sole corporation, the privity of contract was determined.

Lev. 215.
Keighly and
Bulkley, ad-
judged by

If the assignee of a term assigns to another, yet he may be charged in debt for rent growing due after, before notice given to the reversioner; but Q.

Keeling and Windham, *cont.* Twisden. Sid. 338. S. C. Raym. 162. 2 Kcb 260. S. C.

Carth. 177.
Tovey and
Pitcher, held
by Pollexfen
and Rokeby
in C. B. *cont.*
Powel and
Ventris, that

For where covenant was brought for rent against the assignee of the executrix of the lessee, who pleaded that before any rent arrear he assigned over to J. S., on demurrer it was holden, that the privity was destroyed, and the assignment complete without notice, and the defendant discharged of all the rent accrued after the assignment.

the defendant ought in his plea to have set forth notice given to the plaintiff of the assignment; and Ventris dying, the judgment was accordingly; but upon a writ of error in B. R. the judgment was reversed by three judges. 3 Lev. 295. S. C. Show. 340. S. C. 4 Mod. 71. S. C. 2 Vent. 228. 234. S. C. Salk. 81. pl. 2. 12 Mod. 23. S. C. [1 Ld. Raym. 368. S. C. cited. *Vide supra* 352, 353.]

Barry v. Robinson, N. R. 293. Prince v. Nicholson, 5 Taunt. 665.

Debt does not lie against an executor or administrator upon a simple contract of the testator or intestate. But, if the defendant does not demur, advantage cannot be taken of it, either in arrest of judgment or in error. ||

(E) Where

(E) Where Debt is the proper Action, and not Covenant, Case, &c.

ACTIONS of debt are founded on contract, in which the plaintiff sets forth his demand in certainty, and insists on being restored to it *in numero*. 4 Co. 92. b. Slade's case.

The inconveniency of the defendant's being allowed to wage his law in this action occasioned the substituting of other actions in the room of it, such as all actions on the case, which are properly founded on injuries and fraud; for in these the defendant could not wage his law, because he could not make oath of paying that which by reason of its uncertainty he could not know, and which could never be known before it was ascertained by the jury. Vaugh. 101.

Hence if *A.* declares that he sold corn, &c. to *B.* and that *B.* at or before such a day promised to pay so much money, *A.* may at his (a) election bring debt or *assumpsit* for the injury done by the violation of the contract. 4 Co. 92. b. Slade's case. Moor, 433. S. C. Yelv. 20. S. C.

Vide the Register, 95. 139. (a) If I deliver 20*l.* to *A.*, to deliver to *B.*, and he does not deliver it, I may have an action of account, debt, or perhaps case, against him. *Keilw.* 69. a. 77. b. *Cro. Ja.* 687. *Dyer*, 21. *Hut.* 12. — *A.* delivers oxen to *B.* to sell for as much as he can get, and he sells them for so much, *A.* may have debt against *B.* for the money. *Roll. Rep.* adjudged. — *A.* delivers money to *B.*, to re-deliver, debt lies for it. *Palmer*, 364. — The defendant, by bill sealed, acknowledged that he had received 7*l.* of the plaintiff *ad emendandum* a pair of bellows. *Cro. Eliz.* 644. adjudged, that account or debt lay. *Vide* 3 *Leon.* 38. *Roll. Abr.* 597. 2 *Ld. Raym.* 814. 2 *Salk.* 658. 7 *Mod.* 87.

A. pays money to *B.* as a fine, upon *B.*'s promise to make a lease of land, and before the lease is made *B.* is evicted; debt lies not for the money, for it was not paid to be received back; but case lies for non-performance of the bargain, in which he shall recover in damages not only the money given for the fine, but the damage by breach of the contract. Palm. 364.

If *A.* covenants with *B.* to pay him (b) so much money as he shall expend in the repairing and victualling of a ship for him, and *B.* expends 300*l.* accordingly, an action of debt or covenant lies for the money expended. Styl. 31. 133. S. P. (b) 2 Jon. 184. Like point adjudged, though

the certainty of the debt did not appear by the deed.

If it be recited by deed that there is a suit depending between the vicar of *S.* and *A.* concerning a *modus decimandi*, which concerns all the parishioners of *S.*, and *B.* a parishioner, by the said deed, agree and promise *A.* to pay his proportionable part of the charges of the suit, an action of debt or covenant lies upon this deed; for by an averment of what was expended in the suit, that which was at first uncertain may be reduced to a certainty. (c) 3 Lev. 429. Sanders and Mark, adjudged after a long debate. (c) [That debt will lie for an indeterminate sum, capable of being

readily reduced to a certainty, hath been established by other cases. *Bloome v. Wilson*, Sir *T. Jones*, 184. *Birch v. Weaver*, 2 *Keb.* 225. *Rands v. Peck*, *Cro. Ja.* 618. Nor is it now understood to be necessary that the plaintiff should recover the full sum demanded. *Aylett v. Lowe*, 2 *Bl. Rep.* 1221. *Walker v. Witter*, *Dougl.* 6. *Rudder v. Price*, 1 *H. Bl.* 550. And a declaration in debt upon a simple contract hath been holden good, though it

specified by the several counts a *less* sum than appeared to be demanded in the recital of the writ, and yet assigned as a breach the non-payment of the sum demanded in the writ. *McQuillin v. Cox*, 1 H. Bl. 249.] || So of a declaration in debt by bill, where the sums demanded in the several counts amounted altogether to more than the sum at first demanded in the *queritur*; for that is superfluous and may be rejected. *Lord v. Houston*, 11 East, 62. Adjudged on a special demurrer. ||

Cro. Eliz. 380. If *A.* retains *B.* to embroider a sattin gown of a maid servant of the daughter of *A.*, taking for the same 40s., *B.* may have debt against *A.* for the money; for the embroidering of the gown of another at the request of *A.* is a sufficient consideration to charge *A.*, and it is at the election of *B.* to bring debt, or an *assumpsit*.

Wilson v.
Knubley,
7 East, 128.

|| An action of *covenant* will not lie upon the statute of 3 & 4 W. & M. c. 14. against the devisee of land to recover damages for a breach of covenant by the devisor; but the remedy given by that act is expressly confined to cases where *debt* lies. ||

(F) Of the Manner of bringing the Action, and where it must be brought in the *Debet* and *Detinet*.

(a) 50 E. 3. 16. b. Roll. IF the action be brought for (a) money, it must be in the *debet* and *detinet*; but if (b) for goods or chattels, it must be in the *detinet* only.

260. 4 Leon. 46. S. P. Winch, 75. It was brought for money in the *debet* and *detinet*, and for two shirts in the *detinet* only.* — * *Sed qu.* If the declaration was good, as it seems to be two distinct species of action, and to require two different pleas?

Palm. 407. So, if brought for foreign money (c) not made current, for Latch. 77. 84. then it is as bullion.

Jon. 69. S. C. adjudged, where by *Dod.* the action might be brought in the *debet* and *detinet*, or in the *detinet* only; but this must be intended where so much *English* money, being the value of the foreign, is demanded. *Rastal and Draper*, Cro. Ja. 88. Yelv. 80. Brownl. 90. Noy, 13. & vide Leon. 41. Yelv. 135. Brownl. 102. (e) But, if made current by proclamation, the action for it may be brought in the *debet* and *detinet*. Noy, 13. Latch. 77. 84. Palm. 407. — Debt in the *debet* and *detinet* for 107l. 10s. where the declaration was upon a special wager for 100 guineas, which the plaintiff averred were worth 107l. 10s., and it was objected that it should have been in the *detinet* only, for 100 guineas in specie, but held well enough as to this point, though reversed for another fault. *St. Leger and Pope*, Carth. 322. 5 Mod. 4. 4 Mod. 406. Lutw. 484. Salk. 344. S. C. 10 Mod. 336. 12 Mod. 81. S. C.

Cro. Ja. 88. If a man sells certain cloths for 66l. *Flemish* money current Rastal and at *Middleburgh*, to be paid upon request, he may bring an action of debt for 39l. 12s., setting forth the special matter, and averring that the 66l. *Flemish tempore venditionis*, &c. amounted judged. Yelv. to 39l. 12s. *monetæ Angliæ*, and that the defendant has not paid, &c., and if he values the foreign money otherwise than in truth 80. Brownl. it is, the defendant may plead in abatement, and so help himself. 90. Moor, 775. Adjudged, after a verdict, for the plaintiff, and said, that 41. Cro. Eliz. it being found that he owed what is demanded, there ought to 536. S. P. ad- be no (d) farther inquiry of the value. judged, & vide Yelv. 135. Brownl. 102.

(d) But in debt against an executor for 47l. 8s. 8d. *monetæ Flandriæ attingent, ad valentiam 40l. English*, the defendant pleaded *plene administravit*, and it was found against him, and judgment given *quod recuperet debitum*; but upon a writ of error between Bagshaw and Plain, Cro. Eliz.

536., it was reversed, because it should have been *quod recuperet* the 47l. 8s. 8d. *Flemish*, and a writ ought to have been awarded to inquire the value; Moor, 704. reversed, because the jury had not inquired of the value of the *Flemish* money, and the affirmation of the plaintiff that it amounted to 40l. was not a sufficient warrant for the court to give judgment upon.

If an executor brings debt for any thing in right of his testator, it must be in the *detinet* only. Moor, 566. Roll. Abr. 602, 603. 20 H. 6. 5. 5 Co. 32. b. S. P. laid down as a rule.

As, if *A.* be in execution upon a judgment for *B.*, and after *B.* die, and after, *A.* bring an *audita querela* against *C.* the executor of *B.* and have a *scire facias*, and thereupon put in bail for recognizance in chancery, according to the statute of 11 H. 6. c. 10., and after upon this *audita querela* judgment be given against *A.*, and afterwards a *scire facias* issue against the bail, and after judgment the bail be taken in execution upon the recognizance, and the sheriff suffer him to escape; upon which escape the executor brings an action of debt; (*a*) this action ought to be brought in the *detinet* only, and not in the *debet* and *detinet*, for this recognizance is in the nature of the first debt, this being in a legal course. Roll. Abr. 602. Lane, 79. S. C. adjudged. (*a*) So, if one, as executor, obtains judgment in debt, and takes the defendant in execution, and the sheriff suffers him to escape, &c. for the first action being in the *detinet*, and that for the escape being founded upon the same record, it ought to pursue it. Cro. Eliz. 326. Cro. Ja. 545. 685. Hob. 264. 2 Roll. Rep. 132. Styl. 232. Hut. 79. S. P. adjudged, in which last book it was endeavoured to distinguish it from the other cases, because the plaintiff declared generally, and not as executor.

So, if an executor recovers in an action of debt upon a contract, and afterwards brings debt upon the judgment, it must be in the *detinet*. Roll. Abr. 603. Lane, 80. S. P.

If an executor brings debt upon an obligation made to the testator, where the day of payment incurred after the death of the testator, yet the writ shall be in the *detinet* only, for he brings the action as executor. 20 H. 6. 5. b. Roll. Abr. 604. S. C.

So, if a man binds himself to the testator to pay him 100l. when such a thing shall happen; if it happens after the death of the testator, yet the writ of debt by the executor shall be in the *detinet* only. 20 H. 6. 6. b. Roll. Abr. 602.

If a rent be granted to another for years, the executor of the grantee shall have debt for the arrearages of this rent incurred after the death of the testator in the *detinet* only, for he had it as executor. 11 H. 6. 36. Roll. Abr. 602. S. C.

So, if lessee for 20 years leases for 10 years rendering rent, and dies, his executor or administrator shall have debt for the rent incurred after the death of the testator (*b*) in the *detinet* only. Roll. Abr. 603. Spark and Spark, Cro. Eliz. and Noy, 32. S. C. ad-

judged. Cro. Car. 225. Lev. 250. 2 Keb. 407. Sid. 379. S. P. adjudged. (*b*) But in the case of *Tratle and King*, 2 Jon. 169. it is adjudged, it lay in the *debet* and *detinet*, and a diversity taken between things in action and chattels in possession; for as to things in action the writ must always be in the *detinet*; as for the arrears of an account, &c. and it shall not be assets till recovered; but in this case, the reversion of the term being in the executor immediately by the death of the testator, it is assets; for the whole value, and the shewing he is executor, is only to entitle him to the term to which the rent is incident. — And where being brought in the *debet* and *detinet*, is aided after verdict, by 16 & 17 Car. 2. c. 2 vide Lev. 250.

Cro. Eliz. 326. If in an account an executor recovers a debt due to his testa-
 Cro. Ja. 545. tor, in debt for the arrearages thereupon, the writ shall be in the
 5 Co. 31. a. *detinet* only; for though the action is converted into a debt by
 But for this the account, yet it is the same thing which was received in the
vide Hob. 88. life of the testator.
 184. 272.
 Noy, 19.

2 Lev. 111. 2 Jon. 47.

20 H. 6. 4. b. But, if an executor takes an obligation for a debt due to his
 5. b. Roll. Abr. testator by contract, in debt upon this obligation, the writ shall
 602. S. C. be in the *debet* and *detinet*.

20 H. 6. 5. b. So, if an executor recovers in trespass for goods taken out of
 Roll. Abr. 602. his possession, in debt for the damages recovered, the writ shall
 S. C. Lane, 80. be in the *debet* and *detinet*, for he need not name himself exe-
 S. C. cited. cutor.

Roll. Abr. 602. So, if the executor sells the goods of the testator for a certain
 Lane, 80. sum, he shall have debt for this in the *debet* and *detinet*.
 Cro. Ja. 685.

Winch. 80. If an executor, having lands by an extent upon a statute made
 S. C. Brownl. to the testator, and, naming himself executor, by deed leases
 205. Mod. them for three years, rendering rent, &c., if an action of debt is
 185. S. P. after brought by him for this rent, it must be in the *debet* and
detinet, because it is founded upon his own contract.

Cro. Ja. 545. So, an executor, being lessee for years of a rectory in the
 cited to have right of the testator, may have debt upon 2 & 3 E. 6. c. 13. for
 been adjudged. not setting out tithes in the *debet* and *detinet*, because founded
 upon a wrong in his own time, and by the statute it is given to
 the party grieved.

11 H. 4. 16. Also, debt against an executor shall be in the *detinet* only, for
 Roll. Abr. 603. he is chargeable no farther than he has assets.

Sid. 397. *vide* But after (a) judgment against an executor, one may in a new
 tit. *Executors*. action of debt in the *debet* and *detinet* suggest a *devastavit* by the
 (a) But not executor, and (b) thereby charge him *de bonis propriis*.
 without a

judgment. Cart. 2. — And therefore it lies not upon a bond suggesting such a *devastavit*, for
 it is hard upon such a surmise to charge an executor in his own right. Vent. 321. adjudged,
 and the court said they would not extend these actions farther than they had been. 2 Lev.
 209. adjudged. Lev. 147., and for this *vide* Roll. Abr. 603. 5 Co. 32. Saund. 216. (b) Where
 the defendant has been held to special bail in such action. Vent. 355. Sid. 63.

11 H. 6. 8. 17. So, if the executor obliges himself to pay a debt due by con-
 b. Roll. Abr. tract by the testator, in debt upon this obligation the writ may
 603. S. C. be in the *debet* and *detinet*, because the obligation made it his
 own debt.

11 H. 6. 36. In an action of debt against an executor for rent, incurred in
 Roll. Abr. 603. the life of the testator, the writ shall be in the (c) *detinet* only.

(c) If debt be brought against an administrator in the *debet* and *detinet* for rent due before his time, where
 it should only be in the *detinet*, this is aided after verdict, by 16 & 17 Car. 2. c. 8. *Vide* Sid. 379.
 Potter's case, and tit. *Error*.

Roll. Abr. 603. But, if an action of debt be brought against an executor for
 Cro. Eliz. 711. the arrearages of a rent, reserved upon a lease for years, and
 Moor, 566. (d) incurred after the death of the testator, the writ (e) shall be
 Brownl. 56. in

in the *debet* and *detinet*, (f) because the executor is charged of his own possession. Cro. Ja. 411.

546. Bulst. 23.
2 Brownl. 206.

Cro. Car. 225. All. 34. Mod. 185. 2 Brownl. 202. Palm. 116. S. P. (d) Where part incurred in the time of the testator, and part after his death, his executor may be charged in the *detinet* for the whole. All. 76. Styl. 118. (e) He may be charged in the *detinet* only, but then he shall answer only out of the testator's estate. Royston and Cordary. All. 42. adjudged, and said that it was never doubted. Styl. 79. adjudged, & vide Styl. 52. Lev. 127.* (f) For though he hath the land as executor, yet nothing shall be employed to the execution of the will but such profits only as are above that which is to make the rent; and therefore so much of the profits as is to make or answer the rent he shall take to his own use, and he shall be charged for it in the *debet* and *detinet*. Poph. 120. per Popham. 5 Co. 31. Cro. Eliz. 712. [but see Cro. Car. 225.] — And if the land be not worth more than the rent, it is a good plea to such action in the *debet* and *detinet*; for in such case he is to be charged in the *detinet* only. Vent. 171. per cur.; and for this vide Palm. 118., Sid. 266., Mod. 185. — But where he is to be charged upon a lease made to the testator, and hath not the profits of the lease to answer it, he ought to be charged in the *detinet* only; as where debt is brought against an executor of a lessee for rent incurred after assignment of the term. Poph. 120. Sid. 266. Lev. 127. 2 Vent. 209. 3 Mod. 327. So, if brought against him after waver of the term. Helier v. Casebert, Lev. 127. & vide Allen, 43. || But it was said by Wyndham J. in this case, that an executor cannot wave a term so as not to be charged with the rent, if he has assets; for he is bound to perform all contracts of the testator, if he has assets, be the rent above the value of the land or not, which was not denied. And Kelynge J. said, that he could not so wave, but that he shall be charged in the *detinet*, upon which the assets will come into question; and if he continues the possession, he shall be charged in the *debet* and *detinet* in respect of the perception of the profits, whether he has assets or not, to which Twisden J. agreed. So in Billingham v. Speerman, 1 Salk. 297.||

* But where part incurs in the life of testator, and part after, the plaintiff may bring two actions, for the first part in the *detinet* only, the other in the *debet* and *detinet*, and need not charge him as executor, in the last case, by which means he may obtain a judgment *de bonis propriis*.

If an action of debt is brought against baron and feme, upon an obligation entered into by the feme before marriage, it shall be in the *debet* and *detinet*; for by the marriage all the personal goods and power of disposing of the real are by law given the husband, which he has to his own use, and not as executors, who have them only to the use of another. Lloyd and Walcot, 5 Co. 36. a. 3 Leon. 206. S. C. adjudged. Allen, 73. S. P.

So, if an action is brought upon a bond against the heir of the obligor, it shall be in the *debet* and *detinet*, (g) because he hath the assets in his own right. 5 Co. 36. a. (g) And for another reason, because he is bound by special words in the obligation. Cro. Eliz. 712. & vide Cro. Eliz. 350. 2 Leon. 11. 2 Brownl. 204, 205. — But if in the *detinet* only, it is good after verdict, by 16 & 17 Car. 2. c. 8. Comber and Watton, Lev. 224. adjudged. Sid. 342. 375. 379.

|| Debt will lie for use and occupation generally, without stating where the premises lie, or setting forth any of the particulars of the demise. || Wilkins v. Wingate, 6 T. Rep. 62. Stroud v. Rogers, cited *ibid.* King v. Fraser, 6 East, 348.

(G) Of the Extinguishment of the Debt, and pleading in Bar thereof.

IF a man accepts an (h) obligation for a debt due by simple contract, this extinguishes the contract, but the acceptance of an obligation for a debt due by another obligation is (i) no bar of the first obligation. 13 H. 4. 1. Roll. Abr. 604. (h) This must be intended from the debtor;

debtor; for if a stranger gives bond for such debt, it is otherwise. 2 Leon. 110. adjudged. — So, if upon the making the contract, a stranger gives bond for it, or being present promises to give bond for it, and after does so, the debt by contract is extinguished, the obligation being made upon or pursuant to the contract. 2 Leon. 110. *per cur.* — So, if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court, for by the deed the legacy is extinct, and it is become a mere debt at common law. Yelv. 38. (i) For one deed cannot determine the duty upon another. Cro. Eliz. 304 727. for this *vide* 2 Dan. 116. — So, if a statute is accepted for it. Roll. Abr. 470. — Otherwise, if a judgment is given or obtained upon the obligation. 6 Co. 44, 45.

Roades v. Barnes, 1 Burr. 9. 1 Bl. Rep. 65. S. C. || A stated account is no plea to debt upon simple contract; for both being equal, the latter is not merged in the former.

Kearslake v. Morgan, 5 T. Rep. 513. Richardson v. Rickman, *Id.* 517. But a plea that the defendant indorsed a promissory note, of which he was the payee, to the plaintiff, "for and on account of the debt," has been admitted. So has a plea that the plaintiff and defendant accounted together, and that the defendant drew a bill of exchange upon himself payable to the plaintiff or his order, for the sum he was found in arrear, and delivered it to the plaintiff, and afterwards duly accepted it. ||

Vide Hard. 332. of Pleas in Bar, head of Pleas and Pleadings. In debt upon an obligation the defendant cannot plead *nil debet*, but must deny the deed by pleading *non est factum*, for the seal of the party continuing, it must be dissolved *eo ligamine quo ligatur*.

Hob. 218. 2 Inst. 651. But, if the debt be due by simple contract, then he may plead *nil debet*, for it does not appear that there is any debt continuing.

Hard. 332. In debt for rent, if it be by deed, the proper plea is *non est factum*; but, if it be without deed, the defendant may plead *non dimisit*, nothing in arrear, or that he never (a) entered. Also, by the better opinion of the books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, since the debt accrued by subsequent enjoyment. [The indenture is only inducement to the action; matter of fact is the foundation of it.] 763.; and therefore, in a declaration in debt for rent against such lessee, it need not be shewn that he entered, for the contract is the ground of the action. 4 Leon. 18. Hetl. 54. Vent. 41. — And the occupation not material; otherwise, of a lease at will. Dyer, 14. a. Hetl. 54. Vent. 41. 108. Salk. 209. S. P. Ld. Raym. 170. — Where upon a lease from year to year *quandiu partibus placuerit*, no entry or continuance of the possession was shewn as to the second year, and yet after verdict it was intended the lessee was in possession for all the time for which the rent was found due. 3 Salk. 136. Mod. 3. Sid. 423. & *vide* Plow. 423. Palm. 117. 2 Roll. Rep. 131. Keilw. 65.

(b) Waites v. Briggs, 2 Salk. 565. [So, in debt for an escape (b), or on a *devastavit* (c) against an executor, *nil debet* is a good plea; for the judgment is but inducement, and the escape and *devastavit* are the foundation of the action.] (c) Wheatley v. Lane, 1 Saund. 219.

Keilw. 147. In debt for the arrears of an (d) annuity granted for life, *nil debet* is no good plea, for the action is merely founded upon the deed, for without it no action can be maintained; and though by the death of the grantee the nature of the action is changed, *the*

the annuity being determined; yet this proves not but that the action is founded upon the deed.

other remedy to levy it, viz. by distress; otherwise, upon the grant of a bare annuity, for there being no remedy by distress, the grant must be avoided by matter of as high a nature, viz. by acquittance. Hard. 333.

[So, in debt for a penalty upon articles of agreement, or on a bail-bond, *nil debet* is no plea, for in these cases the deed is the foundation, and the fact but inducement.]

778. S. C. 1 Barnard. 15. S. C. 8 Mod. 106. 323. 382. S. C. Fortesc. 363. 367.

But in debt for the arrears of a rent-charge, devised to the plaintiff's wife for life, against the (a) administrator of the occupier of the land, *nil detinet* is a good plea, for a will is no deed, nor wants any delivery: adjudged, and said the action was not so much grounded upon the will itself as upon the statute, by which men are enabled by will to dispose of their lands and rents issuing out thereof.

Hard. 322.
Wilson's case.
(a) That where the testator could not plead *nil debet*, his executor shall not plead *non detinet*. 2 Mod. 266.

In debt upon 2 & 3 E. 6. c. 13. for not setting forth tithes, (b) not guilty, or (c) *nil debet* are good issues.

(b) Where the action is founded upon a penal statute, not guilty is a good plea. 257. Gouls. 39. Noy, 56. 2 Inst. 651. Moor, 914. pl. 1293. [See 1 T. Rep. 462.] (c) Hob. 218. S. P. adjudged.

In debt upon a contract, the defendant cannot plead the contract was for a less sum, or otherways, than the plaintiff has declared, and traverse the contract in the declaration laid, but may (d) wage his law.

Palm. 223. The contract being but the conveyance to the action, is not traversable. Co. Lit. 295.

[Under the plea of *nil debet*, the defendant may give in evidence a release, or other matter, in discharge of the action.

1 Ld. Raym. 394. S. P. Gilb. Debt, 434. 443. Semb. contr.

And it has been holden, that as this plea is in the present tense, the statute of limitations may be given in evidence under it.

153. Anon. 1 Salk. 278. S. P.

But in debt *qui tam*, the defendant was not allowed to give in evidence on *nil debet*, a former recovery against him by another person for the same cause.]

good plea, because the plaintiff hath
Warren v. Consett,
2 Ld. Raym.
1500. 2 Str.
Fortesc. 363. 367.

2 Inst. 651.
Cro. Eliz. 621.
S. P. adjudged.

Cro. Eliz.
257. Gouls. 39. Noy, 56. 2 Inst. 651. Moor, 914. pl. 1293. [See 1 T. Rep. 462.] (c) Hob. 218. S. P. adjudged.

Moor, 49.
(d) Or plead *nil debet*.
Keilw. 39.
Cro. Eliz. 880.

1 Ld. Raym.
566. 12 Mod.
376. S. C.

Draper v. Glassop,
1 Ld. Raym.
153. Anon. 1 Salk. 278. S. P.

Bredon v. Harman,
1 Str. 701.

DEODAND.

3 Inst. 57, 58.

5 Co. 110.

H. P. C. 34.

Pult. 125.

Crom. 31. a.

(a) || The law of deodands has been inveighed against as

founded in superstition and ignorance, and inconsistent with reason and sound policy. Similar confiscations, however, obtained among the wisest nations of antiquity, the *Jews*, the *Athenians*, and the *Romans*, *Exod.* xxi. 28. *Æschin. contr. Ctesiph. Pott. Archæol. Gr.* iii. 178., and the *Lex Aquilia*. They originated in the necessity of watching over the safety of individuals; and a law which tends to check rashness or negligence where the consequences may be so fatal, cannot be considered as altogether irrational or impolitic. It may indeed be fairly doubted, whether the law, as it prevails with us, was founded in superstition, that is, in the Romish doctrine of purgatory. It should seem as if the subsequent application of the thing forfeited had been mistaken for the origin of the law itself. The deodand, it is probable, was at first merely civil: it was taken upon the same principle with the *weregild*; it was the *pretium sanguinis*, the mulct or compensation required by the state for the loss of one of its subjects. *Forst. Cr. Law.* 287. *Stiernh. de Jure Goth. L.* 3. c. 4. Instead of being given, as by the *Aquilian* law at *Rome*, to the family of the deceased, it fell to the crown, and formed a part of its casual revenues. By the crown it was often granted to particular subjects, and under those grants it is holden at this day, and descends and is transferable with the soil upon which the right attaches. At what particular time it was devoted to pious uses, nowhere distinctly appears: the statute *De officio Coronatoris*, 4 E. 1., in speaking of deodands, uses the word "*banni*," that is, mulcts or confiscations, *Du Cange Gloss. tit. Bannus, &c.*; though *Bracton*, who wrote in the preceding reign, gives them the name of "*deodanda*." ||

Hawk. P. C.

c. 27.

To understand what things are forfeited as deodands, we must observe that it is laid down as a rule, that *omnia quæ movent ad mortem sunt deodanda*, and, therefore, that wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also.

Salk. 220. The Lord of the Manor of Hamstead's case, by *Poltexfen* and *Gregory* on the Home Circuit.

As, where a cart meeting a waggon loaded upon the road, and the cart endeavouring to pass by the waggon, was driven upon a high bank and overturned, and threw the person that was in the cart just before the wheels of the waggon, and the waggon run over him and killed him; it was holden, that the cart, waggon, loading, and all the horses, were deodands, because they all moved *ad mortem*.

3 Inst. 58.

S. P. C. 20.

Hawk. P. C.

c. 27.

But, if a man, riding on the shafts of a waggon, fall to the ground and break his neck, the horses and waggon only are forfeited, but not the loading, because it no way contributed to his death.

So, where a thing not in motion causes a man's death, that part thereof only which is the immediate cause is forfeited; as, where

where one climbing upon the wheel of a cart while it stands still, falls from it and dies of the fall, the wheel only is forfeited; but, if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater.

Also, if a man riding on a horse over a river is drowned (a) through the violence of the stream, the horse is not forfeited, because not that, but the waters caused his death. Cro. Ja. 483.
2 Ro. Rep. 23.
Poph. 136.
(a) *Secus*, if
the horse had thrown him. Salk. 220.

By the opinion of our (b) ancient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a steeple, &c. may be deodands; but, by the (c) latter resolutions, they cannot, unless they were severed before the accident happened. (b) S. P. C. 20.
b. Pult. 124. b.
(c) As Sid. 204.
Lev. 136.
Raym. 97.

Keb. 723. 744. S. C. where a man was ringing a bell, and the rope caught him up and dashed him against the roof of the belfry, whereby he died. 6 Mod. 187. S. C. cited by *Holt*, and that it was no deodand. — So, of the wheel of a forge. 6 Mod. 187. See Salk. 220. Hawk. P. C. c. 26. § 5, 6. 8. &c.

It was (d) formerly holden, that a horse or cart, by a fall from which an infant was slain, was not forfeited, perhaps, because the misfortune in this case might seem rather owing to the indiscretion of the infant, than any default in the thing. But this distinction has not been allowed of (e) late; for the law does not ground the forfeiture on any default in the things forfeited, since it extends it to things without life, to which it is plain that no manner of fault can be imputed. (d) 1 Hawk.
P. C. c. 26. § 4.
(e) [It has not
been allowed
as to things
which *move*
to the death

of an infant: but it obtains as to things at rest; for no deodand is due where an infant is killed by a fall from any thing that is not in motion. And according to Sir *William Blackstone's* reasoning, it should seem that the distinction ought to hold in both cases: for if, as he supposes, the original design of deodands was to purchase propitiatory masses for the souls of such as were snatched away by untimely death; and the presumed innocence of childhood rendered such an atonement unnecessary, that presumption must equally arise, and the effect of it should be the same, whether the thing that was the immediate cause of the death were at rest or in motion. And of this the learned commentator seems sensible himself, for he hath recourse to a further reason to support the law in the latter case, namely, that “such misfortunes are in part owing to the negligence of the owner of the animal causing the death, and therefore he is properly punished by such forfeiture.” 1 Bl. Comm. 300, 301. It is said, that it was holden in the time of *Littleton*, that the deodand did not arise, unless the party died without receiving extreme unction, Lill. Pr. Reg. tit. Deodands; Encyclopedic Methodique, tit. Deodand; so that the judges of those days seem to have been influenced by the same reasons upon which the distinction was founded in the case of infants. It appears, however, by *Fleta*, that the masses which the deodand was to purchase were not merely for the soul of the deceased, but for those of the king's ancestors, and all the faithful departed this life: *Ex hiis autem provisum est, quod pro animabus antecessorum regis omniumque fidelium tanquam precium sanguinis distribuuntur, & ideo deodanda vocantur.* Lib. 1. c. 25. § 9.]

This forfeiture takes place at land only, and doth not extend to the seas, that are continually liable to storms and tempests; and therefore a ship in salt water, whether in the open sea, or within the body of a county, from which a man falls and is drowned, is not forfeited. 3 Inst. 58.
H. P. C. 33.
S. P. C. 20. b.
Hawk. P. C.
c. 27.

But a ship, by a fall from which a man is drowned in the fresh water, shall be forfeited, but not the merchandize therein, because they no way contribute to his death. H. P. C. 33.
3 Inst. 58.
Hawk. P. C.
c. 27.

S. P. C. 21. b. In all these cases, if the party wounded die not of his wound
 H. P. C. 55. within a year and a day after he received it, there shall be no-
 Hawk. P. C. thing forfeited; for the law does not look on such a wound as
 c. 27. Dalt. the cause of a man's death after which he lives so long. But, if
 c. 97. Plow. the party die within that time, the forfeiture shall have relation
 260. Keilw. 68. to the wound given, and cannot be saved by any alienation or
 other act whatsoever in the mean time.

5 Co. 110. b. However, nothing can be forfeited as a deodand, nor seized
 Co. Litt. 115. as such, till it be found by the coroner's inquest to have caused
 Dalt. c. 97. a man's death (a); but after such inquisition, the sheriff is an-
 S. P. C. 21. a. swerable for the value of it, and may levy the same on the
 Pult. 125. town where it fell; and therefore the inquest ought to find the
 Hawk. P. C. value.
 c. 27.

(a) [Hence

Lord Coke infers, and he is followed in it by Lord Hale and Sir William Blackstone, that deodands cannot be claimed by prescription. Co. Litt. 114. a. 5 Co. 110. b. 1 H. H. P. C. 419.
 2 Bl. Comm. 265. But *qu.* this doctrine.]

Fost. Cr. As this forfeiture seemeth to have been originally founded ra-
 Law, 266. ther in the superstition of an age of extreme ignorance, than in
 * Upon inqui- the principles of sound reason and true policy; it hath not of
 sitions, the late years met with great countenance in *Westminster-hall*.*
 jury find the

value as small as possible. — And in some cases only the value of the identical thing moving to, or causing the death; as for example, of the wheel of a loaded waggon, &c. [This practice the court of king's bench have impliedly sanctioned, by refusing to reform it on an application by the crown or its grantees. Fost. 266. 2 Barnardist. 82. Nor can such inquisitions be taken by the grand jury on default of the coroner. 1 Burr. 19.; and when taken by the coroner, they may be removed and traversed. *Ibid.* 2 H. H. P. C. 416. || By st. 4 & 5 W. & M. c. 22. for regulating proceedings in the crown office in the court of K. B., it is enacted, that no corporation or person having grants of deodands, who have enrolled and had the same allowed, shall be compelled to plead the same to any inquisition returned by the coroner; that no corporation or persons, who have or shall have such grant from the crown of deodands, felons' goods, and other forfeitures, need to enrol more of them, than to express and set forth the grant of such goods, for which they shall pay 20s. and no more; and after such enrolment, no such grantee shall be compelled to plead the same to any inquisition; that after such enrolment or entry the clerk of the crown shall not issue process against the grantee under a penalty of 5*l.*; but such penalty shall not be incurred for issuing process against any purchaser or devisee who shall not enrol and plead the same; or against the heir who shall not enrol his right by descent, and until after such pleas have been allowed and approved by the court; or where, by the coroner's inquest, the deodands, &c. shall not be found to be in the hands of such purchaser, devisee, or heir, or their respective officers in trust for them.]]

DESCENT.

(A) Of Lineal Descent: And herein of the Exclusion of the ascending Line.

(B) Of Collateral Descent.

(C) Of the Half-Blood, and the *Possessio Fratris*.

(D) Of Descents according to Custom.

(E) Where

- (E) Where a Person shall be said to take by Purchase, and not by Descent.
- (F) Of a Descent, its Operation to take away an Entry.
- (G) In what Cases the Entry of the Disseissee may be lawful notwithstanding a Descent.
- (H) Whose Entry is preserved notwithstanding a Descent.
- (I) How the Entry may be preserved by continual Claim: And herein,
 1. *Of the Nature of continual Claim, and the Effects of it.*
 2. *What is necessary to a continual Claim to make it effectual.*
 3. *The Time in which it is to be made.*

(A) Of Lineal Descent: And herein of the Exclusion of the ascending Line.

ANCIENTLY, the lords gave lands to such persons as had behaved themselves well in the wars, for their lives only, and sometimes they also married their daughters to them, and then they limited the lands to go not only to the tenant himself, but also to the issue of that marriage; and this first brought in the notion of succession among the northern nations where the feudal tenures prevailed.

The lands therefore in the elder times went to the immediate descendants of such marriage; and originally to none else: and in the first place they went to the (a) males as the most worthy of blood, and most capable of doing the service annexed to such donations: and the feud was united in the (b) male, because he was obliged to do the duty in the wars, and for every knight's fee was to go out forty days with his lord, so that the feud did not divide among the males, because the duty could not be commodiously divided: besides, the males were to keep up the name and grandeur of the family; and, therefore, the inheritance was not shared or broken. From hence it came to pass, that among the males, the eldest was preferred as the most worthy, since he was soonest able to go to the wars, and to do the (c) duties of the tenure.

Gilb. Treat. of Ten. 9.
 (a) *Vide* title Coparceners.
 (b) *Vide* titles Gavelkind and Borough-English.
 (c) Also, the eldest son was anciently married with the consent and approbation of the lord, for the lord always approved the

first marriage of his feudatory, and of his heir apparent; and if the feudatory died, his heir within age, the lord had the total marriage of him; and if he was of full age, the lord gave licence to such marriage. From hence the descent always settled in the eldest line, and the daughter of the eldest son was preferred before the second or third brother, and their male descendants, in order to encourage the best marriages with such eldest son. Spelm. Rem. 29.

When a feud escheated to the lords for felony, or want of heirs, the lords used to restore it to the old family, or grant it out

Co. Litt. 11. b.

out again to another family *ut feudum antiquum*, and then the descent was formed in such new feud, as if it had been *feudum antiquum*. Hence, the lineal succession or succession of the father was totally excluded, because no case could happen where the ascending line could be admitted in *feudis antiquis*; for the father took before the son under the first feudatory in every ancient feudal donation; and all above such donation were excluded, so that in such donations the father could not claim as heir to his son. And this order of descent which excluded the father was the rather continued, because the father was guardian to his son; and in those barbarous times they would not trust the father with any profit from the death of his own issue, and so the father was totally excluded.

Co. Litt. 10. b. But, though the father cannot inherit his son, yet if a lease
(a) So if a man hath for life be made to the son, the remainder to his next of blood,
issue two sons, the father shall take the remainder by (a) purchase under the
and the eldest words of designation.
dies, leaving a son, and a remainder is limited to the next of blood to the father, the younger
son shall take it; yet the other is the father's heir. Co. Litt. 10. b.

Lit. § 3. Also, if the son purchases lands, and dies without issue, and
Co. Litt. 11. b. without brothers and sisters of the whole blood, and the lands
(b) Therefore, descend to his uncle; the father may be heir to the uncle, if
in case of a the uncle was in (b) actual possession; but he claims it as heir to
reversion his brother who was last (c) seised, according to the rule *quod*
upon a lease *seisina facit stirpem*.
for life, made
of the lands

by the son, the father cannot be heir, because the son was last actually seised; otherwise, of a reversion upon a lease for years; for the possession of the tenant is the possession of the uncle. Co. Litt. 11. b.—If a son be enfeoffed with warranty, and the uncle enter into the lands after the death of the son, and die; my Lord Coke says, that the father cannot take benefit of such warranty, because it was never actually possessed by voucher, or *warrantia chartæ*. Co. Litt. 11. b.—If an advowson be granted to the son and his heirs, and the son die without issue, and the advowson descend to his uncle, and he die before he can or does present to the church, the father shall not inherit, for before a presentation there is no actual seisin of the advowson. The same law of a rent. Co. Litt. 11. b. (c) The evidence of seisin, or defect thereof, shews when it will or will not descend to the father from the uncle.

Eastwood v. Vinke, [But, if the father happen to be also cousin to the son, and
2 P. Wms. as such his heir, he may, in that remoter capacity, inherit im-
614. mediately after the son.]

Co. Litt. 11. b. But here we must take notice, that if, after the descent to the uncle, the father has issue a son or daughter, that issue shall enter upon the uncle; for the land descended originally upon the uncle, because he was then the next heir; therefore, if an heir nearer than he is springs up, by the same rule that he succeeded to the land at first, that heir must now take place and exclude him. And by the same rule, if a man hath issue a son and a daughter, and the son purchases lands in fee, and dies without issue, the daughter shall inherit; but, if the father hath afterwards issue a son, this son shall enter into the land as heir to the brother; and if he hath issue a daughter and no son, she shall be coparcener with her sister.

(B) Of

(B) Of Collateral Descent.

IF a man purchased the *feudum novum ut feudum antiquum*, and died without issue, it went first to the father's side, because the lords in such feudal donations were presumed to respect the father's side, who had been the ancient tenants of the manor; for where it was given *ut feudum antiquum*, it must be presumed to be meant as if it had been an ancient feud of that manor, and therefore it went to the father's side *in infinitum*, before it could go to any of the female blood. If the father's male line failed, it went to the female blood of the father; for the lords were presumed rather to respect the female blood of their former tenants, than the blood of the mother who was newly introduced into the family of their feudatory, because the feud was given as an ancient one, and, by consequence, the blood of the precedent tenant was preferred to any other. But the blood of his mother's side was preferred to the blood of his grandmother; because, being both female bloods, and both coming under the consideration of ancient tenants, the (a) nearer tenant's blood was preferred to the more remote. But, if the father's side wholly failed, then the blood of the mother was admitted, *to wit*, first the male line, and then the female of such blood, since the lord must be presumed to introduce the blood of the mother, when he had given an indefinite right of representation.

Agreeably to this scheme of descent upon the purchase of the *feudum novum ut feudum antiquum*, if a purchase land in fee-simple, and die without issue, they of the blood of his father's side shall inherit as heirs to him before any of the blood of his mother's side; for the old rules, formerly settled for the directing of the descents of such feuds as were purchased, still prevail; and all new purchases made now of lands in fee shall be considered as the purchases formerly made of the *feudum novum ut antiquum*.

If the son purchases land, and dies without issue, and it descends to any heir of the part of the father, and then the line of the father (after entry and possession) fails, it shall never resort to the line of the mother, though in the first instance, or first descent from the son, it might have descended to the heir of the part of the mother; for now by this descent and seisin, it is lodged in the father's line, to whom the heir of the part of the mother can never derive a title as heir, because he can never shew that he was heir to him that was last actually seised; which being a rule to be strictly observed, he must entitle himself by it, otherwise be excluded.

(C) Of the Half-Blood, and the *Possessio Fratris*.

NONE shall be heir of land in fee-simple, or to a warranty, or sue an appeal of death as heir, unless he be of the (b) whole blood, *viz.* both of the father and the mother.

Plow. 444
to 429. Clerc
and Brook,
Co. Litt. 12.

(a) Co. Litt.
10. b.
*Hæres in lineâ
rectâ præfer-
tur hæredi in
lineâ trans-
versali, &
propinquior
excludit pro-
pinquum,
propinquus
remotum, re-
motus remo-
torem.*

Litt. § 4.

Co. Litt. 14. a.
(b) In a long
course of time
the feudal do-
nation;

nations were worn out, and then it became impossible to compute up to the first marriage, where such donations were originally settled, and therefore they changed the computation, and computed from the last possessor, provided the heir that claimed was of the blood of the first purchaser, and then the rule was taken *quod seisinā facit stirpem*; for since the feudal donation was lost, they could not regularly compute the descendants from the first feudal marriage; and therefore they computed from the last feudatory; and since both bloods of the first marriage were necessary to any person that would claim under the first donation, they required that a man should be of the whole blood of the last feudatory, that would claim as heir to him; for if any person was of the whole blood of such feudatory, then he must of necessity be of both bloods of that remote feudal marriage, where the feud was originally placed; and thus the half-blood came to be excluded. Gilb. Ten. 13.

Co. Litt. 14. a. Therefore, if an elder brother purchases lands in fee, and dies without issue, his sister of the whole, not his younger brother of the half-blood, shall be his heir.

Co. Litt. 15. So, if a man seised in fee hath issue a son and a daughter by one venter, and a son by a second venter, and dies, and the eldest son enters and dies, his sister shall inherit according to the rule *quod possessio fratris de feodo simplici facit sororem esse hæredem*.

Gilb. Ten. 15. || For when the old donations came to be lost, the possession was the only *indiciū* of who was feudary; therefore any person that claimed as his representative must shew a descent from the same stock; and therefore the rule was taken as to lands in fee-simple, and not as to lands in tail. For there a man must claim as heir *per formam doni*, as they did in the old feudal donations *de feudis novis*.

3 Co. 41. b.

Ibid.

So, of a remainder after an estate for life that never fell in possession, a man must claim by virtue of the contract, as heir to him to whom the remainder was limited; for no man in such case can make himself heir to the last feudary, since the feudal possession was in tenant for life.

Ibid.

So, of a reversion on an estate for life, upon which no rent was reserved; for a man must make himself heir to the last feudary before the estate for life was created. But, if a rent had been reserved, it had been doubted, whether he must make himself heir to the last possessor of the estate, or to him that last received the rent; and whether the receipt of rent make such a feudal possession as may be laid as esplees in a writ of right.||

It is now apparently settled, that the receipt of rent in these cases will not make a *possessio fratris*. Gilb. Ten. by Watk. 16. note (n).

Co. Litt. 15. a.

243. a. And.

47. Keilw.

110. 3 Atk.

471. (a) So, if a guardian by knight's service, or

socage, enters, for the possession of the guardian is the possession of the infant. Co. Litt. 15. a. [And see the cases of *Whitcombe v. Whitcombe*, Pr. Ch. 280. *Goodtitle v. Newman*, 3 Wils. 516. || 2 Bl. Rep. 938. S. C.] So, the entry of a devisee for years, it is said, will make a *possessio fratris*. Jenk. 242.]

But,

But, if a man makes a lease for life, and dies, leaving a son and a daughter by one venter, and a son by a second wife, and the eldest son dies before the lease for life is determined, the youngest son shall inherit, because the eldest was never seised.

Co. Litt. 15.
Cro. Car. 411.
Jon. 361.

So, if a father makes a lease for life, and after recovers against his lessee by default, and dies, and the eldest son enters, against whom the lessee recovers by a *quod ei deforceat*, and then the eldest son dies, the brother of the half-blood, and not the sister, shall have the reversion; for when the tenant for life has recovered his estate, he hath entirely defeated all possession in his lessor, which he acquired by the judgment on default, and all possession in the eldest son likewise by virtue of that judgment, and is entirely in of his old estate; so that there is no actual seisin left in the elder brother whereon to found a *possessio fratr̃is*.

8 Ass. 6.
|| *Qu.* for I do not find the case there, and yet it is cited as from thence in Hal. MSS. note 7. Co. Litt. 15. 13th edit.||

|| If a man has a son and a daughter by one venter, and a daughter by another venter, and he makes a lease for life of land without reserving any rent, and the father dies, and the reversion descends to the son, and the son has issue a son, and dies, and the reversion descends to his son, who dies without issue; and afterwards the lessee for life dies; the two sisters by different venters shall have the land, as heir to their father, and not the sister of the first venter only. And this by the opinion of the justices of the Common Bench.||

N. Benl. 143.

There is *possessio fratr̃is* of an advowson or (a) rent, after actual receipt of the rent, or presentation of the clerk; so of (b) a use, because equity follows the rule of the common law; so likewise of a copyhold, where the eldest son receives the profits, and dies, though before admittance.

Co. Litt. 14. b.
And so of other hereditaments, as a seignory, &c.
3 Co. 41. b.
42. a. — Of

offices, courts, liberties, franchises, and commons of inheritance. Co. Litt. 15. b. (a) Co. Litt. 15. b. S. P. 3 Co. 42. a. S. P. (b) Dyer, 10. pl. 40. 274. pl. 43. Ro. Abr. 502. pl. 3. [i. e. of a use not executed by the statute; for uses executed are legal estates. Co. Litt. 14. b. note 5. 13th edit.]

[So, of a trust (c) and (seemingly by the better opinion) of an equity of redemption.] (d)

(c) 1 Co. 121. b. 2 P. Wms. 713. Hardr.

488. (d) 1 Atk. 604. Co. Litt. 205. a. note (1), 19th edit.

But, though the eldest son enters, and gets an actual possession of the land, yet if the father's relict be endowed of the third part, and the eldest son die, the brother of the half-blood, and not the sister, shall have the reversion of the third part, because the actual seisin which the brother obtained, was defeated as to the third part, by the widow's entry into it, who is esteemed in law to be in, in continuance of her husband's estate, without any interruption.

Co. Litt. 15. 2.

But, if the eldest son had made a lease for life, and the lessee had endowed the wife of the father, who afterwards died, the daughter should have the reversion, and not the half-brother; for the widow's acceptance of dower from the tenant for life, and the existence of his estate in the land after her decease, shew that

Co. Litt. 15. 2.

that the tenant for life had an interest in the land; but such an interest always presupposes an actual seisin in the lessor; otherwise he could not make that livery which is necessary on the passing of a freehold; therefore, notwithstanding the dower, this actual seisin in the brother shall establish a *possessio fratris*.

Co. Litt. 14. b.
Ro. Abr. 623.

Lands are given to a man and his wife in special tail, the remainder to the heirs of the husband, and they have issue a son, and the wife dies, the husband marries again, and hath issue a son, and dies, the eldest son enters, and dies without issue; the second brother of the half-blood shall inherit the remainder, because the eldest brother was not seised of a fee-simple, but only of the special tail, and so no ground for a *possessio fratris* of the fee expectant on the tail.

Co. Litt. 15.

If a man dies seised of several parcels of land in one county, and after his death his eldest son enters into one parcel generally, and, before any actual entry into the rest, dies; this general entry into part shall vest in him an actual seisin in the whole sufficient to establish a *possessio fratris* upon; for since the freehold in law is cast upon him by the death of his father, and since the possession is in nobody, and so no particular estate to be defeated, a general entry into parcel, in the name of all, may well serve to reduce the whole into an actual possession. But, if his entry into parcel be special, it shall only reduce that parcel into possession; for it is reasonable to bound the operation of his act by the intention which he appears to have had in doing it.

Co. Litt. 15. a.

The advantages of this rule of *possessio fratris* do not only extend to the sister, but to her issue, who shall be preferred to the half-brother, because they represent the ancestor, and therefore shall succeed to those advantages, which their ancestor would have enjoyed if she had lived.

Co. Litt. 15. a.

3 Co. 42. b.
Cro. Car. 601.
(a) The Lord Grey being a baron by writ, was created Earl of Kent, to him and

There can be no *possessio fratris* of dignities, as duke, marquis, and the other honours annexed to the peerage, but the brother of the half-blood shall (a) inherit them. And this difference seems to be founded on a strict regard to the publick good, which is the better consulted when such persons are promoted to those dignities as are capable of discharging the great duties annexed to them.

the heirs male of his body, and had issue two sons by several venters, the eldest of whom had issue a daughter. The barony shall go to the daughter *jure representationis*, but the earldom to the second son, according to its original limitation. Cro. Car. 601. [Coll. Proc. on Claims of Bar. 195. But, if it was of a feudal title of honour, as of the earldom of Arundel, or barony of Berkeley, there *possessio fratris* should hold well; because the title is annexed to the land. — So, of an office of dignity, and *ea ratione* the office of high chamberlain of England descended to the Earl of Lindsey of the whole blood, and departed from the line male of the Earl of Oxford; and adjudged accordingly in parliament. Hal. MSS. Coll. Proc. on Claims of Bar. 173. Sir W. Jon. 96.] || Lord C. J. Brampton in delivering his opinion in the above case of the barony of Grey of Ruthyn, observed, that one of the reasons why there could be no *possessio fratris* of a barony was, because the title to every barony must be by record. Baron or no baron must be tried by record: so that whosoever shall make a title to a barony must resort to the record, and begin his title there, and so, consequently, must make himself heir to the person first ennobled by that record, which the daughter could not do, notwithstanding the possession of the brother; for she was not heir to the first ancestor, but to the brother of the whole blood. Collins, 255. Cruise, 139. ||

Also, the policy of the kingdom hath established laws and rules for the government of the possessions and descent of the crown, different from those which guide and direct the descents of private property: therefore, if the king hath issue a son and a daughter by one venter, and a son by another venter, and purchases lands, and dies, and the eldest son enters and dies without issue, the daughter shall not inherit those lands, nor any other fee simple lands of the crown, but the younger brother shall have them together with the crown. Co. Litt. 15. a.

(D) Of Descents according to Custom.

THERE are several customs as to descents, which having been allowed time out of mind, must be presumed to be coeval with the common law, and therefore cannot be altered without an act of parliament, as that of *gavelkind* in *Kent*, by which the descent is first to all the male children, then to the females, then to collateral relations. But in this, according to the civil law, regard is to be had to the *stirpes*, and therefore if the eldest son had issue a daughter, she should inherit her father's share with the younger sons. Litt. § 210. Co. Litt. 140. a. Lamb. 608. *Vide* head of *Gavelkind*, and Lamb. 628., that it is probable that most lands in *England* were thus partible.

But, if a remainder of lands of the nature of *gavelkind* be limited to the right heirs of *J. S.* the heir at common law shall take it, and not the heirs in *gavelkind*; for this remainder being (a) newly created, cannot be reckoned (b) within the custom. Co. Litt. 10. Lamb. 607. Hob. 31. (a) Also, for a condition broken, the

heir at common law shall enter, because the condition is a thing of a new creation, and altogether collateral to the land. Lamb. 608. Co. Litt. 11, 12. (b) This custom, like all other customs that are derogatory from the common law, is to be construed strictly, because as far as the particular custom hath not derogated from the common law, the general custom of the whole kingdom ought to prevail. Ro. Abr. 568.

If a rent be granted out of *gavelkind* lands, it is of the nature thereof, and shall (c) descend to all equally; for the rent is part of the profits of the land, and issues thereout. 2 Lev. 87. adjudged. Mod. 96. S. C. adjudged.

[1 Freem. 105. 345. S. C. 3 Keb. 165. 214. S. C. 1 Vern. 489. S. C. cited.] *Vide* Noy, 15. and Bro. tit. Custom, 58. *contr.*; but *vide* 14 H. 8. 9. 26 H. 8. 4. Noy, 15. (c) That a trust shall descend accordingly. 2 Ro. Abr. 780.

The general custom of *gavelkind* lands extends to sons only; but a special custom, that if one brother dies without issue, all his brothers may inherit, is good. Co. Litt. 140. a.

By the (d) custom of *Borough-English*, the youngest sons only shall inherit. For this, and the reasons thereof, *vide*

title *Borough-English*. (d) Where the custom was laid, that if a copyholder dies seised, his youngest son should inherit, and the copyhold was granted to a man and his wife, and the heirs of the man, and he died, whether within the custom? 2 Leon. 208. *dubatur*.

If *Borough-English* lands be let to a man and his heirs, during the life of *J. S.* and the lessee die, the youngest son shall enjoy them. Co. Litt. 110. b. 2. Lev. 138. S. P. adjudged upon a special verdict.

Ro. Abr. 623. If the custom be, that the youngest son shall inherit, the
 4 Leon. 242. youngest (a) brother shall not inherit by force of this custom.
 Cro. Ja 198. (a) If the custom of a copyhold be, that the eldest daughter shall have the
 Cro. Car. 411. land, the eldest sister shall not have it by the custom. Godb. 166. Ro. Abr. 623. 4 Leon.
 242. [So, if the custom be, that lands shall descend to the eldest sister, where there is
 neither a son nor a daughter, an eldest niece is not within it. Denn v. Spray, 1. T. Rep.
 466.]—But by some customs the youngest brother shall inherit, and *consuetudo loci est ob-*
servanda. Co. Litt. 110 b. —Special custom, that lands in fee shall descend to the
 younger son, but lands in tail to the elder is good. March, 54. —So, that lands shall de-
 scend to the younger son, if not of the half-blood; and if he be, then to the eldest. Co.
 Litt. 140. b.

Ro. Abr. 623. If a custom be, that if a man dies without heir male, his
 Godfrey and eldest daughter shall have the land; and if he have no daughter,
 Bullock. that the eldest sister shall have the land; and if he have not a
 sister, the eldest cousin; but, if he have an heir male, that he
 shall have it before any of them; and the tenant of the land have
 several daughters, but no heir male, and the eldest daughter die
 in the life of the tenant of the land, having issue a daughter; this
 grandchild is within the custom, and shall have the land by
 descent upon the death of the grandfather.

Ro. Abr. 624. But, if the custom be, that the youngest son shall inherit, and
 resolved *per* a man have issue two sons, and the eldest have issue two sons,
 Cur. (b) If a and die, and the lands descend to the youngest son, who dies
 copyholder of without issue; the eldest son of the eldest brother shall have the
 the nature of land, because the custom holds not in the (b) transversal line,
 Borough-Eng- but only in the lineal descent.
 lish, surren-
 ders to the use
 of himself and his wife, and his heirs, and dies leaving issue three sons, and the youngest dies
 in the lifetime of the wife; the eldest brother shall inherit, as heir to the younger brother;
 for the custom cannot extend to the collateral descent. Ro. Abr. 624. Cro. Car. 411. Jon.
 360. S. C. by two judges against two.

Lev. 172. between Newton If there be a custom within the manor of T. that if the father
 and Shaftoe, dies, leaving no son, but two or more daughters, that the eldest
 adjudged, and daughter shall have his land for her life only, and after her
 and that the cus- death it shall descend to the next heir male that can derive by
 tom was good, males; and for want of such, that it shall escheat to the lord;
 according to and there is another custom, that if the tenant dies, and leaves
 Co. Litt. 140. a wife, that she shall have it for her life; and a copyholder of
 b. Keb. 925. the manor dies, leaving a wife and two daughters, and no son,
 2 Keb. 111. and his wife enters, and the eldest daughter dies, and after the
 S. C. Sid. 267. wife dies; the second daughter shall have the lands for life,
 S. C. adjudged, within the custom; for though she was not the eldest at the
 and that the death of her father, yet she was so at the death of her mother,
 custom was whose estate was a continuance of the father's estate, as in case
 good; though of free bench.
 said in the re-
 port thereof, that it seemed
 to be admitted by all, that such custom, as to fee-simple lands, would be void; it being wholly
 against the nature of a fee to escheat as long as there are heirs. And in Sid. 268. another
 case was said to have been adjudged accordingly, upon debate in B. R. in 20 Car. 2. between
 Sampson and Quinsey, which sec. Lev. 293. adjudged without argument, because the court
 said, the point had before been adjudged in the case of Newton and Shaftoe.

Salk. 243. between Cle- If A. hath issue five sons, and the youngest dies in the life-
 time of the father, leaving issue a daughter; after which the
 father

father purchases copyhold lands of the nature of Borough-English; those lands shall, at the death of the father, go to the daughter of the youngest son *jure representationis*, and not to the fourth son, although he was the youngest son at the time of the purchase, and death of the father.

ments and Scudamore, adjudged. 6 Mod. 120. S.C. adjudged. 1 P. Wms. 63. S. C. 2 Ld. Raym. 1024. S. C.

(E) *Where a Person shall be said to take by Purchase, and not by Descent.*

IT is an established rule in descents, that none can inherit as heirs, but those who are of the blood of the purchaser; and, therefore, if lands descend to the son of the part of the father, and he enters, and after dies without issue, the lands shall descend to the heirs on the part of the father, and not to the heirs on the part of the mother; and if there be no heirs on the part of the father, then they shall go to the lord by escheat.

Litt. § 4. Co. Litt. 13.

In the same manner, if a man marries an (a) inheritrix of lands in fee, who has issue a son, and dies, and the son enters into the tenement as son and heir to his mother, and after dies without issue; the heirs on the part of the mother are to inherit; and for want of such heirs the lands shall escheat.

Litt. § 4. (a) But, if a man gives lands to another and his heirs of the part of the

mother, yet the heirs of the father's part shall inherit; for no man can institute a new kind of inheritance, not allowed by the law. Co. Litt. 13. But *vide* Co. Litt. 220., that lands may be given to a man and his heirs, on the part of the father; in which case, none of the heirs of the part of the mother shall ever inherit; but the inheritance, as long as it continues, descends according to the rules of law, though it be determinable for want of heirs on the part of the father.

So, if a grandfather had purchased lands in fee; and the lands had descended from him to the father, and from him to the son; if the son had entered, and died without issue, his father's brothers or sisters, or their descendants; or for want of them, his grandfather's brothers or sisters, or their descendants; or for want of them, his great-grandfather's brothers or sisters, or their descendants; or for want of them, his great-grandmother's brothers or sisters, or their descendants, might have inherited; but none of the line of the mother or grandmother, *viz.* the grandfather's wife, should have inherited, because not of the blood, either by father or mother, of the first purchaser, *viz.* the grandfather.

Plow. 446.

A man seised of lands as heir of the part of his mother, makes a feoffment in fee, and takes back (b) an estate to him and his (c) heirs, this is a (d) new purchase of the lands, and, consequently, if the purchaser dies without issue, the heirs of the part of the father, and not the heirs of the part of the mother, shall succeed him in it; for he is the original purchaser of that estate, which he takes back to him and his heirs; and therefore it shall descend as a new purchase.

Co. Litt. 12. b. (b) || But this must be understood of two distinct conveyances in fee; the first passing the use as well as the possession to the lands; and the last re-granting the estate to him. For if in the first feoffment the use had been expressly limited

sion to the feoffee, and so completely divesting the feoffor of all interest in the lands; and the last re-granting the estate to him. For if in the first feoffment the use had been expressly limited

limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such consideration as to raise a use to the feoffee, and consequently, the use resulted to the feoffor; in either case he is in of his ancient use, and not by purchase. *Hargrave's note* (2) to *Co. Litt.* 126. So, if *A.* seised in fee of copyhold lands of inheritance by descent *ex parte maternâ*, surrender to *B.*, a mortgagee in fee, who on payment of principal and interest surrenders again to *A.* and his heirs, the estate will descend to *A.*'s paternal heirs. *Doe v. Morgan*, 7 T. Rep. 103. *Benson v. Scott*, 12 Mod. 49. S.P. || (c) Where the ancestor takes but a particular estate, and the limitations after operate by way of purchase, and not by descent; *vide* head of *Remainders*, and *Co. Litt.* 22. Styl. 148. *Co.* 93. *Moor*, 136. *And.* 69. *Hob.* 30. *Vent.* 372. 2 *Lev.* 75. *Raym.* 228. *Mod.* 121. 226. 2 *Mod.* 207. 4 *Mod.* 380. *Carth.* 272. (d) So, if he levies a fine *sur cognizance de droit*, &c. to *A.* and *B.*, and by the same fine they grant and render the lands to him and his wife in tail, remainder to his right heirs; this makes it a new purchase, and the heirs of the part of the father shall inherit. || *Price v. Langford*, *Carth.* 140. 1 *Salk.* 337. S.C. 1 *Show. Rep.* 92. S.C. ||

Co. Litt. 13. But, if a man seised as heir of the part of his mother, makes a feoffment in fee to the use of him and his heirs, the use shall go to the heirs of the part of the mother; for the use being a creature of equity, must be governed by the rules of equity, which considers in this case, that the use springs and arises out of an inheritance which belongs to the heirs of the mother, and will therefore assign it to them, as a trust which arises out of their

(a) || The better property. (a)

reason seems to be, that the use being the same as it was before the feoffment, it is the old use which continues. *Hargr. note* (2). *Id.* 13. a. ||

Co. Litt. 12. b. A man is seised of land on the part of his mother, and makes (b) But, if he a feoffment in (b) fee, reserving rent to him and his heirs; this gift in tail, or rent, since the statute *Quia emptores terrarum*, &c. if it has a lease for life a distress annexed to it, must be considered as a rent-charge; and of such lands, if it wants a distress, as a rent-seck; and so either way it is the grant of the feoffee, and, consequently, a (c) new purchase; reserving a rent, the heir and therefore it shall go to the heir of the part of the father, on the mother's side and not to the heir of the part of the mother. should have had this rent, because the reversion belongs to such heir, and, consequently, the rent too, as incident to that reversion. *Co. Litt.* 12. b. (c) If a man seised of a manor on the part of his mother, had, before the statute *quia emptores*, &c. made a feoffment in fee of parcel, to hold of him by rent and service; though this rent and service were newly created, yet continuing parcel of the manor, they shall, with the rest of the manor, descend to the heir on the mother's side. *Co. Litt.* 12. b. || So, if a man has a house *ex parte maternâ*, and one grants to him that he and his heirs shall have competent estovers to be burned in such house, these, though a new purchase, shall go with the house, as appurtenant to it, to his heirs of the part of his mother. 8 *Co.* 54. a. ||

Co. Litt. 12. b. If a man hath a rent-seck of the part of his mother, and the tenant of the land grants a distress to him and his heirs, and so improves the rent into a rent-charge, this distress shall go along with the rent to the heir on the part of the mother, as incident and appurtenant to it,

Co. Litt. 13. a. If the heir of the part of the mother, of lands whereunto a warranty is annexed, is empledged for those lands, and vouches, and judgment is given against him, and likewise for him to recover in value, and he dies before execution, the heir on the mother's side shall sue execution to recover in value against the vouchee; for the lands to be recovered in value are designed as a recompence for those lands which were recovered by the demandant

mandant from the vouchee, and so must go to that person who has sustained the loss.

A man hath issue a son, and dies, and his wife dies also, and lands are let for life, the remainder to the heirs of the wife; the son dies without issue; the heirs of the part of the father shall inherit, and not the heirs of the part of the mother; for the lands vested in the son as a purchaser, and therefore the descent is to be governed by the rules of law.

Co. Litt. 13. a.

If a man be seised of lands on the part of his mother, and makes a feoffment in fee of them upon condition, and dies, this condition shall descend to the heir of the part of the father; because he is heir at common law; but, if he enters for the condition broken, then he restores the estate to its former nature, and then the heir of the part of the mother shall enter upon him, and enjoy the land.

Co. Litt. 12. b.
|| *Qu.* this doctrine, and *vide* Robins. on Gavelk. 121. & note.||

If a man, having only two daughters, his heirs, devises his lands to them and their heirs, they take as (a) jointenants, and not as coparceners; for the devise giveth it to them in another degree than the common law would have given it them; and for the (b) benefit of the survivorship between them.

Cro. Eliz. 431.
Owen, 65. S.C.
3 Lev. 127.
S. P. admitted *per Cur.*

(a) If to them and their heirs, equally to be divided between them, share and share alike, they are tenants in common. 2 Sid. 53. 78. *Vide* Godb. 362. 3 Leon. 25. Gouls. 18., and title *Jointenants and Tenants in Common.* (b) If a man devises lands to his son and heir apparent, and a stranger, they are jointenants for the benefit of the stranger. Godb. 94. Owen, 65. || Where one devised to his son and heir, "but in case he died without issue, not having attained twenty-one," then over, and the son attained twenty-one; it was holden by Lord *Henley*, that the son took by devise, as having, under the will, a different estate than would have descended to him; the one being pure and absolute, the other not. *Scott v. Scott*, Ambl. 383. But see *Hinde v. Lyon*, Dy. 124. & 3 Leon. 64. *contr.*||

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|| A testatrix devised and bequeathed her leasehold, freehold, and copyhold estates to trustees, their heirs, executors, administrators, and assigns, to the use of such trustees, their heirs, &c. upon trust to sell the same and pay debts and legacies, and after payment thereof to pay and apply the rents, &c. to A. for life, and after his decease gave, devised, and bequeathed all such part of her real estates, and the produce thereof, as should not have been sold, paid, or applied for the purposes aforesaid, unto the heir or heirs at law of B., and the heirs, executors, and administrators of such heir or heirs at law, and directed her trustees to convey and assign all the remainder of her said real estates to the said heir or heirs of the said B. accordingly. The heirs at law of B. turned out to be the heirs at law of the testatrix, known or unknown to her did not appear. By the devise to the trustees the descent is broken, and the devisees shall take as purchasers, and of course as joint tenants. And by Lord Chancellour, it is impossible that the testatrix could mean that these persons should take as her heirs; and if the devise had been to her heirs, their heirs and assigns, as in the case in Cro. Eliz., [the case immediately preceding,] would that be stronger evidence of an intention that they should take a different estate from that which would pass by descent, than the fact, that she

Swaine v. Burton, 15 Ves. 365.

has given these estates to them, not as her heirs, but as the heirs of another person?||

Reading v. Royston, ||1 Salk. 242. Pr. Ch. 222. S. C. 2 Ld. Raym. 829. S. C. Com. Rep. 123. S. C.|| (a) Palm. 373. 2 Ro. Rep. 352. 2 Sid. 79. S. P.

Hamsworth v. Pretty, Moor, 644. ad-judged. Cro. Eliz. 833. 919. S. C. ad-judged, that

the first devise to the eldest son, and his heirs in fee, being no more than the law gave him, was void; but the devise to the younger, upon his non-payment, was good, by way of future or executory devise. *Vide* title *Devises*, and Vaugh. 271. S. C. cited. 3 Mod. 207. S. C. cited. 1 Ro. Abr. 411. S. C. cited.

Salk. 241. Clerk and Smith ad-judged, and Gilpin's case, Cro. Car. 161., where it is ad-judged, that a devise to the heir at law,

upon condition to pay debts, and if he fails, that the executors shall sell, makes it a purchase in the heir at law, being tied with a condition, denied to be law by *Treby* Ch. Just. and *Powell* Just. 1 Com. Rep. 72. S. C. Lutw. 793. S. C. *Emerson v. Inchbird*, 1 Ld. Raym. 728. S. P. *Allam v. Heber*, 2 Str. 1170. S. P.

3 Lev. 127. Hedger and Row, ad-judged.

If a man, being seised of lands on the part of his mother, devises them to his executors for sixteen years, and after to one who is his heir *a parte maternâ*, he shall take by descent; for the descent to the heir *a parte paternâ* or *maternâ* is but a consequent dependant upon the nature of the estate; though it was objected, it was better for him to take by purchase, for then the heirs of the part of the father might inherit before the heirs of the part of the mother, and so both heirs would be inheritable.

Godbold v. Freestone, 3 Lev. 406.

||If a man seised in fee of lands descended to him from his mother make a feoffment to the use of himself for life, remainder to the heirs of his body, remainder to his right heirs, the remainder shall go to his heirs *ex parte maternâ*, for that it was part of the ancient use, the feoffor having no other estate in him than what came from his mother.

Abbot v. Burton, 2 Salk. 590. Com. Rep. 160. S. C. 12 Mod. 181. S. C. This and the preceding case are cited and approved by Lord *Macclesfield* in *Harris v. Bp. of Lincoln*, 2 P. Wms. 135.

If a man seised in fee of lands descended to him on the part of his mother suffer a recovery and declare the uses to himself for life, then to several other persons in tail, with the last remainder to his own right heirs, this last remainder will go to his heirs on the part of his mother, which is the ancient use; the whole estate coming to him by descent from his mother.

If a copyholder surrender to the use of *A.* for life, or in tail, or to the use of his last will, and he die without making a will; or, if making a will, he limit only a portion of the estate; the residue or part undisposed of, in the first and last cases, and the whole in the second, will be the old estate, and descend to his customary heirs.

1 Watk.
Copyh. 94.
9 Co. 107. a.
1 Brownl. 181.
Cro. El. 148.
Bullen v.
Grant. *Id.*
442. Fitch v.
Hockley, 4 Co. 29. b.

So, if he surrender to particular uses with the ultimate limitation expressly to his own right heirs, they shall take such limitation as the old estate, and, consequently, by descent.

Roe v. Griffiths, 4 Burr. 1952.

A difference, indeed, has been taken as to this latter point, when the surrenderor takes a particular estate himself, and when not. As, if a surrender be made to the use of the surrenderor for life, with remainder to a stranger in tail, and the ultimate limitation be to the heirs of the surrenderor, his heirs shall take by descent; yet if the surrenderor take no particular estate himself, and the ultimate limitation then be to his own heirs, such heirs, it is said, shall be in by purchase.

Allen v. Palmer, 1 Leon. 101. & Kitch. 86. a. 88. a & b.
Lex Cust. 125. c. 15.

But although this distinction is recognized in the case of *Roe v. Quartley*, by *Ashhurst J.* when delivering the opinion of the court, yet such distinction has been questioned by *C. B. Gilbert*, and, after him, by *Mr. Fearne*.

1 T. Rep. 634.
Gilb. Ten. 272.
3 Fearne, Cont.
Rem. 48. 4th. ed.

Had the ultimate limitation been expressly made to the surrenderor and his heirs, whether he himself had or had not taken a particular estate, his heirs would necessarily have been in by descent: but whether such surrenderor would have taken such ultimate estate (without taking a particular one) as a remainder, or as his reversion, seems to have been disputed. According to the distinction above noticed, and especially the case cited in *Kytchin*, the surrenderor would have taken it as a remainder; but according to latter decisions, and particularly the case of *Roe v. Griffiths*, he would have been in of his old estate.

4 Burr. 1952.
Thrustout v. Cunningham,
2 Bl. Rep. 1046.

And it would seem, indeed, to have been uniformly held, that if a copyholder in fee surrender his estate to the use of his will, and devise to a stranger for life, or in tail, and so leave a portion of the fee unlimited, (without giving it expressly to his heirs,) it shall be considered as his reversion, or undisposed of residue, and go to his heirs by descent. So, where a copyholder, seised in fee, surrendered to the use of his will, and afterwards surrendered to particular uses, with the ultimate limitation to his own right heirs, it was adjudged that he was in of his old estate, and that he might have devised his reversion without any fresh surrender or admission.

1 Watk.
Copyh. 96.

Now, the idea that when the ultimate limitation was expressly made to the heirs of the surrenderor, the heirs should take by purchase, and when it was not expressly made to them, but resulted or arose by implication, they should take by descent, originated in this, that the estate being yielded to the lord, the uses limited were new uses; and as the whole estate was thus

Thrustout v. Cunningham,
2 Bl. Rep. 1046.

Dy. 134. a.
Hob. 31.
Godbold v. Freestone, & Abbott v. Burton, *supra*.
Smith v. Trigg.
1 Str. 487.

limited, nothing remained in the surrenderor; but when the whole was not so limited, the residue, as undisposed of, resulted to him again. And a distinction similar to this was once held as to freeholds. But as such distinction, with respect to freeholds, has been now long exploded, it having been repeatedly declared, that it matters not whether the ultimate limitation to the heirs of the grantor be expressly made, or result by implication of law; and as the doctrine once entertained, that by a surrender of a copyhold the old estate of the surrenderor was destroyed, and the uses limited to his heirs on such surrender were absolutely new, and such as, if limited to his heirs, should be taken by purchase, is also exploded by modern decisions; it should seem that the distinction above noticed is also antiquated as to copyholds.

Martin v. Strachan, Willes's Rep. 444. 5 T. Rep. 107. n. S. C. 1 Wils. 66. S. C. 2 Str. 1179. S. C.

But, if tenant in tail of lands *by purchase* under a settlement made by an ancestor *ex parte maternâ*, with the reversion in fee by descent *ex parte paternâ*, suffer a recovery to the use of himself and his heirs, the lands will descend to his heirs *ex parte paternâ*, the use not being the ancient use, but a new use arising out of the estate tail, and not out of the reversion in fee.||

4 Br. P. C. 486. S. C. See also Roe v. Baldwere, 5 T. Rep. 104. where this case was cited and relied upon, and its doctrine applied to copyhold lands.

(F) Of a Descent, its Operation to take away an Entry.

Lit. § 385. Gilb. Ten. 21.

DESCENTS which take away an entry are of two sorts; 1st, Where the descent is in fee; as, where a man seised of certain lands or tenements is disseised, and the disseisor having issue dies seised, and the lands gained by the disseisin descend to his heirs; this descent shall toll the entry of the disseisee, and oblige him to sue a writ of entry *sur disseisin* against the heir of the disseisor, in order to recover the right of possession which he hath lost by the descent. And the (a) reason is, because the freehold being cast upon the heir, the notions of the law make this title to him, that there may be a person in being to do the feudal duties, and to fill the possession, and answer the actions of all persons; and since it is the law that gives him this right, and obliges him to these duties, antecedent to any act of his own, it must defend such possession from the act of any other person till it be evicted by judgment, which being the act of law, may destroy the heir's title.

(a) There are also other reasons for this: as 1st, Because the disseisee not having claimed during the life of the disseisor, the right of possession must be presumed to be derelict. 2d, Because the relief was in the nature of a new purchase upon every descent, for the payment of which a distress was immediately taken upon the descent's being cast. 3d, The right of possession is gotten by descent, that it may be an encouragement to the tenant to be bold in war; for that none can dispossess his children of the estate he died seised of. Spelm. Feud. 31. Gilb. Ten. 23.

Litt. § 386.

2dly, Descents in fee-tail toll entries; as, if a man be disseised, and the disseisor grant the land in tail, and the tenant in tail having issue, die seised, and the issue enter, the possession being thrown

thrown upon the heir in tail, the law construes the right of possession to be in him, for the reasons above given, and therefore bars the entry of the disseisor.

If a disseisor make a gift in tail, and the donee discontinue in fee, and disseise the discontinnee, and die seised; this descent shall not take away the entry of the disseisee; for the descent of the fee-simple to the heir is defeated by his remitter to the estate-tail; and though by virtue of such remitter the heir is seised in tail, yet there is no descent of it, because the tail was discontinued; and the subsequent disseisin doth not regain it to the ancestor; and though the heir be remitted into his elder title, yet such remitter places him in only above the second disseisin, and doth not tend to make a descent of the estate-tail of which his ancestor never died seised; and where a new right springs to the heir by operation and construction of law, he ought to take, subject to the same claim, as ran upon such estate before the remitter, else the act of law would work an injury to the first disseisee, who possibly was prevented from bringing his assize or ejectment, by the frequent shifting of the possession; and the law of descents being in prejudice of an ancient right, is to be taken strictly, and therefore to take place only where the same estate descends from ancestor to heir; and the rather, for that after discontinuance the disseisee might not watch the death of the tenant in tail, whose interest was transferred, and therefore no presumptive dereliction of the disseisee could be formed in this case.

Co. Litt. 238.

A disseisor makes a gift in tail, the donee has issue, and dies seised, the entry of the disseisee is taken away; but, if the issue die without issue, so that the estate-tail is spent, then the entry of the disseisee is revived, and he may enter upon him in reversion or remainder; for in this case there is no relief to be demanded from him in reversion or remainder; so that he labours under no hardship in that point, for which he might expect favour from the law. Likewise, the possession is not cast on him till entry; which being a voluntary act, the law annexes no privileges to it, as in case where a possession is cast on an heir by descent.

Co. Litt. 238.

Grandfather, father and son, the son disseises one, and enfeoffs the grandfather, who dies seised, and the land descends to the father: the disseisee cannot enter, for the right of possession is devolved on the father, (who had no hand in the disseisin,) by a fair and legal descent. But, if the father dies seised, and the land descends to the son, the disseisee may enter on the son; for the feoffment made by the disseisor to the grandfather is a stratagem to derive the lands gained by disseisin to the son by descent, in order to enjoy the benefit annexed to such conveyance, which the law will never cherish; but on the contrary blast such designs, to discountenance all wrong and oppression.

Co. Litt. 238.b.

In descents which toll entries, it is required, that the ancestor die seised of a freehold and fee, or a freehold and fee-tail; for if the disseisor, at the time of his death, hath not the freehold in him,

Litt. § 387,
388, 389. 394.

him, it cannot be cast on his heir, for then there is no danger that the freehold should want a possessor; and therefore the law creates no title to such possession in the heir at law; for it were incongruous that the law should suppose the right of possession in the heir, when the possession is in another at the death of the ancestor; and if the right of possession be not transmitted at the death of the ancestor, the law will not afterwards create him a new title in prejudice of the person that has the right of propriety. If a disseisor therefore makes a lease for life, he parts with the possession, and cannot transmit it to the heir, having parted with it before; and a descent of a reversion will not make a right of possession; for nothing descends to the heir in reversion but a right of reversion, and that is a right against all persons but the disseisee; for since only a right descends, the heir can be in no better case than the disseisor was at the time of his death; and, therefore, when the tenant for life dies, he has only the naked possession, as the disseisor had it; but, if the disseisor had died in possession, the law, for the reasons aforesaid, casting the possession on the heir, makes it a right; for that is properly a right which a man comes to by act of law; and since the heir in such case comes to the possession by act of law, it must be called a right of possession; and it could not be a right of possession, if he could not defend it against all aggressors; and therefore in such case the right of entry is taken away from every one; and hence arose the distinction of *jus proprietatis* and *jus possessionis*.

Co. Litt. 239.
a. Hob. 323. If he in reversion disseise his tenant for life, and die seised, this descent shall take away the entry of the tenant for life; for the right of possession is by law cast upon the heir.

Co. Litt. 239. a. So, if there be tenant for life, remainder in tail, remainder in fee, and tenant in tail disseise the tenant for life, and die seised, this descent shall take away the entry of the tenant for life. But, if the king's tenant for life be disseised, and the disseisor die seised, this descent shall not take away the entry of the tenant for life; for since the king cannot be disseised, the disseisor gains but a bare estate of freehold during the life of the lessee; and therefore the law does not cast the possession on the heir; for if the heir comes into the possession, he must come in as an occupant, which being a voluntary acquisition, the law does not favour it, as it does a right of possession devolved by descent.

Co. Litt. 239. a. If a disseisor make a lease to a man and his heirs during the life of J. S. and the lessee die, living J. S., this shall not take away the entry of the disseisee, because the heir is only in as a special occupant of an estate of freehold, and not of a fee or fee-tail.

Co. Litt. 239. a. If a disseisor makes a lease for years, or has the land extended upon a statute-merchant, staple, judgment, or recognizance, and dies seised; this descent shall take away the entry of the disseisee, because the freehold or fee are cast on him by act of law.

Co. Litt. 237. b. The descent of incorporeal inheritances, as advowsons, rents, &c. does not take away the entry of him who hath right, because

no disseisin can be committed of them, but at the election of the owner thereof.

If a disseisor make a lease for his own life, and die, this descent shall not take away the entry of the disseisee; for though the freehold and fee descend to the heir of the disseisor, yet the disseisor died not seised of both, because his death was to precede the determination of the lease, which carried the freehold to his heir.

Descents to a brother, sister, uncle, or other collateral heir of the disseisor, take away the entry of the disseisee, as well as if the disseisor had had issue, and the descent had been to them.

(G) *In what Cases the Entry of the Disseisee may be lawful, notwithstanding a Descent.*

LORD and tenant; the tenant is disseised, and the disseisor aliens to another in fee, and the alienee dies without issue, whereupon the lord enters, as upon his escheat; this does not take away the entry of the disseisee, because the lord does not come to the land by descent, but by escheat, for want of a tenant, which can warrant his title no longer than such tenant is wanting, nor hinder the disseisee from entry, who is that tenant. But, if the lord by escheat die seised, and the land descend to his heir; here is a perfect descent, which shall take away the entry of the disseisee. Also, his heir upon such descent must pay relief, which the lord upon the escheat only was not obliged to do.

Litt. § 390.
2 Inst. 286.
Co. Litt. 240.

If a disseisor die seised, and his heir without heir, the disseisee cannot enter upon the lord by escheat, because his entry was taken away by the descent cast before, and then whoever comes to the lands shall take the benefit of it.

Co.Litt.240.a.

A man seised of lands in fee, or in tail, upon condition, dies seised: if the condition be broken in his lifetime, or after the lands descended to his heir, yet the entry of the feoffor, or donor, or their heirs, is not taken away.

Litt. § 391.

So, if such tenant on condition be disseised, and the disseisor die seised, and the lands descend to his heir, the entry of the tenant on condition is thereby taken away; but, if the condition be after broken, the feoffor or donor, or their heirs, may enter; because the condition went along with, and was annexed and incorporated in the land into whose hand soever it came, and the feoffor or donor have no other remedy but by entry, which is their title, as the tenant on condition, who is disseised, has; for he having a right, his remedy for it against the heir of the disseisor is by action; and till the condition broken, as well the *jus proprietatis* as the *jus possessionis* is in the feoffee; but, when he is disseised, and a descent cast, the heir of the disseisor has only the *jus possessionis*.

Litt. § 392.
Co.Litt.240.a.

He that hath title to enter upon a mortmain shall not be barred by a descent, because then he would be without remedy, for he

Co.Litt.240.b.

he can maintain no action for it. So, where a woman hath title to enter *causâ matrimonii prælocuti*, no descent shall take away her entry, because she has no remedy by action to recover it. (a)

(a) [Qu. as the writ *causâ matrimonii prælocuti* extends to all degrees? see the writ in the Register. Booth, 197. F. N. B. 205.]

Co. Litt. 240. (b) So, if one hath title to enter for consent to a ravishment, a descent cast shall not take

If a man, seised of lands in fee, by his last will in writing devises them to another in fee, and dies, whereby the freehold in law is cast upon the devisee, and the heir, before any entry made by the devisee, enters and dies seised; this descent shall not take away the entry of the devisee, because then he would be without (b) remedy, (c) having never had possession.

away his entry, because he has no other remedy, nor can maintain any action for it. Co. Litt. 240. b. (c) [The devisee, it seems, is not without remedy, for according to Co. Litt. 111. a., he may either enter, or have his writ *ex gravi querelâ*. But see Ow. 141. 1 Leon. 209.]

Litt. § 393.

If a disseisor die seised, and his heir enter and endow his mother, the disseisee may enter upon her for that third part, because she is in in continuance of her husband's estate, and not by the heir; and therefore, as to that third part, the descent is (d) interrupted or defeated; but till endowment the disseisee could not enter upon any part, nor after such endowment can he enter upon the other two parts, because as to them the descent was perfect, and continues, but as to the third part, the wife's title was paramount to the descent.

(d) So, of tenant by the curtesy. 1 Salk. 241.

Litt. § 395.

If a disseisor enfeoff his father in fee, and the father die seised of such estate which descends to the disseisor as heir, yet the disseisee may enter, because coming again to the disseisor, he shall take no advantage of the descent *quia particeps criminis*; but the disseisee may either enter or have his assise against him.

Litt. § 396.
Co. Litt. 242.

If a man seised of lands in fee hath issue two sons, and dies seised, and the younger son enters by abatement, and has issue, and dies seised, and the lands descend to his issue, who enters; yet the eldest son or his heir may enter upon them, because the entry of the youngest son shall be intended upon a claim as heir, and the eldest son claiming as heir likewise, and so by the same title, may enter upon him, or any of his issue, be there never so many descents. Also, the entry of the youngest may be intended to prevent others, and so to continue it in the family, and not with design to injure or strip his brother of it; and then his brother's entry cannot be taken away. But, if the younger brother, in this case, had made a feoffment in fee, and the feoffee had died seised, this descent had taken away the entry of the eldest brother, because the feoffment made title by livery to the feoffee, and carried it out of the family.

Gillb. Ten. 28.

Co. Litt. 242. b.

If the younger brother of the half-blood enters by abatement, and a descent is cast; or, if the eldest brother hath issue, and dies, and after his death the younger brother or his issue enter, and many descents are cast in his line; yet the eldest son, or his heirs, may enter; for though the brother of the half-blood cannot be heir to his eldest brother, yet he may by possibility be heir

heir to his father if the eldest brother dies before actual possession; and therefore shall be presumed to enter only to preserve the feud in the same family, and keep out strangers, and not in opposition to the lineal heir of the family.

But, if the elder brother had first entered, and the younger brother had entered upon him; this had been in destruction of the elder brother's possession, and as much a disseisin as if it had been committed by a stranger, and then his dying seised shall take away the entry of the eldest brother, or his issue. Litt. § 397.

If after the death of the father a stranger abates, and the younger son enters on him, and dies seised; this descent shall bind the eldest, because *possessio terræ* must be *vacua* when the youngest son enters, which here it was not; but his entry on the abator having no right, was a disseisin, and, by consequence, a descent thereon will take away the entry of the eldest brother; for his entry was a disseisin, not an abatement. Co.Litt. 242.b.

Lands are given to husband and wife, and the heirs of their two bodies; they have issue a daughter, and the wife dies, the husband has issue a son by another wife, who upon the decease of the father abates, and dies seised; this descent shall take away the entry of the daughter, for by the limitation in special tail, the son by another *venter* was utterly incapable of inheriting them; and being an estate which the son could not in any case make title to as representative of the father, his entry is an abatement; for the law cannot make that charitable construction here, that he entered to preserve the estate from strangers that might have abated upon the estate, since the son himself is a stranger, and could not inherit; but in the case of the brother of the half-blood it was otherwise, because he might have inherited his father. Co. Litt. 242. a. b.

If a man be seised of land of the nature of Borough-English, and have issue two sons, and die, and the eldest son, before any entry made by the youngest, enter into the land by abatement, and die seised; this shall not take away the entry of the youngest brother, because the eldest son shall be presumed to enter to preserve the estate in his family, which he or his heirs may some time or other, upon failure of his brother's line, happen to enjoy. Co. Lit. 242, 243.

The same law holds likewise in intrusions as well as in abatement; therefore, if a father makes a lease for life, and hath issue two sons, and dies, and the tenant for life dies, and the youngest son intrudes, and dies seised; this descent shall not take away the entry of the eldest, for the reasons before given: otherwise, if the father had made a lease for years only, because the possession of the lessee for years made an actual freehold in the eldest son, so that the entry of the youngest cannot have such construction, but is a disseisin, because there is no *vacua possessio*. Co.Litt. 243.

If one coparcener enter into the whole, claiming it to herself, and take all the profits, yet such entry shall be intended only in preservation of the estate, and, therefore, a descent in such case shall not bind the other sister as to her moiety: but, if she disseise Co.Litt. 243.a.

seise the other, after both have entered, and die seised, there, such descent will take away the entry of the eldest, or her issue.

Co.Litt. 243.b.

So, if such coparcener enter, claiming the whole, and make a feoffment in fee, and take back an estate to her and her heirs, and have issue, and die seised; this descent shall take away the entry of the other sister, because the feoffment leaves no room for a presumption that her entry was to preserve the estate of the other sister; and in the other case, the claiming of the whole only makes the abatement as to her sister's moiety; for if one coparcener enters generally, and takes the profits, this shall be accounted in law the entry of them both, and no divesting of the sister's moiety.

Litt. § 407,
408.

If an infant disseise one, and alien in fee, and the alienee die seised, and the lands descend to his heir, the infant being under age, the entry of the disseisee is taken away; but, if the infant disseisor enter upon the heir of the alienee, as he may well do, not being bound by his alienation made under age, then may the disseisee enter upon him, because the descent to the heir of the alienee, which took away the entry of the disseisee, is now avoided, and the infant disseisor may enter at any time within or after full age.

Litt. § 409.

So, if a disseisor make a feoffment in fee, upon condition, and the feoffee die seised, this gains a right of possession to his heir, and takes away the entry of the disseisee. But, if the disseisor enter for the condition broken, then is the descent defeated, and the entry of the disseisee revived, because the disseisor is then in of his defeasible estate, having only a naked possession without any right.

Co.Litt. 248.b.
Gilb. Ten. 34.

A civil death, as entry into religion, does not take away an entry, for this was the voluntary act of the ancestor; and though there be a descent cast upon it, yet it is not such a descent as came by the act of God, and therefore shall not take away the entry of the disseisee.

Litt. § 411.

If I demise lands to a man for years, and am disseised, and my termor ousted, and the disseisor dies seised, and a descent is cast, I cannot enter, but my lessee may, because his entry is only to regain his term, and leaves the freehold and fee in the heir by descent, as it was before.

Co.Litt. 249.a.

So, such descent shall not take away the entry of tenant by *elegit*, statute-merchant, &c. for these are only particular interests, of which, as of a term for years, there can be no dying seised, or descent thereof to the heir; but the freehold, which did descend, they leave as it was before, in the heir by descent.

Co. Litt. 249.
Litt. § 412.

In the times of domestick war, when the courts of justice are shut, a descent shall not take away an entry, though the disseisin were in times of peace; for then the disseisee would be without all remedy, there being no courts open wherein to bring his action. Also, the descent, which is an act of law, can give no right, when the law itself is silent. But in the times of foreign war only, a descent shall take away an entry; for to encourage enterprising

enterprising in such war was this privilege chiefly given to the heir of the disseisor.

No dying seised of a bishop, abbot, dean, parson, &c. where the lands come to his successor, shall take away an entry; for the successor comes in by his own act; ||it is by his own concurrent act that he comes to be installed into the rights of his predecessor, and therefore he can have no more than he had; and since the predecessor had a naked possession, and not the *jus possessionis*, the successor can have no more. Besides, the successor pays no relief, unless by grant or prescription: for ecclesiastical lands were not relieved into the hands of the lord for want of a tenant, being given in free alms, or to do service by proxy; and since the lands are not relieved into the hands of the successor for a consideration paid, he doth not acquire a right of possession. Besides, there was no reason to encourage the predecessor to dare in war, who either went not at all, or else by proxy; and therefore no reason such succession should get a right of possession.||

Co. Litt. 250.
Litt. § 243.
Gilb. Ten. 36.

(H) Whose Entry is preserved notwithstanding a Descent.

AS to infants and (a) feme covert, their entry is not taken away by a descent, by reason of their weakness and incapacity to claim, which is not imputed to them.

Gilb. Ten. 32.
Litt. § 402,
403. (a) But,
if a feme sole

is disseised, and after her husband dies she takes another husband, and then the descent happens; this descent shall take away the entry of the feme, for she had once an opportunity of entering. 1 Salk. 241.

If a man seised of lands in fee dies, his wife *privement enseint* with a son, and a stranger abates, and dies seised; and after, the son is born, he shall be bound by the descent, because at the time of the descent he had no right to enter, not being then *in esse*, and, by consequence, had no wrong then done him; and the lord had none to avow upon for his services at the time of the descent.

Co. Litt. 245.b.

B. tenant in tail enfeoffs *A.* in fee, who hath issue within age, and dies, *B.* abates and dies seised, the issue of *A.* being still within age; this descent shall bind the infant; because the issue in tail is remitted to his former and elder right, which is to be preferred before the defeasible title of the discontinuee's heir.

Co. Litt. 246.a.

If a feme sole seised of lands in fee be disseised, and then take husband, and the disseisor die seised, and a descent be cast, this shall take away the entry of the wife after her husband's death, because being disseised when she was sole, she might have entered, and her taking a husband, who would not enter, was her own act and folly: but, if she were under age at her marriage, the privilege of her infancy then, and coverture after, shall preserve her right of entry, though a descent be cast.

Co. Litt. 246.
a. b.

If

Litt. § 405. If a descent be cast, this shall bind a person *non compos*, &c.
 Co. Litt. 247. but not his heir, because if any action should be brought against
 Gilb. Ten. 32. such person after recovery of his understanding, he could only
 [F. N. B. 202. plead his insanity in excuse at the time of such descent: and
 2 Bl. Com. 291. the law does not permit a man to stultify himself.
 Cro. Eliz. 398.]

Co. Litt. 259. a. A descent cast, during imprisonment, shall not bind, because
 Litt. § 436. during such confinement he cannot be supposed to know of the
 [But, if he descent, and, by consequence, not capable of taking any measure
 were at large to prevent it.
 when he was
 disseised, and the descent be cast during his imprisonment, this descent shall bind. Co. Litt.
ubi supr.]

Litt. § 439, So, a descent cast, during the absence of one in foreign parts,
 440. Co. Litt. shall not bind, but that on his return he may enter, because he
 260, 261. cannot be supposed to know his affairs at home, or to take such
 ways as might secure it: but, if he were within the realm at the
 time of the disseisin, or at the time of the dying seised, then a
 descent cast, though in his absence after, shall bind, because he
 might be presumed to have had conusance of it, and therefore
 ought to have taken care to prevent it before his departure, or
 before the death of the disseisor.

Litt. § 443. If an abbot of a monastery die, and during the vacation a dis-
 Co. Litt. 263. seisin be committed, and a descent cast before the election of a
 new abbot, this shall not bind his entry after, because there was
 no person during the vacation that could make continual claim,
 (the convent being in law all dead persons,) and therefore there
 can be no laches imputed to any.

(I) How the Entry may be preserved by continual Claim: And herein,

1. *Of the Nature of continual Claim, and the Effects of it.*

Litt. § 414. **C**ONTINUAL claim is where a man, who hath a right and
 Gilb. Ten. 33. title to enter into any lands or tenements, whereof another
 is seised in fee or in tail, makes continual claim to them before
 the person dies seised thereof; the effect of which is, that, not-
 withstanding any descent cast after, yet he who made such con-
 tinual claim may enter, because he hath done all that, perhaps,
 he could or durst do to regain his possession, and so no default
 being in him, his right of entry remains as it was before, not-
 withstanding any descent.

Litt. § 415. If tenant for life alien in fee, he in reversion or remainder may
 enter on the alienee, or make continual claim to the land before
 the dying seised of the alienee, and then he may enter at any
 time after his death, though a descent be cast.

Litt. § 416. Lands are let for life, remainder for life, remainder in fee;
 tenant for life aliens in fee, and the remainder-man for life
 makes continual claim before the death of the alienee, and then the

the alienee dies seised, and then the remainder-man for life dies likewise before any entry; yet in this case he in the remainder in fee may enter by virtue of the continual claim made by the remainder-man for life; for since the efficacy of this continual claim, if there had been a subsequent entry made by the remainder-man for life, would have extended to the remainder in fee by revesting that too; it is but reasonable to allow the remainder-man in fee a power of entry under such continual claim, especially, since by reason of the intermediate remainder he himself could not make continual claim.

2. *What is necessary to a continual Claim to make it effectual.*

If a man hath cause to enter into lands lying in several towns in the *same county*, and enter into parcel in one town only in the name of all the rest, this shall be sufficient to secure his entry into all the rest. Litt. § 17.

But, if the lands lie in *two counties*, the entry must be in each, because the attestation of both facts, if controverted, must be by the *parcs* of each county. Co. Litt. 252.

If three men disseise me *severally* of three several acres of land in *one county*, and I enter into one acre in the name of all the three acres, this is good for no more than that one acre; because each disseisor made a distinct entry, which being distinct acts of notoriety, require distinct solemnities to defeat them: likewise, each having an independent possession, an entry upon one of them can never affect the rest, so as to destroy their separate possessions. Co. Litt. 252.b.

So, if one man disseise me of three acres of ground, and devise them severally to three persons for their *lives*, my entry upon one lessee in the name of the whole will only revest what belongs to that lessee; for where there are *different liveries* there must be different acts of notoriety to overthrow them, and, therefore, a different entry must be made on each tenant of the freehold. Co. Litt. 252.b.
4 Leon. Hol-
land and Hop-
kins, Dal. 88.

But, if the disseisor had demised the three acres severally to three persons for *years*, then an entry upon one of the lessees in the name of all the three acres would have recontinued and re-vested all the three acres in the disseisee; for though they are different demises, yet being all terms for years, they are *not different liveries* to be defeated by distinct entries, and, therefore, one entry will suffice to regain the possession from the disseisor by overthrowing his entry by an act of equal notoriety. 4 Leon. Co.
Litt. 252. b.
Palm. 402.
Lady Argol
and Cheney.

I am disseised by the same person of one acre at one time, and of another acre in the *same county* at another time; in this case my entry into one of them in the name of both is good; for though there are two entries, yet it is but one continued act of wrong, and but one possession is gained, for which but one assise lies; therefore one entry of the disseisee is an act of sufficient notoriety to revest the possession of both acres. Co. Litt. 252.b.

Co.Litt. 252.b. If one disseise me of two several acres in *one county*, and I enter into one of them generally, without saying in the name of both, this shall revest only that acre where entry is made; for the *intent*, which is the rule to judge of a man's actions, appearing to extend no farther than that one acre, shall not be enlarged to revest the possession of the other.

Co. Litt. 252.
Litt. § 419,
420, 421.
2 Inst. 483. Livery within view and entry afterwards is equal to an entry on the land itself, and if a man cannot enter for fear of an outrage, yet it is good. So also, a claim within view is good when a man fears to enter; for in the case both of entry and claim a man ought to take possession where he can, because it is the change of possession makes the notoriety in both cases. But, if the disseisor menace to hurt the person that has right, then the law allows him to make his claim as near the land as he dares to come.

Co.Litt. 253.b.
2 Inst. 483. But every apprehension of danger will not warrant a claim within view; for if a man fears the burning of his houses, or the taking away or spoiling of his goods, this is not a sufficient ground to warrant a claim within view; because if he should suffer what is threatened, he may recover what he loses, or damages to the value, without any corporal hurt.

Co.Litt. 253.b.
2 Inst. 483. The *apprehension*, then, that will justify a man's claiming within view, must be of the person's lying in wait with weapons, or by words menacing to *beat, maim, or kill the person* that offers to enter; as also the *fear of imprisonment*; for the law will never oblige a man to hazard his person in such a manner as may render him unfit to serve his country, when he may recover his right without such danger, *viz.* by making claim within view.

In pleading, the disseisee must shew some just cause of fear, that the court may judge of the reasonableness of an apprehension of danger to his person; but in a special verdict, if the jurors find that the disseisee did not enter for fear of corporal hurt, it is sufficient, and it shall be intended they had evidence for what they find.

3. *Of the Time in which it is to be made.*

Co. Litt. 237.
b. 254. b. In ancient times, if the disseisor had been in long possession, the disseisee could not have entered upon him: so, if the feoffee of the disseisor had continued a year and a day in quiet possession, the disseisee could not have entered upon him; for the disseisee's neglect of entry for that time formed a presumption, that either he had no right in the lands, or that he relinquished it, especially in the case of the feoffee of the disseisor, because he came in by a legal conveyance and the solemnity of livery, which gave notice to the disseisee, in whom the possession was, so that he might have entered on the feoffee immediately, and recovered the possession.

Litt. § 427.
Co.Litt. 255.a. But the law has been altered in this point; for if a man is now disseised, and the disseisor continues in possession for forty years

years without any claim made by the disseisee; yet, if the disseisee at last make his claim before the death of the disseisor, it shall secure his entry for a year and a day after such claim made, to be computed from the day of the claim inclusive, notwithstanding any descent cast in that time. But, if he suffers the year and day after the claim made to elapse, then a descent after will bind him; and so *toties quoties* after a year and a day after any claim made, a descent will conclude his entry.

[By stat. 21 Ja. 1. c. 16. no man shall make entry upon any lands, but within twenty years after his right shall first accrue. And by stat. 4 Ann.

c. 16. § 16., no claim or entry upon any lands, &c. shall be sufficient to avoid a fine levied of such lands, or to satisfy the statute of limitations, unless an action be commenced within one year after, and prosecuted with effect.]

¶ The notion of the laches, in not claiming for a year and a day, is taken out of the feudal law; so are the express words of *Frederick*, touching the tenant's claim of his lands from his lord. Litt. § 421. 425. Gilb. Ten. 36.

Præterea, si quis infeudatus major quatuordecim annis sua incuria vel negligentia per annum et diem steterit, quod feudi investituram a proprio domino non petierit, transacto hoc spatio, feudum amittat.

Digest. Feud. li. 2. tit. 55. fo. 543. Vigelius, 241. 255—478.

And the reason why this time of a year and a day seems to be set by the feudal law, is, because the services appointed seem to be annually completed; and, therefore, that was the time for the vassal to claim from his lord; and the same time that he had to claim from his lord, he had to claim from any disseisor for the uniformity of the law; and that the lord might know who was the person that he might take for his tenant, and that the lord might receive his feudal fruits from the heir, in case the disseisor died. And if the tenant lost the whole feud, in case he did not claim within a year and a day, it is fit he should lose the right of possession, in case he neglects his claim upon the disseisor in the same space, that the heir may be in peace, and that the lord may receive him as his tenant. For that was by the ancients thought to be a violent presumption of dereliction, both in the one case and the other. But our law, since it gives a distress for all feudal duties, doth not presume the feud derelict, in case feudal services are not paid, since the lord has a power to compel the payment; and therefore the law doth not induce any forfeiture in that case. But the law gives the right of possession to the heir, in case the disseisee doth not claim within the space mentioned, because there the presumption remains of the dereliction of the disseisee, since the entry or action is the only way that he has to obtain possession. But, if the disseisee enters within a year and day before the descent cast, though there were twenty mean disseisins; yet the entry is not taken away; for there can be no *jūs possessionis* in the heir, if the disseisee has continued the possession by those solemn acts that the law requires, and within the time that the law builds a presumption of a dereliction, if the disseisee neglects his entry. But, if the disseisor at common law had kept possession forty years, and the disseisee had entered but half-a-year before his death, yet in that law, as *Littleton* remarks, the heir had not

gained the right of possession, because no dereliction can be presumed if the disseisee claims within the time prescribed by the law. And if the law cannot presume that the disseisee has deserted the right of possession, it cannot be transferred to the heir of the disseisor; nor ought the lord, in such cases, to accept of his services from such heir. Nay, *Coke* says that the feoffee of the disseisor that comes in by title after a year and a day was expired, was anciently held to have right of possession, and to put the disseisee to his writ of entry, because they come in by title; and for quiet of purchasers, this non-claim for a year and a day was held a dereliction. Hence writs of entry against the feoffee in the *per & cui*. But this was not held so in respect of disseisors, because they themselves being the wrong doers, had no law in their favours, lest it should encourage such injuries. But afterwards, as feoffments became more secret, and nothing paid to the lord, then they thought it too hard such feoffments should alter the right of possession, and therefore they construed the feoffee that came in by his own act, to be a wrong doer, and not to alter the right of possession, but the heir, for the reasons aforesaid, was left as before.||

Litt. § 428.
Co. Litt. 255,
256.

The rules of law concerning continual claim, and the effects of it, hold as well in relation to abators and intruders, their donees and feoffees, as in relation to disseisors, their donees and feoffees, and for the same reasons.

Litt. § 426.

If the disseisor dies seised within a year and a day after the disseisin, and before any entry by the disseisee, this gives a right of possession to the heir, because when the disseisee yields up the possession peaceably, the presumptive right is in the disseisor, and the year and day which should aid the disseisee in such case shall be taken only from the time of the claim made by him, not from the time the title of entry accrued to him; and therefore, it is advisable for the disseisee to make his claim as soon after the disseisin as he can.

32 H. 8. c. 33.
Co. Litt. 238.

Since *Littleton* wrote, an alteration as to the entry of the disseisee on the death of the disseisor has been made by 32 H. 8. c. 33. by which it is enacted, "That except such disseisor hath been in the peaceable possession of such manors, lands, &c. whereof he shall die seised, by the space of five years next after such disseisin, &c. without entry or continual claim, &c. that such dying seised, &c. shall not take away the entry of such person or persons, &c."

Co. Litt. 238. a.

But still after the five years, continual claim must be made as at the common law, since the statute which is introductive of a new law does not provide for it after the five years.

Co. Litt. 238. a.
Plow. 47. a.
Quære.

It is said that abators and intruders are not within the statute, because it is penal, and extends only to a disseisor in express words, which was the most common mischief, & *ad ea quæ frequentius accidunt jura adaptantur*.

Co. Litt. 238.
a. 256. a.

The feoffee of a disseisor for the same reason is held to be out of this statute; but in respect of the disseisor himself the statute is construed with that latitude which may best preserve the ancient

cient right; therefore, though the statute speaks of him that at the time of such descent had title of entry, or his heirs, yet the successors of bodies politick, so they be confined to a disseisin, are within the remedy of this act; for the statute extends clearly to the predecessor's being disseised, and, consequently, without naming the successor, extends to him, for he is the person that at the time of such descent had title of entry.

If a man make a lease for life, and the lessee be disseised, and the disseisor die seised within five years, the lessee for life may enter; but, if he die before he enters, it is said the entry of the reversioner is not lawful, because his entry was not lawful upon the disseisor at the time of the descent, as the statute speaks. But, if lessee for life had died first, and then the disseisor had died seised, he in reversion had been within the remedy of the statute, because he had title of entry at the time of the descent, and so within the express letter of the statute, though he was not the immediate disseisee. The same law of a remainder.

Co.Litt.238.2a.
Plow. 47. 2.

DETINUE.

DETINUE is an action that lies for the recovery of goods and chattels, though the party came to the possession of them by (a) lawful means, as by bailment, borrowing, or pledging; and in this action the plaintiff is to recover the thing in specie, or the value of it, and also (b) damages for the detainer.

(a) It lies against a man that hath goods either

by delivery or finding. Co. Litt. 286. Roll. Rep. 128. || F. N. B. 138. E. Willes's Rep. 118. It is said, that this action does not lie if the plaintiff has not the general or special property at the time of bringing it; as, if the defendant took the goods as a trespasser; for, by the trespass the property of the goods is divested. Com. Dig. tit. Detinue (D), cited. 6 H. 7. 9. a. *per Brian*. But *qu.* of this position, and see what is said by *Vavasor* to the contrary, in the same case; and see also the reasoning of *Anderson* and *Warberton* in *Bishop v. Montague*, Cro. El. 824., to the same effect, but applied to the action of trover; and the final resolution of the court in that case in Cro. Ja. 50. || (b) 2 H. 6. 15. Ro. Abr. 575. Rast. Entr. 218.

But, as in this action the defendant was allowed to (c) wage his law, (for it was thought but reasonable that the bailor trusting to the bailee's honesty and integrity at first, should also trust to his oath in a court of justice, since the restitution might have been secret,) and this was (d) found exceeding inconvenient, (it being often experienced that those, who were so dishonest as to retain the goods of another, would generally purge themselves on their oaths,) the action of (e) trover and conversion was substituted in the place thereof, which being the action usually made use of at this day in those cases, I shall but briefly consider,

(c) For this *vide tit. Wager of Law.*
(d) 10 Co. 57. a. Moor, 481. Cro. Ja. 244. Yelv. 178.
(e) *Vide tit. Trover and Conversion.*

- (A) By and against whom Detinue lies.
 (B) For what Things it may be brought.
 ||(C) The Pleadings and Evidence.
 (D) The Judgment.||

(A) By and against whom Detinue lies.

Ro. Abr. 607. **I**F a bailee deliver the goods to another, he shall have an action of detinue against him (a), because he hath his possession, and undertakes for the custody, and the original bailor may have his action against either of them, because in him is the property, which both are bound to answer to him.
 delivered, or a sheriff by *feri facias*, shall have this action against a stranger that takes away the goods, because they are answerable in damages to the absolute owner. 2 Bulst. 311. Sid. 438. Mod. 30. 2 Sand. 47. 2 Keb. 588. Yelv. 44. Cro. Ja. 73. Dyer, 98, 99. Lev. 282. Vent. 52. Danv. Abr. 20. pl. 4, 5.

Sid. 438. If *A.* takes the goods of *C.*, and *B.* takes them from *A.*, *C.* shall have his action against *A.* or *B.* at his election, because both damnified *C.* in their taking.

Sid. 172. Keb. 641. Noy, 70. Styl. 261. Yelv. 165. If a man detains the goods of a feme covert which came to his hands before marriage, the husband can (b) only bring detinue, because the law transfers the property to the husband; but both shall join in *trover*, because the wrong was originally commenced at the time when the wife was sole; and if such injury be punished, the wife herself, who received this injury, must be party to the action, and the wife's demand is sufficient to prove a conversion in the defendant, since one of the parties to the action is denied the goods; but, if the possession be laid in both it is ill, because if both were possessed, the law will transfer in point of ownership the whole interest to the husband.
 (b) So, if goods come to a feme covert before marriage, detinue lies against the husband only, but *trover* and conversion lies against both, because both were concerned in the trespass. Ro. Abr. 607.; but for this *vide* title *Trover and Conversion*.

9 H. 6. 58. b. 60. Ro. Abr. 606. If *A.* delivers goods to *B.* to be delivered over to *C.*, either *A.* or *C.* may have detinue against *B.*; for not delivering them over, according to the undertaking, is an injury done each of them.

1 Ro. Abr. tit. *Detinue*, (D) pl. 1, 2. Bro. Abr. *Detinue de biens*, p. 19. || If the bailee of goods die, this action will not lie against his personal representative, unless he takes possession of them, for the gist of the action is the detainer. But, if after the death of the bailee a stranger take possession of them, it will lie against him.||

(B) For what Things it may be brought.

IT has been (a) holden formerly, that detinue will not lie for money, unless in a box or bag, nor for corn out of a sack, because these things have no mark whereby they may be known in order to be re-delivered to the plaintiff. (a) 7 H. 4. 3. b. Co. Litt. 286. Cro. Eliz. 457 Moor, 394. N. Dyer, 22. 2 Bulst. 308. Ro. Rep. 59, 60. Litt. Rep. 242. Noy, 12.

It seems, however, clear, that if a man lends a sum of money to another, detinue does not lie for it, but he must bring debt on the contract, or *assumpsit*. 18 H. 6. 20. b. Ro. Abr. 606.

So, where a man comes to buy goods, and they agree upon a price, and *a day for the payment*, and the buyer takes them away, detinue does not lie, but an *assumpsit* for the money, because the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due. But, if a man comes to buy goods, and they agree on a price *for present money*, and the buyer takes the goods away without payment, detinue lies, because the property is not altered; and, therefore, the taking away the goods without payment of the money is an injurious taking, for which the action lies. And, if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, detinue lies, because the property is in the buyer. Cro. Eliz. 867.

Detinue lies for writings in a box, or for writings themselves though not in a box, and though the date be not mentioned, or the delivery of the writings, as a deed. And it lies for a husband and wife for a deed by which an annuity is granted to the wife, for every man that has a property in deeds may bring his action for the (b) detaining of them. Co. Litt. 286. 17 E. 3. 45. Ro. Abr. 606. (b) In detinue of charters, if the issue be upon the detinue, and it

be found that the defendant hath burnt the charters, the judgment shall not be to recover the charters, for it appears he cannot have them; but he shall recover the value of the land in damages. 17 E. 3. 45. b. Ro. Abr. 607.

Detinue lies not for a house, and therefore where the plaintiff had declared *de una domo vocat. a bee-house*, upon a writ of error the judgment for this default was reversed. Coupledike v. Coupledike, Cro. Ja. 39.

By the act of navigation 12 Car. 2. c. 18. certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, seize, or sue for the same: it was adjudged, that, in this case, the subject may bring detinue for such goods, as the lord may have replevin for the goods of his villein distrained, for the bringing of the action vests a property in the plaintiff. (c) Roberts v. Withered, 5 Mod. 193. 12 Mod. 92. S. C. 1 Salk. 223. S. C. Comb. 361. S. C. (c) || This case was recognised in Wilkins v. Despard, 5 T. Rep. 112., where it was holden, that if a ship be seized as forfeited under this act by a governor of a foreign country under the dominion of Great Britain, the owner cannot maintain trespass against the governor, although there has not been any sentence of condemnation, because the forfeiture is complete by the seizure, and the property is thereby divested out of the owner. ||

||(C) The Pleadings and Evidence.

Selw. N. P.
610. Br. Abr.
Detinue de
biens, pl. 60.
Mills v.
Graham,
1 N. R. 140.

THE manner in which the goods came into the defendant's possession is matter of inducement only; so that if the plaintiff declare on a bailment, the defendant cannot plead that he did not bail them, for the bailment is not traversable. So, where the plaintiff declared that the goods came to the hands of the defendant by finding, and the evidence was, that the plaintiff had delivered the goods to the defendant (an infant) for a special purpose, and the defendant refused to re-deliver them; it was holden, that the evidence supported the declaration.

Pawly v. Holly,
2 Bl. Rep. 853.

If an action be brought for several articles, the separate value of each need not be set forth in the declaration; it is sufficient if the jury sever the values by their verdict.

2 Ro. Abr. 703.
tit. *Trial*, (C)
pl. 11.

In detinue for a bond of 100*l.* upon bailment, if the defendant plead, that he did not receive a bond for such sum, and it is found that he received a bond for a greater sum, there must be a verdict for him; because the bond is not the same as that which the plaintiff demands.

Co. Litt. 283. a.

The defendant cannot give in evidence upon the general issue, *non detinet*, that the goods were pawned to him for money which has not been paid; for this should be pleaded specially; but he may give in evidence a gift from the plaintiff, for that proves that he does not detain the *plaintiff's* goods.

(D) The Judgment.

Peters v. Hay-
ward, Cro. Ja.
681. Keilw.
646. *per Fro-*
wick C. J. Aston's Entr. 202. pl. 8.

THE form of the judgment is, that the plaintiff do recover the goods in question; or, if he cannot have the goods, the value thereof, and his damages, that is, for the detention.

Cheney's case,
10 Co. 119. b.
per Coke, re-
cognised by

The judgment being in the alternative, it is incumbent on the jury to find the value of the goods; for an omission of this kind cannot be supplied by a writ of inquiry of damages.||

Holt C. J. in *Herbert v. Waters*, 1 Salk. 206. where he says, that he thought that a contrary determination in *Burton v. Robinson*, Sir T. Raym. 124. & 1 Sid. 246. was not law.

DEVISES.

For the learning upon this head, see title WILLS AND TESTAMENTS.

DISCONTINUANCE.

DISCONTINUANCE of an estate in lands signifies (a) such an alienation of the possession, whereby he who has a right to the inheritance cannot (b) enter, but is driven to his action. Co. Litt. 325. and note (1), *ibid.* 13th edit. || The peculiar import of the word discontinuance, where applied to the cases mentioned by Littleton, is shortly, but forcibly expressed by *M. Houard*, who explains it, "*Interruption du droit, qu'on a sur un fonds, par la vente qu'un autre, chargé de conserver ce droit, en a faite.*" See *Antiennes Loix des François*, 2 vol. 435. Our doctrine of discontinuance, Mr. Butler observes, bears some analogy to the doctrine of interruption in the civil law. — There, interruption, when applied to real property, signifies the ousting of a person from the possession of his land; and if he does not renew his possession, but permits the dispossessor to retain it, he absolutely loses his right to it, and the disseisor is said to acquire it by prescription. Co. Litt. n. 278. || (a) To every discontinuance it is necessary there should be a divesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. Co. Litt. 327. b. and 332. same rule. (b) But he, who claims by title paramount above the discontinuance, may enter. Co. Litt. 327.

[It began in the case of husbands' alienations of their wives' land. By the civil law, the father gave the *dos*, which was the estate of the wife given on the marriage; and if it consisted of matter moveable, the husband had the possession, but was bound to restitution at his death; and even an action was allowed to the wife, in case the husband fell to decay, to recover during his life. If it consisted of things immoveable, the husband could not alien without the consent of his wife, by the Julian law. And by Justinian's reformation, he could not alien, though with her consent. *Constante matrimonio rei dotalis dominium civile penes maritum est, naturale penes uxorem.* Dig. li. 23. tit. 2. *De jure dotium.* Ibid. tit. 5. *De fundo dotali.*]

|| When the feudal law allowed the inheritance to descend to women, then began the rights of the husband to be settled. Now, since all the feudal estates were reckoned civil rights, therefore there was no room for the distinction of the civil law, that placed the civil right in the husband, as the head and governor of the family, and the natural right in the wife, as the legitimate owner. The German and northern nations were the strictest observers of the rules of marriage, tying only one man to one woman, and injoining strict obedience to the husband, even before their receiving Christianity, and much more so afterwards. Then when the woman was allowed to succeed into the feud, when she took husband, she had no separate property, but the whole power was lodged in the husband, and they were reckoned as one in interest; therefore the husband had the right of possession, and the wife the right of propriety; or, in other words, the husband was seised in the right of his wife. This distinction was before known in the feudal law; for every person that came in by descent, or by lawful alienation in manner

manner before mentioned, by the ancient feudal law, had the right of possession; therefore the husband being possessed of the wife's lands by the marriage contract, was supposed to have the right of possession; and, by consequence, the husband having aliened such right of possession, she was anciently driven to her writ of right, by the opinion of Sir *William Herle*, and as I think by the better opinion. 5 E. 3. 58. 2 Inst. 343. For the wife could not complain of disseisin done to the husband, because they were one in estate and interest, and the husband could not do her wrong; and it would have been very absurd for the law to have allowed her to complain on the memory of her husband, as though he had been guilty of a violent disseisin; therefore the ancient law gave no possessory action, which complained of a violation of possession, but only allowed her to controvert the right. But, when the writs of right grew so tedious, and the trial by bat-tail grew out of repute, the law gave her a recovery by the writ of entry of *cui in vita*; and the husband was the rather supposed to have the right of possession in him, for that being the superior and governing power, he might defend the possession by all actions; and therefore if the husband lost by default in a possessory action, this put the wife to a writ of right, as before, till the statute of *Westminster*, c. 3. But now an actual entry is given to the wife and her heirs, by the 32 H. 8. c. 28., and, consequently, the writ of *cui in vita* has since become unnecessary; and see F. N. B. 193. in margin.||

Under this Head we shall consider,

- (A) Of Discontinuances made by Ecclesiastical Persons.
- (B) Made by Tenants in Tail.
- (C) By Husbands seised in Right of their Wives.
- (D) Of Discontinuances by Women of Lands of the Gift of their Husband, or his Ancestor.
- (E) What Estate or Interest may be discontinued.
- (F) By what Act or Conveyance a Discontinuance may be made, and the Effect thereof.

(A) Of Discontinuances made by Ecclesiastical Persons.

Co.Litt. 325.b.
Comp. Incumb. 484.
Gilb. Ten. 102.

IN ancient days, abbots and prelates were supposed to be married to the church, and, as husbands and representatives of the church, were allowed to have a fee in right of the church, that they might maintain actions, and hold courts within their manors and precincts. Therefore, at common law, a bishop, abbot,

abbot, or any other person, seised in fee in right of his house or church, might have discontinued, and thereby put his successor to his action to recover the right of possession.

But, as the right of property was in the church, the bishop could not alien without the consent of the chapter, who represented the clergy of the diocese; nor could the abbot alien without the consent of his house. Co. Litt. 325.

And at this day, by the 1 Eliz. c. 19. and 13 Eliz. c. 10. and 1 Ja. c. 3. no bishop, dean, master of an hospital, &c. can discontinue any of their possessions, or bar their successors of their right of entry. Co. Litt. 325. b. 342. Ro. Abr. 633.

As to parsons, vicars, prebendaries, and others who are representative, they were considered only as having a qualified right, and their estate by the common law only an estate for life, the fee being in abeyance; and therefore they could not discontinue, or do any other act to the prejudice of their successors, though they could alien with the consent of the patron and ordinary. * Co. Litt. 341. a. Dyer, 239. pl. 41. Hetl. 88. * By 13 El. c. 20., charges made upon benefices with cure are declared void.

If a bishop leases parcel of the demesnes of a manor for life, not warranted by the statute of 1 Eliz. c. 19. and after leases the manor to another for life; the parcel so leased shall pass with attornment of the first lessee; for the said lease did not make any discontinuance, but the reversion thereof continued parcel of the manor. 2 Ro. Abr. 58. But for this vide under head of *Leases and Terms for Years, Leases made by Ecclesiastical Persons.*

(B) Of Discontinuances made by Tenants in Tail.

IF tenant in tail makes a *feoffment* in fee, this is a discontinuance; for he has the right of possession inheritable in him; for although the statute *de donis* preserves the right of the inheritance to the issue; yet it does not preserve the right of possession, and (a) therefore the issue is put to his action. Litt. § 595. (a) Also, the entry of the issue is taken away, because the feoffment had anciently

a warranty annexed unto it, which defended such right of possession; and when a man had a warranty to cover his possession, it was not fit he should be put out of possession by any act in *pais*, without bringing in his warrantor by voucher; and therefore the entry was disallowed in such cases, that a man might not be obliged to the expence of getting his judgment in the writs of *warrantia chartæ*. Co. Litt. 327.

So, if tenant in tail, remainder to his right heirs, makes a *feoffment* in fee; this is a discontinuance. 13 H. 7. 22. b. Ro. Abr. 633. Cro. Car. 387.

405, 406. Jon. 358. Hut. 126. S. C. and S. P. admitted.

If tenant in tail be disseised, and *release* to the disseisor all his rights; this works no discontinuance; for a *release* being a conveyance in secret, cannot pass the possession; and therefore a conveyance, that cannot pass the possession, cannot pass the right of possession. Litt. § 598, 599. 3 Co. 85. S. P. But Q. after such release, what estate or interest the disseisor has.

|| Some have said, that he has an estate to him and to his heirs during the life of tenant in tail; so that then he has only a freehold, and the heir is a special occupant, and has no fee in him, because a less estate by right will drown a greater by wrong; for a man shall

shall never be presumed to do wrong, when he may hold by right. Took v. Glascock, 1 Saund. 260. Cart. 108. S. C. Others have holden, that the disseisor has in such case a fee simple, that his wife is dowable, but that it is determinable by the entry of the issue in tail. And the reason is, because when a disseisin is committed, the whole fee is notoriously in the disseisor by his possession, which cannot be abridged and turned into an estate for life without an act of notoriety. For if there could be such transmutation of estates without the solemnities of entry, no man would know in whom the fee resides; so the release leaves the disseisin *in statu quo*, as to the entry of the heir on him. For this see Co. Litt. 106. and 108. b. Seymour's case, 10 Co. 96., revived by Holt in the case of Machell v. Clarke, 1 Ld. Raym. 778. 2 Salk. 619. S. C. 7 Mod. 18. S. C. Com. Rep. 119. S. C. 11 Mod. 19. S. C. Gilb. Ten. 119. ||

Litt. § 601. But, if tenant in tail, being disseised, releases all his right to
3 Co. 85. S. P. the disseisor, and binds himself and his heirs to warranty, and
(a) So that it dies, and the warranty descends (a) upon the issue in tail; this
is not the war- is a discontinuance (b), by reason of the warranty.
ranty only that makes the discontinuance, but the warranty and descent upon him that hath right to the lands.
Co. Litt. 328. a. (b) *Viz.* That if assets descend, he to whom the release is made may plead
the same, and bar the demandant. Co. Litt. 328. a. b.

Co. Litt. 332. a. If tenant in tail leases for years, and after levies a fine, this is
Bulst. 162. a discontinuance, for a fine is a feoffment upon (c) record, and the
2 Roll. Rep. freehold passes.
484. (c) But,
if tenant in tail levies a fine *sur conuzance de droit tantum*, this is not any discontinuance
till execution; for if he dies before execution, the tenant may enter. 36 Ass. 8. Ro. Abr.
632. S. C. So, if a fine be levied to tenant in tail, and he grant, and render the land to the
conuzor and his heirs, and die before execution, this is no discontinuance; otherwise, if
executed in the life of tenant in tail. Co. Litt. 333. b.

Co. Litt. 332. But, if tenant in tail leases for his own life, and after levies a
fine, this is no discontinuance, because the reversion expectant
upon an estate of freehold, which lies only in grant, passed
thereby.

Litt. § 620. If tenant in tail leases for the life of the lessee, by this the
(d) So, if tail and reversion thereupon is discontinued; and if the tenant
tenant for life surrenders to in tail by deed grants his reversion in fee to another, and the
the grantee, or tenant for life attorns; and (d) after the tenant for life dies,
the grantee (e) living the tenant in tail, &c. (f) this is a discontinuance in fee.
recovers in
waste, and enters for the forfeiture, &c. Co. Litt. 333. b. Litt. § 621. 629. Jon. 210.
Latch. 65. (e) If tenant in tail leases for the life of the lessee, and after levies a fine with
warranty; though this is not any discontinuance, so as to take away the entry of him in re-
version after the death of the tenant for life, unless executed in the conusee by the death of
tenant for life in the life of tenant in tail; yet the grantee hath an absolute fee, to which the
warranty being annexed, and descending upon the reversioner, will be a bar; Jon. 210. ad-
judged. Cro. Car. 156. adjudged; for by the estate for life the tail was discontinued, and a
new fee gained; which reversion in fee being granted with warranty, the warranty was an-
nexed to the fee, and bound those that had right. *Vide* Latch. 64. 72. Salk. 245. Lutw.
770. 782. (f) Where the reversion is executed in the life of tenant in tail, it is equivalent
in judgment of law to a feoffment, for the estate for life passed by livery. Co. Litt. 333. b.

Co. Litt. 333. b. If tenant in tail leases for (g) life, the remainder in fee, this
(g) So, if he is an absolute discontinuance, though the remainder is not exe-
leases for cuted in the life of tenant in tail, because all is but one estate,
years, the re- and passeth by one livery.
mainder in fee, and makes *livery of seisin* accordingly. Litt. § 631.

But,

But, if tenant in tail leases for three lives, according to 32 H. 8. Co.Litt.333. a. c. 28. this is no discontinuance of the estate-tail, or of the (a) re- But for this version, (b) because it is authorised by act of parliament, wherein *vide* head of every man's consent is involved. Leases.

(a) But, if tenant in tail levies a fine, and after dies without issue, the donor is put to his formodon. (a) But, if 4 Leon. 191. Co. 96. Cro. Ja. 696. Sid. 83. (b) Dyer, 57. pl. 1. Owen 28. 2 Leon. 46.

If tenant in tail leases for life, and after disseises lessee for life, Co.Litt.333. b. and makes a feoffment in fee, and the lessee dies, and then tenant (c) Where by in tail dies; though the fee was executed, yet, because it was custom an infant above the not executed by (c) lawful means, it is no discontinuance. age of 15 may make a feoffment, and being tenant in tail, he makes a feoffment; it is no discontinuance, because the custom will not enable one to do a tort. Cro. Ja. 80.

If there be tenant for life, remainder in tail, remainder in Co. 76. a. Co. tail, &c. and tenant for life and he in the first remainder in tail Litt. 302. b. levy (d) a fine, this is no discontinuance of either of the remain- Cro. Eliz. 827. ders, because each of them passed only what he lawfully might. Moor, 634. *vide* 2 Lev. 254. 2 Jon. 58. (d) So, if they make a feoffment. Co. 76. Owen, 129. Cro. Eliz. 135. Leon. 127. But Q. and *vide* Dyer, 324. And. 286. Cro. Eliz. 36. 6 Co. 15. and Sid. 83, where this opinion is denied; because a feoffment differs in its nature from a fine. — If such feoffment be made by parol, it will be the surrender of tenant for life, and the feoffment of him in remainder, *ut res magis valeat*, and, consequently, a discontinuance. Co. 77. — But a naked consent of the tenant for life will not amount to a surrender, so as to make it a discontinuance. Carth. 110.

If tenant in tail enfeoff the donor, this is not any discontin- Litt. § 65. Co. tinuance, because the donor hath the (e) immediate estate, and 140. S. P. it operates as a surrender; it passes no more than it lawfully (e) But, if there may pass. be tenant in remainder in tail; and the tenant in tail enfeoff him in reversion in fee, this is a discontinuance, Co. 140. Co. Litt. 335. S. P. because there is a mesne estate. Keilw. 42. a. S. P. *per Fro-* *wick con.* Dyer, 10. pl. 32.

If the donee enfeoff the donor and a stranger, (f) this is a dis- Co.Litt.335. a. continuity of the whole land. (f) Conditionally, viz. if the stranger survive. Dyer. 12. Cro. Car. 406.

If a man covenants to stand seised to the use of himself for Stephens v. life, remainder to his wife for life, the remainder to the heirs Bittridge, male which he shall beget on the body of his wife, remainder to 1 Lev. 36. his eldest son by a former wife, &c. and after the husband and Raym. 36. S.C. wife levy a fine with warranty, and die without issue; this is no Sid. 83. S. C. discontinuance of the remainder, because the estate-tail was not adjudged. executed by reason of the intervening estate limited to the wife, But it was which estate is not drowned, but remains distinct. agreed, that if the estate-tail had been executed, this fine had been a discontinuance of the remainder in tail, and so the warranty descending upon him in remainder would have barred.

If a man has the right of possession, and is not possessed by Litt. § 637. 641. virtue of the entail, he cannot discontinue otherwise than by Carth. 110. (g) warranty. S. P. *post* letter (E).

(g) As, if tenant in tail is disseised, and dies, and the issue in tail releases to the disseisor with warranty, though the issue was never seised by force of the entail, yet it hath the effect of a discontinuance by reason of the warranty. Co. Litt. 339. Dyer, 55. Moor, 256.

As,

Litt. § 658.
Ro. Abr. 634.
Raym. 37.

As, if there be grandfather, father, and son, and the grandfather be seised in tail, and the father disseise the grandfather, and make a feoffment in fee, and die, this works no discontinuance, because the father was not possessed of the entail, but of a fee-simple by disseisin, which was subject to the entry of the tenant in tail, and, consequently, the alienance is subject to the entry of the issue in tail, inasmuch as the father, who made the alienation, had only the naked possession by disseisin, and not the right of possession by virtue of the entail.

Litt. § 638.
(a) So, though the grant had been with warranty. Co. Litt. 339.; yet *vide* Jon. 210. Cro. Car. 156. Latch. 62.

So, if tenant in tail lease to one for life, and have issue and die, and the reversion descend to the issue, and the issue (a) grant the reversion to another in fee, and the tenant for life attorn, and die, and the grantee enter, and be seised in fee in the life of the issue, and the issue in tail have issue a son, and die, this is no discontinuance; but the son may enter, &c. for that his father had never any thing in him by force of the entail.

Ro. Abr. 634.
& *vide* 2 And. 110. Roll. Rep. 188. Moor, 747. Styl. 158. Bulst. 162.

So, if there be tenant for life, the remainder in tail, and he in remainder enter upon the lessee, and disseise him, and make a feoffment over, this is not any discontinuance, because he was never seised by force of the entail.

Ro. Abr. 634.
(b) So, if he make a deed of feoffment with a letter of attorney to

But, if there be lessee for years, the remainder in tail to *J. S.* and (b) *J. S.* enter upon the lessee, and make a lease for life, or feoffment in fee, (c) this is a discontinuance, for he was seised by force of the entail at the time of the feoffment.

J. N. to make livery, and he enter and oust the lessee, &c. Moor, 91. Dyer, 363. (c) Though the lessee re-enter. Moor, 281.

(C) Of Discontinuances by Husbands seised in Right of their Wives.

2 Inst. 681.

ANY alienation made by the husband of the wife's land, whether by feoffment, or fine, was a discontinuance, and after his death, she was put to her *cui in vita* to reinstate herself.

(d) The husband causes a *præcipe* to be brought against him and his wife upon a feigned title, and suffers a recovery without any voucher, and execution to be had against him and his wife, this is an act within the statute suf-

But now by the 32 H. 8. c. 28. § 6. "No fine, feoffment, or other act or acts, made (d), suffered, or done by the husband (e) only, of any manors, &c. being (f) the (g) inheritance or freehold of his wife, during the coverture, shall in any wise be or make a discontinuance thereof, or be prejudicial or hurtful to the (h) wife or her (i) heirs, or to such as (k) shall have right, title, or interest to the same by the death of such wife; but that the (l) wife or her heirs, and (m) such others to whom such right shall appertain after her decease, shall and may then lawfully enter into such manors, &c. according to their rights and titles therein; any such fine, feoffment, or other act to the contrary notwithstanding; fines levied by the husband and wife (whereunto the wife is party and privy) only excepted."

fered by the husband. Co. Litt. 326. (e) Though a feoffment be made by the husband and wife, for this in substance is the act of the husband only. Co. Litt. 326. a. (f) Where during

during the coverture lands are given to the husband and wife, and the heirs of their two bodies, this is the inheritance of the wife within the act; so that if the husband makes a feoffment, and dies, she or her issue may enter. 9 Co. 138. 2 Inst. 681. Cro. Car. 477. Co. Litt. 326. 2 Inst. 681. 8 Co. 72. Brown. 131. — But, if the husband levies a fine with proclamations, the issue is barred, though the wife is helped by this statute. Keilw. 205. 213. Dyer, 351. pl. 24. And. 39. 8 Co. 72. — But, if the husband is tenant in tail, remainder to the wife in tail, and the husband makes a feoffment in fee, if the husband die without issue the wife may enter. Co. Litt. 326. a. 8 Co. 72. But there said, if he suffers a recovery, she is barred. (g) This extends not to the wife's copyhold of inheritance. Moor, 596. — But though the statute does not extend to it, yet the husband cannot at common law discontinue the wife's copyhold. 4 Co. 23. Cro. Ja. 105. Poph. 138. Moor, 596. Ro. Abr. 632. (h) If after a feoffment made by the husband they are divorced *causa præcontractus*, she may enter within this act, and is not driven to her *cui ante divortium*, as at common law; though by the statute the entry is given to the wife, and now upon the matter she was never his lawful wife; yet at the time of the alienation she was his wife *de facto*; and where the husband dies, she is not his wife at the time of the entry. Co. Litt. 326. a. 8 Co. 73. a. She may enter though her husband is living, but *vide* Moor, 58. (i) But her heirs by the common law could have no remedy, nor by this act can they enter during the life of the husband. Co. Litt. 326. 8 Co. 72, 73. (k) But, if the wife before entry dies without heirs, the lord by escheat shall not enter; for though an entry is given by the act, yet the feoffee, &c. is in by title as before. Hob. 243. 261. (l) But, if the husband makes a feoffment, and dies, and the wife before entry levies a fine, this so strengthens and fortifies the discontinuance, that she or those in remainder can never enter; and though, by the statute it is enacted, that the feoffment of the baron shall not be a discontinuance, but the wife may enter, yet it is a discontinuance till entry. 2 Ro. Rep. 311. Cro. Car. 320., and *vide* Ro. Abr. 632. (m) By these words the entry of him in reversion or remainder is preserved. Co. Litt. 326. Hob. 261.

Although the words of this act are very general, and seem to give the wife and her issue an entry, to avoid any fine levied by the husband of her lands, yet if the husband levies a fine with proclamations, and five years pass after his death, without any entry or claim by the wife, her entry is not only taken away, but her right is for ever extinguished; because the statute was intended to provide only against the discontinuance, which was a grievance particular to feme covert, but not to invalidate fines duly levied, according to 4 H. 7. c. 24. as to femes covert; because they by that statute have a remedy in common with others, which is by entry or claim to avoid the fine; whereas before the statute of 32 H. 8. c. 28. it was not in their power to prevent the discontinuance; and therefore the statute relieves them in that particular. Besides, though the words of the act be general, that such fine shall not be prejudicial to the wife or her heirs, yet the following words, *viz. but that she may lawfully enter according to her right and title therein*, are explanatory, and allow her an entry only in cases where she had a right before the statute, and it is plain that by 4 H. 7. c. 24. she had no right after the five years were lapsed from the death of the husband.

If husband and wife are tenants in (a) special tail, and the husband aliens in fee, this is a discontinuance; for though the words of the statute are, *of any lands being the freehold and inheritance of the wife*; yet, as this joint estate may without any impropriety be called the inheritance of the wife, the mischief being equal, it shall be intended to be provided against. the baron makes a feoffment in fee, this is a discontinuance; for the baron is seised by force of the entail. Cro. Car. 320. Jon. 314. 3 Co. 5. Ro. Abr. 632, 633. 2 Ro. Rep. 311.

If

Co. Litt. 326.
Dyer, 72.
162. 191.
Plow. 373.
8 Co. 72.
2 Inst. 681.
9 Co. 140.

Co. Litt. 326.
8 Co. 71. b.
(a) If lands are given to baron and feme, and the heirs of the body of the baron, and

2 Inst. 681.

If a husband levies a fine of the wife's lands to the king, she may after the death of her husband enter upon the king; for though the statute does not expressly name the king, yet being made to prevent an injury and wrong, he shall be bound by it, the rather because it is his most immediate concern to relieve his subjects from any grievance or wrong.

(D) Of Discontinuances by Women of Lands of the Gift of their Husband, or his Ancestor.

Dan. Abr. 579. **T**HE learning hereof depends upon the statute 11 H. 7. c. 20. which provides against discontinuances and disherisons by the wife, to the prejudice of the heir of the husband, and seems to be well explained by the following notes and observations of Mr. *Danvers*.

(a) So, if a woman, having only title of dower, enters before she is endowed, and levies a fine. 2 Leon. 168. 3 Leon. 78. cited by *Rhodes* to have been adjudged. (b) But this extends not to estates in fee. *Dyer*, 248. 4 Co. 3. Moor, 716. Bridge. 136. Cro. Eliz. 524. adjudged; for they may go to a collateral heir. (c) Extends not to copyholds. 2 Sid. 41. 73. adjudged. [But it does to a use or an equity of redemption, for uses are here expressly mentioned, and a trust is now, what a use was then. 2 Vern. 489. 1 Ab. Eq. 220.] (d) If one seised in the right of his wife levies a By 11 H. 7. c. 20. “ If any woman which shall have any (a) estate in dower, or for term of life, or (b) in tail, jointly “ with her husband, or only to herself, or to her use, in any “ manors, lands, tenements, or other hereditaments (c) of the “ (d) inheritance (e) or purchase of her husband, or given (f) to “ the said husband and wife in tail, or for term of life, by any “ of the ancestors of the said husband, or by any other person “ seised to the use of the said husband, or of his ancestors, and “ shall, being sole, or with any other after taken (g) husband, “ (h) discontinue, (i) aliene, release, or confirm (k) with war- “ ranty, or by covin suffer (l) any recovery of the same against “ them, or any of them, or any other seised to their use, or to “ the use of either of them, after the form aforesaid, all such “ recoveries, discontinuances, alienations, releases, confirmations, “ and warranties so to be had and made, shall be utterly void “ (m) and of none effect. And it shall be lawful (n) to every “ (o) person and persons, to whom the interest, title, or inheri- “ tance, after the decease of the said women, of the said manors, “ lands, and tenements, or other hereditaments, being discon- “ tinued, aliened, and suffered to be recovered, in the form “ aforesaid, shall appertain, to enter into all and every of the “ premises, and peaceably to possess and enjoy the same, in “ such manner and form as he or they should have done, if no “ such discontinuance, warranty, nor recovery had been had “ nor made. And if any of the said husbands and women, or “ any other that shall be seised, to the use of them of the estate “ afore specified, do make or cause to be made, or suffer any “ such discontinuance, alienations, warranties, or recoveries in “ form aforesaid, that then it shall be lawful to the person “ (p) or persons to whom the said manors, lands, or tenements “ should or ought to belong after the decease of the said women, “ to enter into the same, and them to possess and enjoy, ac- “ cording to such title and interest as they should have had in “ the same, if the same women had been dead, no discontinu- “ ance, warranty, nor recovery had, as against the said husband “ during

“ during his life, if the said discontinuance, alienation, warranties, and recoveries be hereafter had by or against the same husbands and women during the coverture and espousal betwixt them. Provided always, that the said women, after the decease of their said husbands, may re-enter into the same manors, lands, and tenements, and them enjoy according to their first estate in the same. And if the said woman, at the time of such discontinuance, alienations, recoveries, warranties, in form aforesaid, to be had and made of any of the premises, be sole, then she shall be barred and excluded of her title and interest in the same from thenceforth. And the person and persons to whom the title, interest, and possession of the same should belong after the decease of the said woman, shall immediately after the said discontinuances, alienations, warranties, and recoveries, enter into the same manors, lands, tenements, and other hereditaments, and them possess and enjoy according to his or their title in the same. Provided also, that this act extend not to any such recovery or discontinuance to be had (q) where the heirs (r) next inheritable to the said woman, or he or they that next after the death of the same woman should have estate of inheritance in the same manors, lands, or tenements, be assenting or agreeable to the said recoveries, where the same assent and agreement is of record, or enrolled. Provided also, that it shall be lawful to every such woman being sole, or married after the death of her first husband, to give, sell, or make discontinuance of any such lands for term of her life only, after the course and use of the common law before the making of this present act.”

fine, and the conusee grants and renders the land to the husband and wife in special tail, the remainder to the heirs of the wife, and they have issue, and the husband dies, and the wife takes another husband, and they levy a fine, this is directly within the words, but out of the meaning of the act, because the estate of the land moved from the wife. Co.Litt. 366.a. Easton and Stud. Plow. 459. adjudged. Keilw. 214. adjudged. N. Bendl. 230. pl. 266. and with this

agrees Cro. Eliz. 524. Moor, 715. pl. 1000. Nay, Cro. Eliz. 2. it is said to have been adjudged, if baron and feme levy a fine of such land, and the conusee grants a rent to them in tail, it is out of the act, for the rent is in lieu of the land. — So, if the ancestor of the baron makes a feoffment in fee, upon condition that the feoffee shall give it to the baron and feme in tail, &c., this is within the meaning of the act, though out of the words, for they are in by the feoffment, and not by the ancestor of the baron. Moor, 93. pl. 231. *Per Plowden* said to have been so adjudged, *Linch and Spencer*, Cro. Eliz. 514. 2 And. 44. Moor, 455. 3 Co. 50. — It is within the act, though the gift by the husband or his ancestors, by which the feme takes, was made as well in consideration of money paid by the feme, or her father, as of the marriage. *Dyer*, 146. a. b. *Keilw.* 208. Moor, 93. pl. 231. Cro. Ja. 474. — Otherwise, if the lands had moved from the ancestor of the feme, as, if settled by the father of the feme in consideration of the marriage, and of money paid by the baron for the lands moving from her father, it shall be intended that her advancement was the principal cause of the gift, and not the money. *Kynaston and Lloyd*, Cro. Ja. 624. adjudged, *Jon.* 113. adjudged. *Palm.* 213. 218. adjudged, *Copland and Pyot.* Cro. Car. 244. adjudged, *Jon.* 254. adjudged, and *vide* Moor, 93. pl. 231. 2 And. 45. — But, where conveyed by a stranger in consideration of the wife's fortune paid by her father to the vendor, and other money paid by the baron; this is the purchase of the husband within the act. Moor, 250. pl. 398. — If *A.* in consideration of good service done by *B.*, conveys lands to *B.*, his man, and *C.* his cousin, and the heirs of their bodies, &c.; this is not within the act, not being made by the baron or his ancestor; and being in consideration of service done, it is not such a purchase as the act intends. *Ward and Warthew*, Cro. Ja. 173. adjudged. And though *C.* was named cousin by the deed, it was said that was not material, because it did not appear to be any part of the consideration; however, being found in fact that she was his cousin, and that a marriage was intended; it was said it should be presumed the marriage was as well the cause of the gift as the service. *Noy*, 122. adjudged. *Yelv.* 101. adjudged. Moor, 683. adjudged. (e) Baron and feme being joint copyholders in fee, the baron purchases the freehold thereof to him and his wife, and the heirs of their bodies; they have issue; the baron dies; and the feme enters and suffers a recovery, &c., this is a forfeiture within the act,

for the copyhold by the acceptance of the new estate was extinct. Cro. Eliz. 24. agreed *per cur.* (f) If a man devises lands to his wife in tail, this is within the words, but not within the meaning of the act. Foster and Pitfal, Leon. 261. Cro. Eliz. 2. [Hughes v. Clubb, Com. Rep. 369. S. P.] (g) A man seised in fee levied a fine to the use of himself for life, and after to the use of his wife, and the heirs male of her body by him begotten, for her jointure; and after he and his wife levied a fine, and suffered a recovery, and the husband and wife died; and it was held, the issue upon this act might enter, for though it was not within the words, yet it was within the remedy intended to prevent the disherison of heirs. Co. Litt. 365. But in the case of Kirkman and Thompson, Cro. Ja. 474. this point is adjudged *con.* and that such alienation was neither within the words nor intention of the act, which seems clearly to be law. (h) *Vide* Jones and Philpot, Lev. 49. Sid. 63. (i) If such feme tenant in tail accepts a fine *sur conuance de droit*, and thereby renders the land for 1000 years, &c. this is an alienation within the act, else it would be to little purpose. 3 Co. 51. said to have been so resolved. Moor, 250. adjudged. 2 Leon. 168. adjudged. 3 Leon. 78. adjudged, & *vide* Cro. Eliz. 514. 2 And. 58. — Diversity where such lease made by fine, where by deed only. Cro. Ja. 629. Bridg. 28. 1 Jon. 60. & *vide* 2 Ro. Rep. 490, where it is said by two judges, that though such lease be made by fine, yet it not being any discontinuance, or prejudicial to the issue, he cannot enter till after her death. (k) This relates only to releases and confirmations, which are no discontinuance without, so that a lease by such feme tenant in tail made for three lives without warranty, if not pursuant to 32 H. 8. c. 28. is a forfeiture within the act. Sir George Brown's case, 3 Co. 50. b. Cro. Eliz. 514. (l) Extends to such, where she comes in only as vouchee. Moor, 716. pl. 1000. (m) Yet it continues as to the parties, and all others, except him to whom the interest, &c. by whose entry it is to be avoided. 3 Co. 59. b. 60. Hob. 166. (n) Unless he hath disabled himself by levying a fine, suffering a recovery, &c. Ward and Walthoe, Cro. Ja. 175. adjudged. Yelv. 101. adjudged. Noy, 122. adjudged. — And where he hath concluded himself by suffering a recovery, &c., his issue whom he had power to bar shall not enter. Lincoln College, 3 Co. 61. 2 And. 31. — But, if after such feme tenant in tail suffers a recovery, the issue in tail releases to the recoveror, yet the issue of that issue is not barred thereby. 3 Co. 59. cited from Doctor and Student, and 3 Co. 61. agreed to be law. — But, if the issue in special tail, the remainder being to him in fee, levies a fine with proclamations, (though not found,) and after his mother (being tenant in tail within this act) leases for three lives, (not warranted by 32 H. 8. c. 28.) living the issue, the conusee may enter; for the tail was extinct by the fine, and the conusee was the person to whom the interest, &c. belonged after the death of the woman. Sir George Brown's case, 3 Co. 51. adjudged. Cro. Eliz. 514. adjudged. Moor, 455. adjudged. 2 And. 44. adjudged. And there said that the record of the fine being in the same court, they might inspect it to see the proclamations. Ro. Abr. 878. pl. 7. 3 Co. 61. But, if the reversion in fee had been in another, then the conusee taking nothing by the fine, but by estoppel, could not enter; nor could the heir, because concluded by the fine. Ward and Walthoe, Cro. Ja. 175. adjudged. Yelv. 101. adjudged. Noy, 122. adjudged. But in this last book the case is not fully stated, for there is no notice taken of the last fine levied by the woman alone after the death of her second husband, which made the forfeiture. (o) The statute intended only to prevent such prejudice as might arise to the heirs of the baron, by whom advanced, and not where the immediate interest upon the death of the wife was so limited, as to belong to a stranger. Foster and Pitfal, Cro. Eliz. 2. Leon. 261. [Hughes v. Clubb, Com. Rep. 369. S. P.] (p) But, if such woman be tenant for life — remainder for life, remainder in fee; and the two tenants for life join in a feoffment, the entry of him in remainder in fee is lawful by this act, *per* Leon. 262. But this seems to be such a forfeiture, for which the remainder-man in fee might by the common law enter. Co. Litt. 251. b. (q) If the baron, being seised to him and his feme, and the heirs of the body of the feme dies, and in the life of the wife his issue (then being tenant of the freehold, as pleaded, which must be intended by disseisin, no surrender or forfeiture being alledged) suffers a recovery, (which binds not the tail, he being in of another estate,) by agreement that the recoverors should enfeoff *J. S.*, and that the wife should release to him with warranty, which she does accordingly, and dies, and the warranty descends, &c. this shall bind; for not being prejudicial, but intended to perfect the assurance of the heirs, it is not restrained by this act; for the woman, joining with the heir by fine or recovery, might have barred the tail; and it was never intended to prevent a warranty being made to him that had the land, by the conveyance of the heir himself. Lincoln College's case, 60. a. b. adjudged. (r) But, if such heir, being a daughter, joins, and after a son is born, he may enter. 3 Co. 61. b.

[By stat. 32 H. 8. c. 36. § 2. it is enacted, that no fine levied by any woman of any such estate as is mentioned in the above statute, 11 H. 7., shall be of any effect.]

(E) What

(E) What Estate or Interest may be discontinued.

THERE can be no discontinuance of things which lie in grant; and, therefore, if tenant in tail of a rent (*a*), advowson, common, or remainder, or reversion expectant on a freehold, make a grant by deed or fine, or disseise the tenant of the land out of which the rent is issuing, whereof he is seised in tail, and make a feoffment with (*b*) warranty; this is no discontinuance of the entail, for nothing passes but during the life of tenant in tail, which is lawful, but every discontinuance works a wrong.

Litt. § 627, 628. Co. Litt. 327. 3 Co. 85. (*a*) Tenant in tail of an advowson in gross grants the same in fee, and after, a collateral ancestor releases to the

grantee with warranty, and dies, this is a good bar for ever. 1 Leon. 111. said by *Anderson* to have been adjudged, but *vide* 2 And. 110. (*b*) But, where the issue by bringing a formedon admits himself out of possession, and shall be barred by the warranty and assets, *vide* Co. Litt. 332. b.

A copyhold estate cannot be discontinued by surrender, for the tenant gives up no more than he had, and the surrendree is in by the lord's admittance; and this is not (*c*) like a feoffment at common law, which being so notorious a way of conveying estates, takes away the entry for the benefit of strangers, who otherwise would be at a loss to know against whom to bring their *præcipe*.

Ro. Abr. 632. Co. Copyh. 141. 4 Co. 23. a. (*c*) For a warranty is usually annexed to it; and if the rightful owner might enter,

the benefit of the warranty would be lost, but warranty cannot be annexed to copyhold estates. Leon. 95. 352.

But by custom, a copyhold estate may be discontinued by surrender, and by such surrender an estate-tail in copyhold lands for ever.

Ro. Abr. 632. For this *vide* Stephens v. Eliot, Cro. El.

484. Erish v. Rives, *Id.* 717. Dell v. Higden, Moore, 358. Oldcot v. Levell, *Id.* 753. Knight and Footman's case, 1 Leon. 95. Reyner v. Poel, Brownl. 44. 79. 4 Co. 23.

Also, if there hath been a custom in a manor, that plaints should be prosecuted there in the nature of real actions; if a recovery be had upon such plaint against tenant in tail, it is a discontinuance; for since the custom warrants the recovery, it is an incident to such a recovery by the common law, that it should be a discontinuance, which it seems is drawn from the nature of the thing, that a judgment given in a court of judicature ought not to be avoided, but by matter of as high nature, *viz.* a recovery in a court of justice, and not by the entry of the party that hath right.

4 Co. 23. a. || Eylet v. Lane, Cro. El. 280. Clun v. Pease, *Id.* 391. ||

If the reversion or remainder be in the king, the tenant in tail cannot discontinue the estate tail.

Co. Litt. 335. 2 And. 156. 2 Leon. 157. 3 Leon. 75.

But, if there had been tenant in tail, the reversion in the king, before 34 & 35 H. 8. c. 20. he might have (*d*) barred the tail by a common recovery, but that common recovery neither barred nor discontinued the king's reversion.

Co. Litt. 335. (*d*) And where such tail may now be barred by fine, with-

out discontinuing the king's remainder, *vide* Jackson v. Darcy, Moore, 115. 4 Leon. 40. S. C. Keilw. 213.

Stone v. New-
man, Cro.Car.
427.

¶ Tenant in tail to him and the heirs male of his body, reversion in the crown, made a feoffment of the lands, and was afterwards attainted and executed for treason; and by a special act of parliament, by which his attainder was confirmed, it was enacted, that he should lose all his lands, &c., and that they should be vested in the queen without office found. The question was, whether there was any estate or right remaining in the tenant in tail after the feoffment, which was not forfeited by the attainder and act of parliament. The judges upon the arguing of this in the Exchequer Chamber were divided. Some held, that by the feoffment of the tenant in tail (the reversion still remaining in the crown) there could be no discontinuance of the estate tail, and therefore, being in him at the time of the attainder, was by the forfeiture vested in the king by the statute of 26 H. 8.; but, if the estate tail was not in him, yet the right of the estate tail remained, which was given to the king by the 33 H. 8. The other judges argued, that though the reversion was in the king, and so no discontinuance, yet all was divested out of the feoffor as strongly as if there had been a discontinuance, and so nothing remained to be forfeited. No judgment was given in the Exchequer Chamber, but afterwards upon exceptions taken in the King's Bench to the pleadings, it was there agreed, that judgment should be entered for the plaintiff, according to the opinion of the majority of the judges in the Exchequer Chamber; and so the estate was adjudged forfeited.¶

Cro. Car. 460.
In this case it
was agreed by
all, that if
tenant in tail
of a common
person, where
no reversion is
in the king, make a feoffment, it is a discontinuance; and if he be attainted of treason, there is no forfeiture, according to 3 Co. 3.

Co.Litt.327.b.

If *A.* being tenant in tail makes a gift in tail to *B.*, and *B.* makes a feoffment in fee, and dies without issue, and *A.* hath issue and dies, the issue of *A.* may enter; for though the feoffment of *B.* did discontinue the reversion of the fee-simple, which *A.* had gained upon the estate-tail made to *B.*, yet it could not discontinue the right of entail which *A.* had, which was discontinued before; and therefore, when *B.* dies without issue, the discontinuance of the estate-tail of *B.* which passed by his livery ceases, and consequently the entry of the issue of *A.* is lawful.

Swift v.
Heath, Carth.
109. (a) And
it is a maxim
in law, that he
who hath no
freehold in the
land cannot by
any means dis-
continue the
estate therein.
Carth. 110.

If husband and wife are seised of lands, remainder to the heirs of the body of the husband, with remainder over, they make a lease for years, not warranted by the statute, the husband dies leaving issue *J.S.*, who at the age of 16, with the consent of the wife and second husband, with his own hands makes a feoffment to the lessee; this is no discontinuance of the remainder over, for *J.S.* had (a) only a reversion expectant upon an estate for life, and so (b) no freehold in him at the time of making the feoffment.

Carth. 110.

per Curiam, vide supra letter (B). (b) For though the tenant for life consented, yet such a naked assent will not amount to a surrender. *Ibid.*

(F) *By what Act or Conveyance a Discontinuance may be made, and the Effect thereof.*

A MAN may discontinue by five sorts of conveyances, viz. Co.Litt. 325. a.
 (a) fine, recovery, (b) feoffment, release, or confirmation (a) But if he
 with warranty. dies before
 execution, it is

no discontinuance. Ro. Abr. 632. Co. Litt. 333. b. (b) But a feoffment with livery in law
 works no discontinuance. Ro. Abr. 632.

A feoffment made by tenant in tail is a discontinuance, with Co.Litt. 328. b.
 or without warranty; but a release or confirmation is not, for a
 man can pass no more thereby than he may lawfully pass: but
 a warranty added to a release, or confirmation to a disseisor,
 works a discontinuance, if it descend on him that hath the right.

But, if one having a son, marry a second wife, and land be Co.Litt. 328. b.
 given to the husband in special tail, and he have issue by his
 second wife, and be disseised, and release with warranty, and
 die; or if tenant in tail of *Borough-English* land have issue two
 sons, and be disseised, and release with warranty to the disseisor,
 and die; yet is not the entail discontinued in either case; because
 the warranty always descends to the heir at law.

If tenant in tail exchanges with another, (c) this is not a dis- Perk. § 294.
 continuance. 9 Eq. 22. Co.
 Litt. 332. b.

S. P. Roll. Abr. 632. S. P. (c) Because no livery of seisin is requisite thereupon. Co. Litt.
 332. b. Co. 44. b. — So, of partition between parceners. Co. Litt. 173. a.

If tenant in tail bargains and sells his lands in fee, this is no 2 Inst. 644.
 discontinuance, for only a freehold, which determines within the Moor, 42.
 compass of a life, passes.

So, if tenant in tail by indenture enrolled bargains and sells to 9 Co. 96. b.
J. S. and his heirs, and after levies a fine with proclamations to Seymour's
 the bargainee and his heirs, and dies without issue; this is no case. Buls.
 discontinuance of the remainder, because the remainder is not 162. S. C.
 touched or (d) displaced thereby; for no freehold passes by the [But in this
 fine; but the fine only corroborates the estate of the bargainee case it was
 by the statute. agreed, that if
 the fine had
 been levied be-
 fore the bargain and sale was enrolled, it would have been a discontinuance. So, where a
 fine is levied in pursuance of a covenant in a prior conveyance, as, where a tenant in tail
 conveys his estate by lease and release, and covenants in the release to levy a fine, which is
 done accordingly; in this case, the lease, release and fine will be considered as only one
 assurance, and the fine will, therefore, operate as a discontinuance of the estate tail. Doe
 v. Odjarne, 2 Burr. 704.] (d) For every discontinuance it is necessary there should be a de-
 vesting or displacing of the estate, and turning the same to a right; for if it be not turned to a
 right, they that have the estate cannot be driven to an action. Co. Litt. 327. b. — But
 there may be a discontinuance, which turns the estate to a right, and yet does not take away
 the right of entry; and a warranty may bar where the reversion is only displaced, and turned
 to a right, though the right of entry is not taken away. Vide Salk. 245. per Powell J.

Some discontinuances are for life only; as, when tenant in Co.Litt. 335. b.
 tail makes a lease for the lessee's (e) life: some are during the 336. a. Salk.
 limitation of an estate tail; as, when tenant in tail makes a gift 244. S. P.
 in tail: also, if he makes a lease for years; or for his own life, (c) If a feme
 remainder tenant in tail

within the statute 11 H. 7. because the estate in fee passes by the livery.
 c. 20., accepts a fine *come ceo*, &c. and grants and renders it for 500 or 1000 years, rendering the ancient rent, this is within the act; for though strictly a term for years can work no discontinuance, yet they are in equal mischief, and the statute would be useless if such leases were not within the remedy thereof, Moore, 250. Piggot and Palmer, 2 Leon. 168. 3 Leon. 78. S. C. Penicock's case, Dy. 148. b. 3 Co. 51. b.

Co. Litt. 327. And none can make a discontinuance larger than the alienation of the tenant in tail, who made it; therefore, if *A.* tenant in tail make a gift in tail to *B.*, and *B.* enfeoff *C.* and die without issue, *A.*'s issue may enter.

Co. Litt. 336, 337. (a) As by entry for a condition broken, or otherwise. 8 Co. 44. a. (b) But the reversion may be revested, and yet the discontinuance remain; as, if a feme covert had been tenant for life, and the husband had made a feoffment in fee, and the lessor had entered for the forfeiture, the reversion was revested, and yet the discontinuance remained at the common law. Co. Litt. 335. a.

DISSEISIN.

(A) What Acts amount to a Disseisin.

(B) What Persons are capable of committing such Disseisins.

(A) What Acts amount to a Disseisin.

Litt. § 279.
 Co. Litt. 181.
 277. and note, that by a disseisin nothing more is acquired against the disseisee but a bare possession, though against all others a fee-simple.

A *Disseisin* is where a man enters into any lands or tenements where his entry is not congeable, and *ousts* him who hath the freehold; so that it differs from an *abatement*, which is the entrance of a stranger into lands, of which an ancestor died seised before the heir has entered, whereby there is not properly an actual ouster committed of the person that was seised of the freehold, as there is in case of a disseisin; but the entry of the person who has the title to the freehold is prevented. In like manner a disseisin differs from an *intrusion*, which is when an ancestor dies seised of any estate of inheritance expectant on an estate for life, and then tenant for life dies; and between the death of the tenant and entry of the heir a stranger interposes and intrudes, and so gets possession of the freehold; so that it is rather a prevention of the heir's entry, than an actual ouster of him of his freehold.

Ro. Abr. 658. If husband and wife purchase lands in fee, and then the husband is attainted of felony, and the king seizes the land, and afterwards the lord of whom it is held hath it, upon his suggestion,

delivered to him out of the hands of the king, as his proper escheat; this is a disseisin of the wife who was jointenant with the husband, for the lord got possession of the freehold by his misrepresentation of the nature of the estate to the king, which being a manifest act of injustice and falsehood, the possession acquired by it must be looked upon as an acquisition of the same nature with a possession gained by open and avowed violence, and so a disseisin.

A man has a house, and locks it, and departs, and another comes to the house, and takes the ring of the house in his hand, and says, that he claims the house to himself in fee, without making any entry into it, this is a disseisin of the house; for the claim he made upon taking the ring into his hand, shews his intention in doing it to be a plain seisin of the entire freehold, and consequently a disseisin of the true proprietor; and his non-entry into the house, upon his seising it, will not qualify the intention of what he has done, since his seisin of part, in the name of the whole, gives him whatsoever an entry could have done, and therefore such an entry was not necessary. Ro. Abr. 659.

A man has a mill, and *A.* turns the water that used to serve the mill, so that it cannot grind; this is a disseisin of the mill, for which an assise lies against *A.*; for to deprive a man of the means he has of obtaining the profits of his freehold, is, in effect, to disseise him of his freehold. Bro. Disseisin, 25.

If *A.* cuts trees in his soil, and *B.* who has common there, says that the soil is his, and commands him not to cut there, whereupon *A.* departs out of the land, this is no disseisin in *B.*, for he who has no right to a freehold cannot be seised of it by bare words only, which are fleeting and transitory, and do not amount to such an act of notoriety and solemnity as is required in gaining possession of a freehold, whereof strangers are to take notice. Ro. Abr. 659. Bro. Disseisin, 42.

If a man, who has right of entry into lands, in coming thither is disturbed and hindered from entering, this is a disseisin, such hinderance of entry being equivalent to an actual ouster of the freehold. Ro. Abr. 659.

Where a man enters into my house by my sufferance without making any claim, this is no disseisin. Ro. Abr. 659.

A man grants all his lands in *D.* to *A.* besides the chamber he lies sick in; and after livery made pursuant to the grant, by the sufferance of *A.*, the grantor removes into the hall without claiming any thing to his own use, and dies; this coming into the hall is no disseisin, being by the permission of the grantee, and so not unlawful. Bro. title Disseisin, 28.

If the king be seised in fee of the manor of *B.*, and a stranger erect a shop in a vacant plat of it, and take the profit of it without paying any rent to the king, and after the king grant over the manor in fee, and the stranger continue in the shop, and occupy it as before, this is no disseisin; for the first entry of the stranger was no disseisin, but an intrusion on the king's possession; for that the king's title appearing of record, the entry *in pais*, which is not an act of equal notoriety, will not divest it Ro. Abr. 659. Hob. 332. Bro. Disseisin, 4.

out of him: if then the king is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it, and, consequently, cannot be said to be disseised by the stranger who has made no entry upon him after the king's conveyance, but only continued the old interest which he had before the grant, and so remains an intruder still, and liable to an action of trespass or ejectment for it.

Bro. title Dis-
seisin, 6. Ro.
Abr. 659.

So, if a man enters into certain lands, parcel of a manor which is in ward to the king, by reason of the nonage of *J. S.* and takes the profits as owner thereof, and *J. S.* after sues livery, and the intruder still continues in possession, and takes the profits as formerly, this continuance after the livery is no disseisin, but only an intrusion to be remedied by trespass or ejectment; and the manor being in the king only as guardian makes no difference; because, till it is relieved out of his hands, he is in actual possession of it as much as if it were his own.

Bro. title Dis-
seisin, 24.

Baron and feme seised in tail, the baron goes out of the country, and in his absence the feme enfeoffs *A.* in fee, [who enters,] this is a disseisin of the husband by *A.*, because the cooffment by the feme covert was void, and so his entry under it tortious.

Ro. Abr. 662.

If a disseisor makes a lease for years, or at will, and the disseisee enters upon him, and then the lessee re-enters, claiming by virtue of his lease, though that was only a term for years, yet he is a disseisor, because he enters upon the proprietor of the soil, and ousts him of his possession, and that by virtue of a former disseisin, so that the possession of the freehold cannot be supposed to be left in the disseisee; and therefore such an entry must be equivalent to an avowed disseisin.

Ro. Abr. 662.
Co.Litt. 271.a.
Dyer, 134.
pl. 11.

If a man enters into my land claiming a lease for years, or enters as tenant by statute merchant, when he has no right, he is a disseisor, the entry being unlawful, and the pretence of title unjust.

Bro. title Dis-
seisin, 7. 1 Ro.
Abr. 662.

So, if a guardian in chivalry assigns dower to a woman, as wife of the deceased tenant, who in fact is not his wife, and she enters thereupon, she is a disseissoress, for her false title being an act of fraud and injustice, and the possession acquired by it tortious, the pretence of title, when it appears that she has none, will not avail her. And *Q.* whether the guardian in this case is not a disseisor likewise?

Ro. Abr. 662.

A man makes a lease for years to another and his heirs, and the lessee dies, and the heir claiming the term enters; though the term, being a chattel, must go to the executors, and not to the heir, yet the heir is no disseisor, because he claimed only a term and no freehold, and such a term too as was in being, and actually limited to him; and therefore the heir in this case, that is named in the words of limitation, shall be only presumed to enter on behalf of the executor, to continue the term that was in being, and not to commit a disseisin on the freehold.

Ro. Abr. 659.
Prenson and
Sone.

If there be tenant by sufferance; and a stranger, who has no right to the land, make a lease thereof for years by indenture to the tenant, without making any entry upon such tenant pre-
vious

vious to the demise, and the tenant thereupon pay the rent reserved on this lease to the stranger, this is no disseisin of the rightful proprietor, for the tenant at sufferance was no disseisor before the demise; and after the demise, or by virtue of it, he can be no disseisor, because he still continued his old possession, without committing any actual ouster of him who had the freehold: for the acceptance of the deed of demise, and payment of rent thereupon, are not acts of sufficient solemnity and notoriety, since they may be transacted in private, to change the possession of a freehold.

If a guardian, after the full age of the heir, continues in possession, he is no disseisor, but an abator (a), and an assize of mortdancestor lies against him by the heir, for he does not actually oust the heir of his freehold, which is required in a disseisin, but holds him out by an *intermediate entry* between him and his ancestor, which makes the distinction between an abatement and disseisin.

ham's case, Justice *Barclay* said, that he, whom Lord *Coke* calls in this place an abator, must be taken for a disseisor, as he had actual possession by the possession of the guardian. Lord Nott. MSS. Co. Litt. 271. a. n. (2), 13th edit.]

If a man enters as guardian into the lands of an infant, who has no title to be guardian, it is at the election of the infant to make him a disseisor, on account of his wrongful entry upon an actual ouster of such infant, or else to dissemble the wrong, and call him to an account as guardian.

tenant at will made a lease for years, and the lessee for years entered, and the court held, that though the estate at will did not warrant the lease for years, it was only a disseisin at election. For where a person gains a possession under a title consistent with that of the person having right, and who was in possession, it is but a disseisin at election. And it was said in this case, that, admitting it to be a disseisin, the tenant at will is the disseisor, and not the lessee for years. See *Hovenden v. Lord Annesley*, 2 Scho. & Lefr. 622. *Goodright v. Forester*, 1 Taunt. 599. ||

An absolute feoffment is made by deed, and a letter of attorney therein to deliver seisin; the attorney makes livery upon condition; he is a disseisor of the feoffor, because not pursuing his commission it is all one as if he had none at all, and then his livery is tortious, and amounts to a disseisin.

A. seised of lands in fee permits his son to enter into them by his consent, and to occupy as tenant at will; the son after by indenture leases them for 21 years, rendering rent: this was holden no disseisin, but at the election of the father, who may if he pleases call it such, because the lease for years was more than he could justify; but a disseisin being an actual ouster of another's freehold, the possession of the son, being in possession as tenant at will, gives room to the father to construe his demise no disseisin, if he thinks fit; and therefore the son, in this case, shall be presumed to act in behalf of the father, and to demise the land as attorney to him, especially if the father afterwards demand and receive the rent; for the rule is, *Ratihabitio retrahitur et mandato æquiparatur*. However, the first lessor, before he hath received any rent, may take the demise to be a disseisin

Co. Litt. 57. b. 271. a.

(a) [But on the argument of the case of *Blunden and Baugh*, commonly called Lord Notting-

Ro. Abr. 661. Cro. Car. 302. *Blunden v. Baugh*. || The point decided in this case was, that a

Bro. title Disseisin, 34. 71.

Jon. 315. Cro. Car. 303, 304. Bro. title Disseisin, 68. Dals. 46.

seisin

seisin at his election; for when the tenant at will takes upon him to make a greater estate than he has himself, this may be construed a disseisin, because it is an usurpation upon the right of the lessor, and in effect a seizure of his freehold; and the great reason why the lessor is allowed to make the other construction, is to avoid the inconveniences which otherwise would follow; for if a lessor was obliged to look upon leases for years of his tenant at will to be disseisins, then if a tenant at will should make a lease for a small time, and the lessor not knowing thereof should levy a fine of such lands for his wife's jointure, or other uses, the lessee of tenant at will would be necessitated to become a wrong-doer, perhaps contrary to his intent, and the disseisee would be deprived by his fine of all remedy for recovering his right, as well as the person to whom he levied it; for he himself could not set up a title to such lands, because he had transferred it to another in a court of record, and the other could not claim, because a naked right cannot be transferred.

Cro. Eliz. 230.
Shaw and
Barber *cont.*
Jon. 317. Cro.
Car. 302.

In this case, if the lessor takes such a disposition by his tenant at will to be a disseisin, then both the tenant at will and his lessee are disseisors, since they both concur to the act that is the disseisin; but in respect of all strangers the tenant at will only is to be esteemed tenant of the freehold, and the person who as such is disseisor; for as for the lessee of tenant at will, he in respect of all strangers, and likewise of tenant at will, has a fair and legal interest derived out of the inheritance of his lessor, and so cannot be tenant of the freehold jointly with his lessor, but must claim under him.

Jon. 317.
Cro. Car. 302.
Bro. title Dis-
seisin, 3. 64.
66.

If a lessee for years, or at will, makes a lease for life, or a gift in tail, that creates a good lease, or a good gift in tail among themselves and all others, besides the first lessor, and as to him they are both disseisors, for they both clearly concurred in ousting him of his freehold, one by giving, and the other by receiving the livery, which passed the freehold.

Jon. 317. Mat.
Taylor's case.
[*Vide* Cro. Ja.
615. 1 Atk.
442.]

Tenant at will, or for years, makes a feoffment in fee, and dies; his wife brings dower: the feoffee cannot plead that her husband was never seised; for since the feoffee received his estate from him, he is estopped to say that the husband was never seised: besides, in respect of the feoffee, the feoffor had an estate; though in regard to the disseisee he is to be considered as a wrong-doer.

Ro. Abr. 661.
Cro. Car. 223.
Bro. title Dis-
seisin, 30.

If a man enters into the land of an infant by his assent, the infant may proceed against him at full age as a disseisor; for the contract made between them during the nonage of the infant may be considered by the infant as void, and, consequently, the entry by virtue of it may be esteemed illegal; or the infant, if he thinks it more for his advantage, may at full age ratify the contract between them, and so allow him as his tenant.

Dyer, 173. in
margin. Ro.
Abr. 661. Mo-
lineux's case.
Dyer, 62.
pl. 33. *cont.*

If *A.* be seised of lands in fee, and a stranger enter upon him by virtue of a lease for years, which is void, and pay rent to him, *A.* can never proceed against him as a disseisor, for his acceptance of rent at his hands is a full and uncontestable allow-
ance

ance of the lease he claims, and, consequently, the entry by virtue of it purged and made rightful.

A. bargains and sells lands by indenture enrolled to *B.* upon condition that on the payment of 300*l.* at the end of three years it shall be void, and that in the mean time the bargainee should not meddle with the profits of the land: the bargainor occupies, and makes a lease for five years, and at the day does not pay the 300*l.* the bargainee does not enter, but (the bargainor occupying it) devises the land: it was adjudged a good devise, for the bargainor in this case was tenant at will; and, therefore, his lease does not put the bargainee under the necessity of being a disseisee.

Palm. 201.
Jon. 316.
Cro. Car. 222.
Ro. Abr. 661.

If a guardian by nurture makes a lease by indenture to one who is already in under the title of the infant, rendering rent to the guardian, which is paid accordingly; this is no disseisin, for there is no actual ouster consequent on such demise; and the rent paid to the guardian must be accounted for to the infant.

Ro. Abr. 659.

[*A.* tenant for life, remainder to *B.* in tail; *B.* recovers in ejectment against *A.* and has an *habere facias possessionem*, and whilst in possession makes a feoffment of the estate to *D.* with livery of seisin, that he might become tenant of the freehold, in order for the suffering of a common recovery. A recovery is accordingly suffered, and afterwards *A.* brings an ejectment, and obtains a verdict. It was adjudged, that *B.* by his entry in this case under the judgment was not an actual disseisor, and therefore had not in him any estate of freehold; and that the feoffment gave *D.* an estate of freehold only at the election of *A.* but did not give him an actual estate of freehold.]

Taylor v.
Horde, 1 Burr.
60. 5 Br. P. C.
247. Cowp.
689. See Co.
Litt. 330. b.
n. 1. 13th edit.
where the law
of the case is
questioned
with great abi-
lity. See also
1 Prest. Con-
veyanc. 59, 60.
Litt. § 278.

If two or more disseise another of any lands to their own use, they are all jointenants, and all disseisors; but if they disseise another to the use of one of them only, he to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called co-adjutors to the disseisin.

There are others who are called counsellours and commanders in a disseisin, *viz.* when any person counsels or commands another to disseise a third person. Here we are to take notice, that though the persons that concur in a disseisin have these several names given them from the nature of that part of the disseisin that they commit, yet co-adjutors, counsellours, and commanders, are disseisors in respect of the person disseised, as well as the person to whose use the disseisin is made, and all equally liable to the assise of the disseisee; nay, though the disseisor, who is tenant of the land, dies, yet the assise lies against the co-adjutors, counsellours, &c. and tenant of the land, although he be no disseisor. And this is a most equitable proceeding; for since they all concur in committing the injury, it is but reasonable they should all answer for it; and though the person, that succeeds the disseisor that was tenant in the tenancy, had no hand in the disseisin, yet, claiming under it, he must be liable to the remedy the law gives the disseisee for recovering his right.

Co. Litt. 180.
Ro. Abr. 663.
Bro. tit. Dis-
seisin, 12. 40.
45.

Bro. tit. Dis-
seisin, 37.

A man makes a lease for life, rendering rent, and goes into foreign parts; tenant for life dies, and *A.* counsels *B.* who is not heir to the lessor, to enter, who does it accordingly, and enfeoffs *A.* the counsellour; the lessor returns, and is hindered to enter by *A.*, whereupon he brings his assise against *A.* without naming *B.*, and well; for *A.* by his counsel is a disseisor, and being tenant of the land, and the person who disturbed the lessor of his entry, the lessor who was absent when the disseisin was committed, and so unacquainted with the manner of it, is not obliged to bring his remedy against any other but the person who is actually in possession, and defends that possession with force and violence.

Co. Litt. 180.b.
Bro. tit. Dis-
seisin, 59.

A. disseises one to the use of *B.*, who knows not of it, and *B.* afterwards assents to it; in this case, till the agreement, *A.* was tenant of the land, and after agreement *B.* is tenant of the land, but both of them are disseisors.

Co. Litt. 180,
181. [Why
disseisin of
tenant for life
makes a fee in
the disseisor is
thus ac-
counted for by
Lord *Hobart*:
"A grant to
"*J. S.* and his
"heirs during
"the life of *J. D.*
"a disseisin of
"an estate for
"life by necessity
"in law makes a
"*quasi* fee; be-
"cause wrong is
"unli-
"mited, and ravens
"all that can be
"gotten, and is not
"governed by terms
"of the estates, be-
"cause it is not con-
"tained within rules." *Hob.* 323.]

A man disseises tenant for life, to the use of him in reversion; and after, he in the reversion agrees to the disseisin: by the better opinion, he in the reversion is a disseisor in fee; for by the disseisin made by the stranger, the reversion was devested, which cannot be revested by the agreement of him in reversion; for his agreement to the disseisin makes him a party to it; and therefore if he gets any thing by such agreement, he must get it as a disseisor; and so in this he is not seised of his old estate, but of an estate by disseisin.

Co. Litt. 180.

The demandant and others, in a *præcipe*, disseised the tenant to the use of others, and the writ did not thereupon abate; for though the demandant was a disseisor, yet he gained no tenancy in the land, being only a co-adjutor, and so his remedy to gain the freehold still continues; for the design of such remedy being to recover the freehold, till that be obtained there is no reason to abate it; and that is not obtained by the disseisin, for he gains no freehold by it, so that the writ must still continue.

Ro. Abr. 663.
Bro. tit. Dis-
seisin, 57.

If a man commands *J. S.* to enter into certain lands in his name, provided he has a right to them; if *J. S.* enters accordingly, yet if the commander has no right to the lands, he is not the disseisor, but *J. S.* only, for *J. S.* was not absolutely commanded to enter, but only conditionally, if the commander had right; so that it was incumbent on *J. S.* to inquire into the commander's title before he entered; and the commander having no title, the entry of *J. S.* was his own act, and not the execution of the command.

Ro. Abr. 663.

For the same reason, if a man says to *J. S.* that his ancestor died seised of certain lands, and thereupon commands him to enter into those lands in his name, if his ancestor died seised in fee, otherwise not; and thereupon *J. S.* enters, and yet the an-
cestor

cestor did not die seised in fee; *J. S.* is the sole disseisor, and the commander has no share in it.

If a man says to me, that he will disseise *J. S.* to my use, and I tell him that I am content; this does not amount to a command, but is only a sufferance of what is to be done, and so does not make me a disseisor, without an actual command; but he only that ousts *J. S.* is the disseisor. Bro. tit. Disseisin, 15.

A disseisor makes a lease for years, and the termor enters, the disseisor after leaves the kingdom, and at his departure commands his termor, that if the disseisee enter upon him, not to suffer him to continue in possession, but to maintain the possession against him as termor of the disseisor; the disseisee enters on the termor in the absence of the disseisor, and the termor re-enters, ousts him, and pays his rent after to the use of the disseisor, being absent; it seems the lessor is party to this second disseisin, though he did not expressly agree to it after it was done, for the precedent command and instructions sufficiently shew his intent and concurrence to it. Dyer, 141 pl. 47.

A man recovers several houses in an assise, and after the tenant reverses the judgment in a writ of error, and a writ issues thereupon to the sheriff to put him in possession of those houses; in this case, though the tertendants are strangers to the recovery, and therefore ought not to be ousted without a *sci. fa.*, yet if the sheriff executes the writ, and so puts them out of possession by virtue of it, he is no disseisor; for he acts under the authority of the court, which he is sworn to obey, under the penalty of being fined if he does not. Ro. Abr. 663. Floyd and Bethell.

The same law in all cases where execution is of a judgment wherein the demand is made of a thing certain: but, if an execution is to be executed without mentioning any thing in particular, there the sheriff, at his peril, ought to make execution of the thing in demand, otherwise he will be a disseisor; for he is obliged to take notice of the thing in demand, and has no authority from the court to make execution of any thing else. Ro. Abr. 664.

Lease for life, remainder for life, remainder in fee; the remainder-man for life disseises the tenant for life, and then tenant for life dies, the disseisin is purged; for then the remainder-man for life is seised of his own rightful estate for life, which was to take place upon the death of tenant for life, and the fee revests in the remainder-man in fee. Co. Litt. 276. Palm. 202.

is turned into a rightful estate for life by operation of law. 8 Mod. 53. *arguendo*.]

[Rights and the purging of wrongful acts are always favoured in law; and therefore, where a disseisin or abatement is made, and the disseisee brings his ejectment, and has a verdict and judgment for him, (but no execution,) yet an entry by the plaintiff being found as being in the declaration in ejectment, that entry will purge the disseisin, and the continuer in possession afterwards is only as a trespasser.] Goodtitle v. Ridsen, Vin. Abr. tit. Disseisin(N), pl. 6.

Two co-heirs, one an infant, and the other of full age; she of full age enters upon the feoffee of their father, claiming the land Bro. tit. Disseisin, 43. 76.

land to her and her sister; her entry being unlawful, the land vests entirely in her of full age, and nothing in the infant; and so she of full age must be the disseisor; for an infant can never be made a wrong-doer by the act of another, or injure himself by any contract entered into during his minority.

Bro. tit. Disseisin, 59.

If my tenant at will enters into another's land contiguous to his own, claiming it to my use, and feeds his cattle there, and fells the trees, upon which the tenant of the freehold is obliged to quit his possession, and so brings his assise; and it is found that I never commanded my tenant to commit this disseisin, nor ever shared in any of the profits of it, I shall be acquitted of the disseisin, since it would be apparent injustice to charge me with the guilt of an act I never concurred in.

Bro. tit. Disseisin, 77. 2
Scho. & Lefr.
621.

A. demises the land of *B.* to *C.* for years, rendering rent, *C.* enters and pays the rent to *A.*: it seems *A.* by this transaction is a disseisor; for his demise to *C.* is tantamount to a command to enter into the lands of *B.*, and he that commands the disseisin is the disseisor.

Bro. tit. Disseisin, 79.

A. has common in the land of *B.*, and *B.* comes with his family and incloses the land, so that *A.* cannot have the use of his common: *B.* and his family are disseisors; for they oust *A.* of his common by the inclosure, which is plainly a disseisin.

Bro. tit. Disseisin, 81.

A man leases for life, rendering rent, with a clause of re-entry for non-payment, and for arrears of rent distrains; and being possessed of the distress, re-enters; and adjudged a disseisor; for though he had an election upon non-payment of the rent to re-enter or distrain, yet by distraining he had determined his election, and so put it out of his power to re-enter; therefore, when afterwards he re-enters, it is unlawful, and, consequently, such an ouster of him who has the freehold, as amounts to a disseisin.

Bro. tit. Disseisin, 85.

Land descends to an infant, and *A.* enters as guardian only, and devises it to *B.* and dies, *B.* enters, and the infant brings an assise against him, and he was adjudged a disseisor; for though *A.* was the first that entered, yet he entered as guardian, so that it was in the election of the infant to charge him as a disseisor, or call him to an account as a guardian; and therefore when the infant charges the devisee as a disseisor, it shall be presumed that he looked upon *A.* as his guardian, otherwise *B.* could not be charged as the disseisor, but as the devisee of the disseisor; for if he had reckoned *A.* as his disseisor, then *B.* must have been esteemed a person who claimed under the disseisor by legal conveyance, and so not to be charged as the actual disseisor of the infant. But, if the infant is supposed to look upon *A.* as his guardian, then he may charge *B.* as a person who ousted him by wrong of his freehold, since he, and not the guardian, was the person who seized the possession without title.

Bro. tit. Disseisin, 94.
2 Inst. 409.
413.

The father enfeoffs his son within age, and after enters as his guardian, and enfeoffs *J. S.* and dies; the infant brings his assise against the feoffee, who was adjudged a disseisor for the reasons before mentioned; and likewise, because it is provided by

Westm. 2.

Westm. 2. c. 25. that if lessee for years, or guardian, alien in fee, the remedy for recovering the freehold shall be by an assise of *novel disseisin*, and both the feoffor and feoffee shall be esteemed disseisors, and the survivor of them shall be liable to this remedy. So, if either happens to die, he that survives may be construed as a disseisor, and as such liable to this action.

Not only guardians in chivalry, but in socage, and by nurture, ^{2 Inst. 413.} come within this law of *Westm.* 2. So also their alienations not only in fee, but in tail, or for life, are within this act; for wherever a freehold is transferred by the solemnity of livery, by a person who has no right to make such a conveyance, there is an actual ouster of him that has the freehold, and so a disseisin.

Here it will be proper to observe, that though the statute ^{2 Inst. 413.} mentions only tenant for years, yet tenant by elegit, statute-merchant, or staple, as also tenant at will or at sufferance, are by an equitable construction brought within it, as being all equally capable, by the possession which they enjoy, of committing disseisins, by transferring the freehold by livery: but a bailiff is not within the act, because it mentions and intends only those persons who have some interest, and thereby a possession in the lands, which a bailiff has not.

If tenant for years, or a guardian, makes a lease for life, remainder for life, remainder in fee, and tenant for life enters, he is a disseisor, for he accepts of the livery, which transfers the freehold, and so produces the disseisin, and therefore makes himself a party to the wrong. The same law of him in remainder, if he in remainder for life or in fee enters, for such entry is an agreement to that act which makes the disseisin. ^{2 Inst. 413. Bro. tit. Disseisin, 86.}

If a guardian accepts of a feoffment from his ward, the ward may bring an assise against him as a disseisor; for the guardian acts contrary to his duty when he assents to any alienation made by his infant; for it is his duty to protect the inheritance of his ward, and to deliver it up to him at full age, and not to bring it into his own family. ^{Bro. tit. Disseisin, 95.}

A. lets lands for 21 years, from *Michaelmas* next ensuing, rendering rent, and the lessee enters 29th *September*, and occupies for one year; the lessor brings debt for the rent reserved; and adjudged, that though his entry, which was without title, made him a disseisor, and that this disseisin was not purged by the accruing of the term after, yet debt lay upon the contract; for though his entry, being made the day before the lease commenced, cannot be supposed to be made by virtue of the contract, yet it does not disannul the contract, for that must remain till defeated by an after-agreement of equal notoriety with it; and therefore the action in this case may well be formed upon it. And the reason why in this case the accruer of the term after entry did not purge the disseisin, is because when the lessee enters before his title accrued, he is presumed to disclaim the title of a termor, and set up another; and therefore such title shall not protect him from the notice of the law; for that would be ^{Cro. Eliz. 169. Alexander and Dyer.}

be to consider him under a title which by an express overt-act he disowns.

(B) What Persons are capable of committing such Disseisins.

Ro. Abr. 660.
Bro. tit. Dis-
seisin, 67.

AS to femes covert, if a husband disseise another to the use of his wife, this does not make her a disseisoreess, she having no will of her own: nor will any agreement of hers to the disseisin, during the coverture, make her guilty of the disseisin, for the same reason: but her agreement after her husband's death will make her a disseisoreess, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee.

Ro. Abr. 660.
Bro. tit. Dis-
seisin, 67.

So, if a man disseise another to the use of a feme covert, her agreement to it signifies nothing; and though the husband's agreement to it settles the estate in the wife, yet it makes her no sharer in the guilt of the disseisin.

Co. Litt. 357. b.
Litt. § 678.
Ro. Abr. 660,
661. Bro. tit.
Disseisin, 15.
67. 8 H. 6. 14.
cont.

But, if a feme covert actually enter and commit a disseisin, either solely or together with her husband, then she is a disseisoreess, because she gains thereby a wrongful possession: but yet such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors; because though by such entry she gains an estate, yet she has no power of transferring it to another.

Bro. tit. Dis-
seisin, 5. 16.
35. Ro. Abr.
660.

As to infants, they are under the same restrictions with feme coverts; so that their *agreement* during minority to a disseisin committed to their use does not bind or make them disseisors, any more than if an infant *commands* a disseisin to be made; because no acts, during their minority, are so binding, but that they may at full age revoke and cancel them. But an *actual entry* by an infant into another's freehold gains the possession, and makes him a disseisor as well as it does a feme covert.

Bro. tit. Dis-
seisin, 19.

Two infants jointenants, one releases to the other, by which the other holds the whole: this seems a disseisin, because the release, being in no manner for the advantage of the infant, is utterly void, and then the entry of the other, being without title, is tortious and a disseisin. But, if there had been livery made upon it, though between jointenants this is void, yet it seems no disseisin, for the regard the law has for the solemnity of livery, which shall continue till defeated by act of equal notoriety.

Ro. Abr. 661.

If a man carries an infant into the lands of J. S. and there claims the lands to the use of himself and the infant; yet the infant seems no disseisor, because he made no claim of it himself, and then shall not be charged with the tort of another person.

Bro. tit. Dis-
seisin, 65.

If the king enters without title, or seises lands by a void or insufficient office, he is no disseisor; for being the fountain of justice, and engaged in multiplicity of affairs, his acts are not to be charged with injustice. But this privilege does not extend to
any

any of his subjects; and therefore if the king by letters patent grants land so seised, and the patentee enters, he is a disseisor, because he has time and leisure to inquire into the legality of his title, which the prince is supposed to want leisure for.

If a corporation aggregate disseise to the use of another, they are disseisors in their natural capacity, and the persons who committed the wrong shall be charged therewith, and not the corporation, which consists of a constant succession of various persons, and as a corporation can do no act without writing.

Vide head of Corporations.

DISTRESS.

THE distress is a remedy given to the lord to recover the rent or services which the tenant hath obliged himself by his feudal contract to pay by way of retribution for his farm.

Gilb. Distr. 1.

These services, when the feudal tenures prevailed, were chiefly of two sorts; either military as attending on the lord in war; or ministerial as attending his courts in time of peace, and there assisting the lord in the distribution of justice; or ploughing and tilling his demesne.

*Spel. Rem. 40.
Bacon on Government, 47.*

The non-performance of these services was by the old feudal law a forfeiture of the feud. This is evident from several passages in *Vigellius* (under title *Causæ ex quibus feudum amittitur*) *Si vassallus domino non serviat, fidelitatemque ei non præstet* — *Si vassallus a domino in jus vocatus non venerit* — *Si pactum feudi non servetur*. — These, says he, were all forfeitures, and the lord on such failures of his tenant was at liberty by that law to re-assume his feud.

*Vigel. 257.
271. Jur. feud.
Ann. 126. 129.*

The rigour of this law was mitigated with us, and these feudal forfeitures changed into distresses according to the pignorary method of the civil law, from whence the notion seems first to have been borrowed, as may be seen in the title *DE DISTRACTIO PIGNORUM* — *Creditoris arbitrio permittitur, ex pignoris sibi obligatis, quibus velit distractis, ad suum commodum pervenire*: for there appear no footsteps of it in the feudal authors.

Bacon on Government, 48.

*Dig. lib. xx.
tit. v. leg. 8.*

From whence soever the name or notion came, the remedy obtained so early in our law, that we have no memorial of its original with us; and as this power was anciently used by lords, it grew as burthensome and grievous to tenants as the feudal forfeiture, there being no difference to the tenant, between the lord's seizing the land itself, and turning the tenant out of his possession, and his stripping him of the whole produce or fruits of it at his pleasure.

And not only the produce of the farm, but the *inducta & illata*, and every thing that was brought on the land were liable to the lord's distress. By this means all the plunder of the war which the vassal had brought home was often carried off by the lord, and the distress by his power removed out of the reach of the tenant; and all this on the slightest occasions.

This power, as it was practised by the lords, did not only oppress the tenants, but put them so entirely under the power of their lords, as to enable them to bring great numbers of their vassals into the field against their prince, and thereby disturb the publick peace of the kingdom.

There were yet two other inconveniencies which arose from the abuse of these distresses.

The first was, that in the disputes and contests which frequently arose between neighbouring lords themselves, whilst each lord was endeavouring to enlarge his bounds and encroach on his neighbour's property, the tenants were generally distrained by both, by which the tenant was brought within the seignory, and so became subject to that feudal dependance and service which accompanied the military tenure.

The other mischief was, that when the lords had brought them under their dependance, they would distrain them for the amerciaments of their courts; and as the statute of *Marlbridge* expresses it, *Graves ultiones fecerint, et graves districtiones, quousque redemptiones receperint, ad voluntatem suam*. And what made these abuses the more insupportable, was, that these lords *justiciari non permittant per ministros domini regis, nec sustineant quod per eos liberentur districtiones quas auctoritate propria fecerunt ad voluntatem suam*; so that they seemed to throw off the authority of the law, and to subvert the fundamental rule, that no property was to be altered without the king's writ.

2 Inst. 102,
103.

But these oppressions ended with the distractions of the barons' wars; for towards the end of the reign of *Henry 3.* there were particular laws made to regulate the manner of distraining, and not to suffer the lords to extend this remedy beyond the mischief it was first introduced for, which was no more than to empower the lord by seizing the chattels, to oblige the tenant to perform the feudal services. These were to remain in the lord's hands as pledges to compel the performance, and the detention was no longer lawful than the tenant refused to do the services which were reserved by the feudal contract. By what steps it came to be brought under the regulations which govern it at this day, we shall have occasion to observe, by considering,||

(A) Who may distrain.

(B) What Things may be distrained.

(C) Of the Manner of distraining as to Time and Place.

(D) Of the Distress when seised: And herein of the Distraîner's Interest therein, and what he is to do therewith.

(E) Where

(E) Where a Distress shall be said to be wrongful and excessive: And herein of the Remedy which the Party injured hath.

(F) Of distraining Things Damage-feasant.

(G) Of Distresses for Amercements.

(A) *Who may distrain.*

IF a man seised in fee makes a gift in tail, or a lease for life, years, or at will, saving the reversion to himself, with a reservation of rent, or other services; the law gives the donor or lessor, without any express provision, remedy for such rent or services by distress. Litt. § 214.
Bro. tit. Distress, 5. 15.,
and this my Lord Coke calls a rent distrainable of

common right. Co. Litt. 142. a. 8 H. 4. 15. Mo. 36. Cro. Eliz. 636. The bailiff that distrains must shew in whose right he does it. Bro. Distress, 78. [A receiver under the court of chancery has power, it seems, to distrain without applying to the court for particular directions for that purpose, unless there be a doubt who has the legal right to the rent; for the distress must be in the name of the persons entitled to the legal estate. Pitt v. Snowden, 3 Atk. 750. Hughes v. Hughes, 3 Br. Ch. Rep. 87.]

But, if the donor or lessor reserve not the reversion, he cannot distrain of common right: but he may reserve to himself a power of distraining, or the reservation of the rent may be good to bind the lessee by way of contract, for the performance whereof the lessor shall have an action of debt. Co. Litt. 47. a.
5 Co. 3.
Jewell's case,
2 Saund. 303.

A rent distrainable of common right, or by the common law, cannot issue out of an incorporeal inheritance: as, if I have a right of common in another man's soil, and I grant it to *A.* reserving rent, if the rent be behind, I cannot distrain the beasts of *A.* because the right of common, which every man has, runs through the whole common. Co. Litt. 47. a.
142. a. 2 Roll.
Abr. 446. So,
of tithes, be-
cause there is
no place where
the distress
can be taken.

Cro. Ja. III. 173. 2 Roll. Abr. 446. 451. Co. Litt. 47. 142. Bro. tit. Distress, 67. 80. 11 H. 4. 40. 5 Co. 5. vide Chan. Ca. 79. || A landlord may distrain for the rent of ready-furnished lodgings. Newman v. Anderton, 2 N. R. 224. ||

A rent granted for equality of partition by one coparcener to another is good. So is a rent granted to a widow out of lands whereof she is dowable, in lieu of her dower. The like law of a rent granted in lieu of lands upon an exchange. And for these the law gives a remedy by distress, without any provision of the parties, though they have no reversion. Co. Lit. 169. b.
3 Co. 22. b.
Keilw. 104.
126.

If a termor grants all his term, rendering rent, he cannot distrain for it. Bro. Distress,
7. Latch. 211.
Bro. Debt, pl.

39. Freem. 228. pl. 226. Cro. Ja. 487. Stra. 405. Al. 57. [2 Wils. 375. — v. Cooper. Where a lease came back to the original lessor by an agreement entered into between him and the assignee of the lessee, that the lessor should have the premises on the terms mentioned in the lease, and further should pay a certain sum annually over and above the rent towards the good-will already paid by the assignee, it was adjudged, that such agreement operated as

a surrender of the whole term, and that the assignee could not distrain either for the original rent, or the sum to be paid in gross annually. *Smith v. Mapleback*, 1 T. Rep. 441.]

Fairfax v. Gray, 2 Bl. Rep. 1326.

[Although a term be vested in an annuitant himself for securing an annuity, yet he may distrain for the arrears: as, where lands were conveyed to trustees and their heirs to the use of *A.* for 99 years, if he should so long live, upon trust that he should receive and take thereout an annuity or yearly rent of 25*ol.* with power of distress, and subject thereto, to the use of the grantor for life, remainder over, it was holden that *A.* might distrain, for that the grantor during the term was merely an under-tenant to him at the above rent, to which rent distress was incident by law, exclusive of the clause in the deed.]

7 Co. 23-4.
Butt's case.
Co. Litt. 147. b.
Cro. Ja. 390.
Ro. Rep. 330.
Cro. Eliz. 607.
622.

If a man seised of land in fee, and possessed of other land for years, grant a rent-charge for life out of both, with a power to distrain in both, if the rent be in arrear, the leasehold as well as the lands of inheritance are subject to the distress, because a man may oblige his chattels to the discharge of the rent; but the rent, being a freehold, shall issue only out of the inheritance, because the leasehold, being only a temporary and perishing interest, is not a fund commensurate to the charge, and therefore the rent shall issue out of the inheritance, which for its duration is a more competent estate to support the charge, and render the grant effectual: and hence it was adjudged, that though the grantee might distrain in the leasehold lands, yet he must avow for a rent issuing out of the inheritance.

27 Ass. 24.
Bro. Heriot, 6.
Fitz. Avowry,

For an heriot service due after the death of the tenant, the lord may either distrain or seize the best beast of the tenant.

177. Cro. Eliz. 32. 590. Cro. Car. 260. Jon. 300. Ro. Abr. 665. n. 5. So, may the lord distrain for relief. [Co. Litt. 83. If he claims the relief not by tenure but by custom, it seems there must be a prescription to warrant the distress. Lat. 37. 95. 130. 3 Bulstr. 323. 1 Jon. 132.] If he dies, his executors cannot distrain, but may have an action of debt for it. 4 Co. 49. Ognel's case. [Co. Lit. 83. b. 47. b. 1 Show. 36.] Where a distress might have been taken for aid to marry his daughter, or make his son a knight. Ro. Abr. 665. 2 Inst. 234.

Co. Litt. 96. a.

The services or rent, for which the lord or lessor may distrain, must be certain, or such as may be reduced to a certainty; for otherwise the lord cannot, in his avowry, recover damages for the non-performance or non-payment, when the jury cannot determine what injury he has sustained. But, if the tenant holds of his lord to sheer all his sheep feeding in such a manor, this is certain enough, because it is easy to compute the number within the precincts of the manor, and, consequently, what expence the lord was at in employing other hands to that work, and what damages he sustained by the omission of his tenant.

4 Co. 50. b.
Ognel's case,
Vaugh. 40. 41.
S. C. cited;
the same law
of a rent service. Ro. Abr. 672.

If a man seised in fee, or for life, of a rent-charge, after arrearages incur, grants over the rent to another, he cannot distrain for these arrearages, because they are by the grant divided from the freehold of the rent.

[If the mortgagee give notice of the mortgage to a tenant in possession under a lease prior to the mortgage, he may distrain for all arrears of rent in his hands at the time of the notice, as well as for what accrues subsequent to it.]

Moss v. Gallimore, Dougl. 266. 1 T. R. 384. See Powell's Mortgage, 84.

¶ If a terre-tenant, holding under two tenants in common, pay the whole rent to one after notice from the other not to pay it, the other tenant in common may distrain for his share.

Harrison v. Baraby, 5 T. Rep. 246.

One tenant in common may take a distress without his companions, and avow solely.

Willis v. Fletcher, Cro. El. 530.

Grant of rent to a testator for years, with a clause in the deed, that the grantee and his heirs might distrain for it during the term; yet ruled, that the executor should have the rent and distrain for it, and not the heir.

Durrel v. Wilson, Cro. El. 644.

A person entitled to the separate herbage and feeding of a close for a certain time, may distrain cattle belonging to the owner of the close damage-feasant there during the time.

Burt v. Moore, 5 T. R. 329.

If, under an agreement for a lease at a certain rent, the tenant is let into possession before the lease is executed, without any stipulation, that in case no lease is executed, he shall hold for one year certain, the lessor cannot, during the first year, distrain for the rent; for here is no demise, express or implied; the occupier is a mere tenant at will.

Hegan v. Johnson, 2 Taunt. 148.

A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put on the land by the landlord for the purpose of taking possession.

Taunton v. Costar, 7 T. R. 431.

By 7 H. 8. c. 4. "the recoverors of manors, lands, and advowsons, their heirs and assigns, may distrain for rents, services, and customs, due and unpaid, and make avowry and justify the same, and have like remedy for recovering them, as the recoverees might have done or had, although the recoverors were never seised thereof."

By 32 H. 8. c. 37. the personal representatives of tenants in fee, tail, or for life, of rent-services, rent-charges, rents-seck, and fee farms, may distrain for the arrears upon the lands charged with the payment, "so long as those lands continue in the seisin or possession of the tenant in demesne, who ought immediately to have paid the rent or fee farm so being behind, to the testator in his life, or in the seisin or possession of any other person claiming the lands only by and from the same tenant by purchase, gift, or descent."

By § 3. husbands seised in right of their wives, in fee, tail, or for life, of any rents or fee farms, may distrain after the death of their wives for arrears due in their lifetime.

By § 4. tenants *pur autre vie* of any rents or fee farms, and their personal representatives, may distrain after the death of *cestuy que vie* upon the land charged for the arrears due in the lifetime of *cestuy que vie*.

This last statute, being remedial, would seem now to be considered as extending to the executors of *all* tenants for life, as well

Co. Litt. 162. a. n. (4). 162. b. n. (1). Hool

v. Bell, 1 Ld. Raym. 172. well to those executors who previously to the statute were entitled to action of debt, as to those who had no remedy whatever; though upon one (a) occasion it was restricted only to the last.
 2 Lutw. 1227. S. C. Lambert v. Austin, Cro. El. 332. (a) Turner v. Lee, Cro. Car. 471.

Appleton v. Doiley, Yelv. 135. This statute does not extend to copyhold rents, but only to rents out of free land.

Renvin v. Watkins, M. 5. G. 2. B. R. Selw. N. P. 619. *A.* seised in fee, let to the plaintiff for twenty-one years, and afterwards dying seised of the reversion, the defendant administered and distrained for half a year's rent due to the intestate, for which he avowed. On demurrer to the avowry, it was objected, that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by the administrator. And it was observed, that this was a case out of the statute of 32 H. 8. for that gives remedy by way of distress only for rents of freehold; and of this opinion the court seemed. Co. Litt. 162. a. Cro. Car. 471. Wade v. Marsh, Latch, 211. were cited.

Powell v. Killylick, Middlesex sittings, M. 25. G. 2. Selw. N. P. 619. cited from Serjt. Hill's MSS. Bull. N. P. 57. S. C. But, where in trespass for entering plaintiff's house and carrying away his goods, upon not guilty, the defendant gave in evidence, that he was executor of *A.* who was the plaintiff's landlord of the house, and that he distrained for rent due to his testator at the time of his decease; it was objected for the plaintiff, that the executor was empowered to distrain only by virtue of the statute of 32 H. 8., and that that statute extended to the executors and administrators of those persons only to whom rent-services, rent-charges, rent-seck, or fee farms were due, and that the present case did not fall within any of those descriptions. *Lee* C. J. overruled the objection, and said, that this was a rent-service, the testator being in his lifetime seised in fee, and the plaintiff holding under a tenure which implied fealty.||

For this *vide* 14 H. 4. 31. 23 H. 7. 96. 6 Co. 64. Co. Litt. 47. Cro. Ja. 442. (b) But might distrain the cattle damage-feasant. Keilw. 96. a. If tenant *pur auter vie*, or tenant for years, held over, yet the lessor could not distrain them for (b) rent that became due before the determination of their respective leases, though they continued in possession of the land afterwards; for when the lease was determined, the lessor could not avow on them as his tenants, claiming under a lease, which was determined.

11 Geo. 2. c. 19. To remedy this, it is enacted by the 8 Ann. c. 14. § 6. "that it shall and may be lawful for any person or persons, having any rent in arrear, or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined.
 § 7. "Provided that such distress be made within the space of six kalendar months after the determination of such lease and
 "during

“ during the continuance of such landlord’s title or interest,
 “ and during the possession of the tenant from whom such
 “ arrears became due.”

[Where there is a custom that a tenant may leave his away-going crop in the barns, &c. of the farm for a certain time after the lease is expired, and he has quitted the premises; the landlord may distrain the crop so left after the expiration of the six months, and within the time limited by the custom.]

Beavan v.
 Delahay, 1 H.
 Bl. 5.

If a lessee dies before the expiration of the term, and his personal representative continues in possession during the remainder and after the expiration of it, the landlord may distrain under this act for rent due for the whole term.]

Braithwaite v.
 Cooksey, 1 H.
 Bl. 465.

|| By 4 G. 2. c. 28. § 5. “ all and every person or persons,
 “ bodies politick and corporate, shall and may have the like
 “ remedy by distress, and by impounding and selling the same,
 “ in cases of *rents-seck*, *rents of assize*, and *chief rents*, which
 “ have been duly answered or paid for the space of three years
 “ within the space of twenty years before the first day of the
 “ then present session of parliament, or shall be thereafter
 “ created, as in case of rent reserved upon lease; any law or
 “ usage to the contrary notwithstanding.”

A rent reserved on a grant in fee made after the statute of *quia emptores* is in its nature a rent-seck, and cannot be distrained for, except under this statute; and if granted before it, the distrainer must, in his avowry, allege, that it had been duly answered or paid for the space of three years, within the space of twenty years, before the first day of the session of parliament in which the statute was made.||

Bradbury v.
 Wright,
 Dougl. 624.

(B) What Things may be distrained.

THERE must be a valuable property in some body in the things distrained; therefore, no distress can be of (a) dogs, (b) deer, coneyes, &c., which are *feræ naturæ*.

Co. Litt. 47.
 (a) [Qu. as to
 dogs, now that
 the legislature

hath passed an act to prevent the stealing of them. See stat. 10 Geo. 3. c. 18. and Willes’s Rep. 48. (b) But deer kept in a private inclosure for the purpose of sale or profit may be distrained for rent. *Davies v. Powell*, C. B. Hil. 11 G. 2. 3 Bl. Com. 8. Willes’s Rep. 46. S. C.]

Things fixed to the freehold, or part of the freehold, as furnaces, chauldrons, doors, windows, fixed to the freehold, or corn * growing, cannot be distrained. || For what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal, and, consequently, that cannot be a pledge which cannot be restored *in statu quo* to the owner. Besides, what is fixed to the freehold is part of the thing demised; but the nature of a distress is not to resume part of the thing itself for the rent, but only the *inducta & illata* upon the soil or house.||

18 E. 3. 4.
 Co. Litt. 47.
 2 Inst. 82. S. P.
 2 Mod. 61.
 Gilb. Distr. 42.
 [So, an anvil
 in a smith’s
 shop, and a
 millstone in a
 mill, are privi-
 leged from dis-
 tress: and a
 temporary re-

moval of the anvil out of the stock, or of the millstone out of the mill, for the purpose of its being picked, does not destroy the privilege. 14 H. 8. 25. b.] * Cattle on the common, and corn growing, may be distrained for rent, by 11 Geo. 2. c. 19. § 8.

Co. Litt. 47. No man can be distrained for rent by the utensils of his trade (a), as the axe of a carpenter, the books of a scholar, the materials for making cloth in a weaver's shop; for these the law protects under a presumption, that without them the tenant could neither be useful to others, nor gain a livelihood for himself.

to be levied by distress, such distress may be of those implements, by which the party gets his livelihood, for the maintaining of those is for the publick good; and therefore the taking part of the loading has been adjudged good. Mod. 104. Lev. 96, 97. S. C. Raym. 232. Ld. Raym. 385. 2 Stra. 1228. So, has the distraining part of the tackle of the ship, as where the anchor, cable, and sails were taken. Carth. 357. Ld. Raym. 384. 12 Mod. 216. 5 Mod. 359. Salk. 248. for this vide 2 H. 7. 16. 2 Roll. Abr. 202. 3 Co. 710. Dyer, 352. The cart of a husbandman may be distrained, though an implement of his occupation. Carth. 359. admitted *per cur.* [And implements of trade may be distrained if not in actual use at the time, and no other sufficient distress can be found. Gorton v. Falkner, 4 T. R. 565, Simpson v. Harcourt, C. P. Mich. 18 Geo. 2. cited by Buller J. *Id.* 569. Willes's Rep. 512. S. C. by the name of Simpson v. Hartopp. The like law with respect to *averia carucae*. But *averia carucae*, or implements of trade, may be distrained for a poor's rate, although there be other sufficient distress: for the distress in this case is in nature of an execution. Hutchins v. Chambers and others, 1 Burr. 579. Com. Dig. tit. Distress (C). Saund. on Conventicles, p. 39.]

10 H. 7. 21. b. Also, for the benefit of trade and commerce, some things are privileged from being distrained, as an horse in a smith's shop, Bro. Distress, 99. Co. Litt. 47. 3 Bulst. an horse in an inn, sacks of corn or meal in a mill, cloth or garments in a taylor's shop, or sacks of corn or meal in a market. 270. Ro. Abr. 668. Cro. Eliz. 549. 596.

[Noy, 68. But a chariot standing at a livery-stable is not privileged from distress. Francis v. Wyatt, 3 Burr. 1498. 1 Bl. Rep. 483. Nor is a race-horse in a stable belonging to an inn-keeper, a mile distant from the inn. Crosier v. Tomlinson, Hertford Assizes, *coram Ryder*, C. J. cited in 3 Burr. 1500.]

Cro. Eliz. 550. So, if an horse carries corn to a mill, and is tied to the mill door, during the grinding of the corn, he shall not be distrained (b). But cattle driving to a market, and by the way put into a pasture, may be distrained. *per curiam arguendo*. (b) 2 Vent. 50. But vide 2 Vern. 130. [*Infra*, note on the last case.]

Re. Abr. 668. And these things are privileged, though they continue there three or four days, or are retained never so long by the tenant for his satisfaction in some thing he has done about them.

Ro. Abr. 668. If a man rides to a place, and is there taken sick, by means whereof he is obliged to tarry there two or three days, his horse cannot be distrained for rent.

keeps for journeys cannot, as is said, be distrained. 2 Inst. 133. 2 Ro. Abr. 160. Ro. Abr. 668. *Sed quæ*? Nor an horse upon which another rides. Co. Litt. 47. Cro. Eliz. 552. But an horse upon which a man is riding may be distrained damage-feasant, and led to the pound with the rider on him. Vent. 36. Sid. 440. [But this is not law. Things in actual use cannot be distrained, because the taking of them would occasion a breach of the peace. See what is said by Willes C. J. on the case of Webb v. Bell, 1 Sid. 440. in 4 T. R. 569. and Storey v. Robinson, 6 T. R. 138., and Willes's Rep. 517.]

Co. Litt. 47. Things distrained damage-feasant cannot be distrained for rent, because they are in the custody of the law; ¶ for it is *ex vi termini* repugnant, that it should be lawful to take goods out of the custody of the law.¶

In debt against an executor he pleads *riens in ses mains*, but

certain

certain goods distrained and impounded: adjudged no assets to charge him. Cro. Eliz. 23. [So, it seems that goods under an attachment cannot be distrained. Monk's case, 1 Vent. 221. *arguendo*.] || Or in execution, Eaton v. Southby. Willes's Rep. 136. But, if after seizure under a writ of execution, the sheriff abandon the possession, the goods are no longer considered as under the protection of the law, and may be distrained. Blades v. Arundale, 1 Maule & Selw. 711. So, if goods remain on the demised premises after a fictitious bill of sale made of them under an execution, they are liable to the landlord's distress. Smith v. Russell, 3 Taunt. 400. Corn in the blade taken and sold under a writ of *feri facias*, and afterwards continuing on the demised premises before any rent due, may be distrained, it seems, for rent becoming subsequently due. Gwilliam v. Barker, 1 Price, 274. ||

If a clothier having put his wool to spin comes with an horse to carry it back, but because there is no beam or weights at the spinner's house to weigh it, the clothier and spinner, with the leave of a neighbour, who had a beam and weights in his house, bring the horse thither, and enter the house to weigh the yarn, the lord of the house, whilst they are there, cannot distrain the horse for services.

becomes a common carrier, and the goods in his possession are privileged.

Cro. Eliz. 549.
596. adjudged.
3 Lev. 261.
S. C. cited. A private person, who undertakes to carry all persons' goods, thereby Salk. 249, 250.

Things for which a replevin will not lie, so as to be known again, as money out of a bag, cannot be distrained; and for the damages, that shocks of corn *, hay, &c., might sustain, it was held that they could not be distrained.

may be distrained; for the bag sealed may be known again. 22 E. 4. 50. b.] * But for this *vide* 2 W. & M. c. 5. set forth at large, letter (D), *post*. [But, notwithstanding this act, sheaves of corn, it seems, cannot be distrained for the arrears of an annuity. Horton v. Arnold, Fort. 361.]

Ro. Abr. 667.
Keilw. 145.
2 Inst. 82.
[But money in a bag sealed

Averia carucæ, or beasts of the plough, or any thing belonging to it, cannot by common law be distrained while there are other goods or beasts (which *Bracton* calls *animalia otiosa*), that may be distrained. Also, a covenable distress is not of armour or vessel, or apparel, or jewels, so long as there are other sufficient or covenable, nor of sheep, saddle-horse, poultry, or fish.

Co. Litt. 47.
2 Inst. 133.
See *supra* in this chapter.

By the statute *de districtione scaccarii* made 51 H. 3. st. 4. "No man shall be distrained by the beasts that gain his land, nor by his sheep, but until another distress or chattels sufficient be found, except for damage-feeasant."

This statute extends not only to distresses between lord

and tenant, but to all other distresses, as well at the suit of the king, as at the suit of the subject. 2 Inst. 133. Dal. 84. In an action on this statute, it is not necessary to shew that there was a sufficient distress, *præter*, &c., but it must come on the other part, *ss.* to plead that there was not a sufficient distress, *præter*, &c. Dyer, 312. It must be intended there were cattle sufficient at the time of the distress, and it is not material what were before or after. 2 Inst. 133.

It is agreed that the cattle of a stranger escaping into his neighbour's grounds, and there being *levant* and *couchant*, may be distrained by the lord or lessor of those grounds for rent or services due to him; for it shall be imputed the owner's folly that he did not provide against this mischief by proper bounds and fences.

27 E. 3. 80.
2 Inst. 296.
Palm. 43.
Dyer, 317, 318.
2 Leon. 7, 8.
Co. Litt. 47.
2 Brownl. 170.
But such cattle

shall not be liable to a distress for an amercement. Noy, 20. Nor to a rent-charge issuing out of those lands, unless they were *levant* and *couchant*. Ro. Abr. 668. 1 Mod. 63. And by

by the better opinion of the books, it seems not to be material whether they were *levant* or *couchant* or not. *Vide* Co. Litt. 47. 2 Saund. 290. 2 Brownl. 170. Palm. 43. Hob. 265. || A collector of the house and window-tax under 43 G. 3. c. 161. seems to be armed with a power similar to that which the landlord possesses, and may for the arrears of those taxes take any goods found upon the premises, whether the property of the debtor himself, or of a third person. *Juson v. Dixon*, 1 Maule and Selw. 601.||

Ro. Abr. 669. Cattle which are in certain land by way of agistment may be distrained for rent.

22 E. 4. 49. If the tenant ought to inclose against the highway by prescription, and in driving my cattle by the way, by default of the inclosure they escape into the land of the tenant, the lord cannot distrain them. So, if he ought to inclose by prescription against my land, and my cattle escape.

Pool v. Longueville, 2 Saund. 289. If *A.* and *B.* have two closes lying contiguous, and *A.* by prescription is bound to repair the fences between both the said closes, and *A.* leases his close to *C.* for years, rendering rent; and the fences between the two closes being out of repair, the cattle of *B.* escape into the close of *A.*, he may distrain them for rent arrear; and it is not material whether they are *levant* and *couchant* or not: adjudged, and the judgment affirmed upon a writ of error, though objected that they escaped there through the default of *A.* who ought to have taken care that the hedges were repaired. And by *Sanders*; *nota*; this was a hard case to maintain, there being a vast difference between the lord's taking a distress within his seignory, and the lessor's distraining for rent reserved upon his own lease; for the lord had nothing to do with the land or fences, and so it concerns not him whether they are in repair or not: otherwise of the lessor; for he ought to repair them, else he will have advantage of his own wrong.

[The various cases upon this point were very fully considered in a later case, where the following distinctions were made. If a stranger's beasts escape into the land by the default of the owner, they may be distrained for rent, without being *levant* or *couchant*. But, if their escape be in consequence of the default of the tenant of the land in not repairing his fences, the lessor cannot distrain them, though they have been *levant* and *couchant*, unless he have given notice to the owner, and he suffer them to remain there afterwards. But the lord of the fee, or the grantee of a rent charge, may in this last case distrain them, without giving notice, after they have been *levant* and *couchant*.]

2 Vent. 50. If a man, that is driving his cattle to *London* to sell, asks leave of the lessor to put his cattle into the ground for a night, and he gives him leave so to do, with the consent of the lessee, and the cattle are put in accordingly, the lessor is not concluded by this licence, but that he may distrain them for rent: adjudged upon demurrer; and it not appearing by the pleading that the ground belonged to a common inn, it came not in question whether in that case they might have been distrained.

the head landlord being looked upon as a fraud and contrivance to subject the cattle to a distress. 2 Vern. 129. Pr. Ch. 7. S. C. decreed for the plaintiff with costs, at law, and in equity. || And it should seem, says the late editor of *Saunders's Reports*, that at this day a

court of law would be of opinion, that cattle belonging to a drover being put into a ground with the consent of the occupier to graze only one night, in their way to a fair or market, were not liable to the distress of the landlord for rent.||

|| By 7 Ann. c. 12. § 3. it is enacted and declared, that process of distress against the goods of any ambassador, or other publick minister of a foreign state, or of his domestick servants, shall be void.||

(C) Of the Manner of distraining, as to Time and Place.

A DISTRESS for a rent-service, or a rent-charge, cannot be in the night, but one may distrain cattle damage-feasant in the night, otherwise they may be gone before morning. Co. Litt. 142. 7 Co. 7. a. 9 Co. 66. a.

If the tenant, when the lord is in view of the cattle, to avoid the distress, chases them into a place not within the lord's distress, yet the lord may take them freshly; for the tenant shall not have advantage of his own wrong. 4 Leon. 218. But, if before the stat. 8 Ann. c. 14. and 11 G. 2. c. 19. the tenant, before the lord had view of them, had chased them away; or if the tenant, for other lawful reason, even after view, had chased them away; or if, after view, the cattle went out of themselves, the lord could not distrain them. 44 E. 3. 20. Co. Litt. 161. a. 268. a. 2 Inst. 131. [But now by 11 Geo. 2. c. 19., goods, &c. may be distrained in 30 days after removal.]

[If by the custom of the country, or by express stipulation between the parties, the rent be payable on the day on which the tenant enters, the landlord may distrain for it on that day. So, it seems, by the usage of a parish, a quarter's rent may be distrained for before the end of the quarter.] Buckley v. Taylor, 2 T.R. 600. 6 Mod. 214.

By the statute of *Marlbridge* made (a) 52 H. 3. c. 2. "None shall distrain any to come to his court, (b) which is out of his fee, or upon whom he has no jurisdiction, by reason of a hundred or bailiwick, nor take distresses out of the fee or place where he hath (c) jurisdiction." (a) This is declarative of the common law. 2 Inst. 104. (b) This is intended of suit-service in respect of a seignory, and not of suit-real in respect of reliance. 2 Inst. 104. (c) But no distress is prohibited by this act in any place where he hath power, by custom or otherwise, to distrain. 1 And. 71, 72.

By the same statute, c. 15. it is enacted, "That from (d) thenceforth (e) it shall be lawful for no man (f) for any manner of cause to take distresses out of his fee, or in the king's highway, or in the common street, but only to the king and his officers, having special authority so to do." (d) But this is only in affirmation of the common law. 2 Inst. 131. (e) This must not be taken

simpliciter, so as to take advantage thereof in bar of an avowry, but *secundum quid*, viz. that the tenant may have an action against the lord upon this statute, in which he shall be fined. 2 Inst. 132. And if it may be pleaded in bar of the avowry, the king shall lose his fine. (f) This must be intended only of distresses by reason of a seignory, and not of distresses for rent-charges, &c. or by reason of a leet. 2 Inst. 131. And. 72. Nor of such things for which no distress can be taken but in the highway, as for toll-thorough due by custom. Cro. Eliz. 710. But an heriot custom may be seised in the highway, for that is not a distress but a seizure: but a distress cannot be taken there for an heriot service. 2 Inst. 132. Gouls. 97.

2 Inst. 232.

If the lord coming to distrain hath a view of the beasts within his fee, and before he can distrain them the tenant chases them into the highway, the lord, notwithstanding the statute of *Marlbridge*, c. 15. may distrain them there.

46 E. 3. 26.

b. Ro. Abr.

671. 5 Co. 92.

A distress for rent may be taken in a house, if the door be open; so may it be taken out of a window.

One cannot break open the outer door to distrain; and *Ld. Hardwicke* C. J. held, that a padlock put on a barn door could not be opened by force, to distrain the corn. 9 Vin. Abr. 128. pl. 6. If the outer door be open, one may break open the inner door to distrain. Comb. 17. || So by *Lord Hardwicke*, Ca. temp. *Hardw.* 168. Where a landlord, who occupied an apartment over a mill demised to his tenant, from which it was separated only by a boarded floor without any ceiling, took up the floor, and entered through the aperture to distrain for the rent; it was adjudged he was no trespasser; and where a man can get in without a trespass, he may lawfully distrain. *Gould v. Bradstock*, 4 Taunt. 562. || [See the stat. 11 G. 2. c. 19. § 7., which empowers the landlord in the case of goods being fraudulently removed to prevent a distress, to break open a dwelling-house, taking a constable with him, and having first made oath before a justice of a reasonable cause to suspect that they are therein. See *infra*, tit. *Rent*, (K).]

Rogers v.

Berkmire,

Ca. temp.

Hardw. 245.

2 Str. 1040.

S. C.

[If the demises are several, there must be separate distresses upon the several premises subject to each distinct rent; for one distress cannot be taken distributively, and the law gives no right to enter into any premises but those whence the rent issues.]

(D) Of the Distress when seised: And herein of the Distrainer's Interest therein, and what he is to do therewith.

2 Inst. 106.

BY the common law, a man might have driven a distress whither he pleased, which was very mischievous; 1st, Because the tenant was bound to give the beasts sustenance, if impounded in an open pound, and being driven into another county, he could not by intendment of law know where they were. 2dly, He could not tell where to have a replevy; but now,

This statute is confirmed by *Westminster* the 1st, made

3 E. 1. 2 Inst. 191.

Yet if the tenancy is in one county, and the manor in another, the lord may drive the distress taken in the tenancy unto the manor in the other county; for the tenant doing suit to the manor, by common intendment knows what is done there. 2 Inst. 106. *Keilw.* 50. *Bro. Distress*, 33. Where he who will take advantage of this act must do it by way of action, so as to entitle the king to a fine, *vide* 3 Lev. 48.

(a) Not into the county of the city *Litchfield*, though till 1 Mar. part of the hundred in which, &c. *Gouls.* 100. (b) *Godb.* 11. *Gouls.* 101.

Also by the statute of the 1 & 2 of Ph. & Mary, c. 12. "No distress shall be driven out of the (a) hundred, rape, wapentake, or lath, where taken, except to a pound overt within the same shire, not above (b) three miles distant from the place where taken; and no distress shall be impounded in several places, (c) whereby the owner shall be constrained to sue several replevins, upon pain that (d) every person offending shall forfeit to the party grieved 5*l.* and treble damages."

(c) As if impounded in several liberties, &c. else it is no offence within the statute. *Noy*, 52. *Dyer*, 177. in margin. (d) But, where three persons distrain a flock of sheep, and severally impound them in three several pounds, whereby, &c. yet they shall forfeit but one five pounds and

and one treble damage. Cro. Eliz. 480. Moor, 453. pl. 620. Noy, 51. 62. Dyer, 177. in margin. But Noy, 62. by Fenner, if the plaintiff brings his action against them severally, every one shall pay 5*l.* but Q. [Trespass will not lie for impounding a distress in another county, but the action must be upon this statute. *Gimbart v. Pelah*, 2 Str. 1272.] || If the hundred in which the cattle were distrained, be in one county, and the hundred, into which they were driven, be in another, the venue may be laid in either county. Pope v. Davis, 2 Taunt. 252.||

If a man distrains dead goods, as utensils of a house, or such like, which may take damage by wet or weather, and the like, he ought to impound them in an house or other pound covert within three miles in the same county; for if he impounds them in a pound overt he ought to answer for them.

Co. Litt. 47.
A pound overt is a pin-fold made for such purposes, or the close of him that

distrains, or the close of a stranger with his consent, where the distress is taken: a pound covert or close is when the distress is impounded in a house. Co. Litt. 47.

If a man distrains cattle, and puts them in a pound overt, the owner ought to keep them at his peril, for it is lawful for him to come there for this purpose; but, if put in a pound covert or close, there the distrainer ought to keep them at his peril, and yet he shall not have any satisfaction for it.

Co. Litt. 47.
2 Inst. 106.
S. P.

He who distrains cannot make use of the distress, so as to work a horse, &c. for he hath no property therein, but a bare power by act of law to take it: so, if a man hath a return irreplevisable, yet he cannot work it, for the judgment is to remit it to the pound *ibidem remansur*, &c.

Owen, 124.
Dyer, 280.
pl. 14. But cattle taken in *Withernam* may be used.

Owen 46. 1 Leon. 220.

If a man takes a cow for a distress, he cannot milk her; for though the cow be the better for this, yet he ought not to do good to the owner without his consent, and perhaps the owner would have come before any damage came by this to the cow; and if it perish by this, he who took the distress may distrain again.

Ro. Abr. 648. 879.
Owen, 124.
Cro. Ja. 147.
Yelv. 96.

Where a man distrained a trunk for rent,

and being informed that there were things of value in it, he caused it to be corded to prevent damage; he was for this adjudged a trespasser *ab initio*; cited by *Twisden* to have been adjudged before *Roll C. J.*, 1. Ventr. 37. [It is said by *Popham C. J.* that the distrainer may meddle with a distress where it is for the owner's benefit, as by scouring armour, or fulling raw cloth. Cro. Eliz. 783.] A hide distrained may not be tanned, for the property is thereby *quasi* altered; the marks whereby the owner might know it being thereby taken away. Cro. Eliz. 783. If a man distrains for several barrels of beer, and draws beer out of one of them, he is a trespasser *ab initio* as to that barrel only. 6 Mod. 216. per *Holt C. J.*

27 Ass. 64.
Ro. Abr. 673.
Where one distrained a hog damage-feasant, which afterwards

If a man distrains a horse, and impounds him, and the horse leaps three times over the pound, which is as high as it used to be, and thereupon he who distrained ties the horse to a post in the pound, by reason whereof he strangles himself, the owner may have an action of trespass.

escaped, but it did not appear that it was by the distrainer's fault; in an action of trespass brought by him for the trespass done by the hog, it was adjudged that the action would not lie, for he might choose what pound he pleased, and it was his folly not to choose one that would hold him; which is not like a distress dying in pound, that being the act of God; and his default must not entitle him to another action, nor subject the defendant to a double punishment for the same cause, viz. the loss of his pig, and the damages and costs in this action. *Vaspar v. Eddowes*, 1 Salk. 248. 1 Ld. Raym. 719. S. C. 12 Mod. 658. S. C. 11 Mod. 21. S. C. by the name of *Jasper v. Eadowes*.

¶ By

|| By 11 G. 2. c. 19. § 19., where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent; the distress shall not be deemed unlawful, nor the distrainer a trespasser (a) *ab initio*; but the party grieved may recover satisfaction for the special damage in an action of trespass, or on the case, at his election, (b) and if he recover, he shall have full costs. But by § 20., no tenant or lessee shall recover in such action, if tender of amends has been made before action brought.

(a) It has been determined that since this act trover will not lie against a party making an irregular

sale of a distress, as it tends to place the distrainer in the same situation as before the passing of it, by considering him as a trespasser *ab initio*. *Wallace v. King*, 1 H. Bl. 13. *A fortiori* not trespass for irregularity in omitting the appraisement. *Messing v. Kemble*, 2 Campb. N. P. 115. (b) This election does not give the option of either of these remedies in every case of an unlawful act or irregularity, but must be determined by the subject of the grievance, that is, the party may have trespass, in those cases where by the general rules of law trespass would be the proper remedy; and case, where case would be so. If on making a distress the landlord turns the tenant's family out of possession, and continues in possession after the rent has been paid, trespass may be maintained against him. *Etherton v. Popplewell*, 1 East, 139. So, if he remain in possession of the goods in the plaintiff's house beyond the five days, the time allowed by 2 W. & M. *Winterbourne v. Morgan*, 11 East, 395.

By 17 G. 2. c. 38. § 8, 9, 10., where any distress shall be made for money justly due for the relief of the poor, the distress shall not be deemed unlawful, nor the party making it a trespasser on account of any defect or want of form in the warrant of appointment of overseers, or in the rate or assessment, or in the warrant of distress thereupon, nor shall the party distraining be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him, but the party grieved shall recover satisfaction for the special damage in an action of trespass or on the case, with full costs; unless tender of amends is made before action brought.||

Distresses for rent being in nature of pledges, and the person distraining having no power to sell or dispose of them, they oftentimes proved of little or no benefit towards hastening the payment of the rent; for remedy whereof it has been enacted,

2 W. & M.

sess. 1. c. 5.

(c) [The five days are inclusive of the day of sale. *Wallace v. King*, 1 H. Bl. 14.] (d) || It is not necessary to set forth in the notice at what time the rent became due. *Moss v. Gallimore*, Dougl. 280. *per Buller J.*||

“ That where any goods or chattels shall be distrained for any
“ rent reserved and due upon any demise, lease, or contract
“ whatsoever, and the tenant or owner of the goods so distrained
“ shall not, within five (c) days next after such distress taken,
“ and notice (d) thereof (with the cause of such taking) left at
“ the chief mansion-house, or other most notorious place on the
“ premises charged with the rent distrained for, replevy the
“ same, with sufficient security to be given to the sheriff accord-
“ ing to law; that then after such distress and notice as afore-
“ said, and expiration of the said five days, the person dis-
“ training shall and may with the sheriff, or under-sheriff of
“ the county, or with the constable of the hundred, parish, or
“ place where such distress shall be taken, (who are hereby
“ required to be aiding and assisting therein,) cause the goods
“ and chattels so distrained to be appraised by two sworn
“ appraisers (whom the sheriff, under-sheriff, or constable, are
“ hereby empowered to swear) to appraise the same truly,
“ according to the best of their understanding; and after such

“ appraisement shall and may lawfully sell the goods and chattels so distrained, for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the sheriff, under-sheriff, or constable, for the owner’s use.

“ And that upon any pound-breach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action upon the case, for the wrong thereby sustained, recover (a) treble damages and costs of suit against the offender or offenders in any such rescous or pound-breach, any or either of them, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession.

§ 4. (a) [The plaintiff under this clause is entitled to treble costs as well as damages. *Lawson v. Story*. Carth. 321. *Ld. Raym.* 19.]
[A tender of this statute.

the rent after the impounding of the distress, is no bar to an action on this statute. *Firth v. Purvis*, 5 T. R. 432.]

“ Provided, that in case any such distress and sale be made § 5.
“ by virtue or colour of this act, for rent pretended to be arrear,
“ and due, where in truth no rent is arrear, or due to the person or persons distraining, or to him or them in whose name
“ or names, or right, such distress shall be taken, that then the
“ owner of such goods or chattels distrained, and sold as aforesaid, his executors or administrators shall and may, by action
“ of trespass, or upon the case, to be brought against the person or persons so distraining, any or either of them, his, or
“ their executors or administrators, recover double the value of
“ the goods or chattels so distrained and sold, together with full
“ costs of suit.”

Also, the same act empowers “ any person, having rent arrear, § 3.
“ to seise and secure any sheaves or cocks of corn, or corn loose,
“ or in the straw, or hay in any barn or granary, or upon any
“ hovel, stack, or rick, or otherwise upon any part of the land
“ charged with such rent, and to lock up or detain the same in
“ the place where the same shall be found, in the nature of a
“ distress, till the same shall be replevied, upon such security to
“ be given as aforesaid; and in default of replevying the same
“ within the time aforesaid, to sell the same after such appraisement thereof to be made; so as such corn, grain, or hay, be
“ not removed by the person distraining, to the damage of the
“ owner thereof, out of the place where the same shall be found
“ and seised; but be kept there as *impounded*, till the same shall
“ be replevied or sold, as aforesaid.”

|| By 8 A. c. 14. § 5. “ all distresses thereby impowered to be made, shall be liable to such sales and in such manner, and the money arising by such sales to be distributed in like manner as by the preceding act of W. & M. is in that behalf directed and appointed.” ||

An action was brought, wherein the plaintiff declared against *A. and B. in custod. mar., &c. de eo quod ipsi*, such a day and year, *Salter v. Brunsden*, 4 Mod. 232.

year, *apud, &c. in com. prædict vi & armis, &c. bona & catalla, viz. quadraginta quarteria hordei ipsius C. (pl.) ad valentiam 40 librarum adtunc & ibidem invent. nomine districtionis pro reddita per ipsum C. præfat. A. super dimission. messuag. & quarundem terrar. eidem C. per ipsum A. ante tunc. fact. debit. & in arretro fore supposit. & prætens. colore cujusdam actus parlamenti in hujusmodi casu nuper edit. & provis. ceper. & distriker. & bona & catalla illa sic district. adtunc & ibidem detinuer. quousq; postea ss. 23 die, &c. præd. bona & catalla colore actus illius vendider. & disposuer. ubi revera & in facto tempore captionis bonorum & catallor. præd. aut tempore venditionis eorundem nullus redditus per ipsum C. eidem A. debit. aut in arretro fuit, & alia enormia, &c. B.*

One defendant pleads not guilty, and issue thereupon, and judgment is given against the other defendant by default, &c. and it was now moved in arrest, &c. that there must be a lessor and lessee to bring this case within the act, and that if there be no demise, this act gives no remedy; and here no demise is sufficiently set forth in the declaration; nor is it said that the goods were distrained for rent arrear, but that they were taken *nomine districtionis*, which is not a good averment that they were distrained. But *per cur.*, the declaration is good.

Walter v.
Rumball,
4 Mod. 385.
to 395. Comb.
336. S. C.
1 Ld. Raym.
53. S. C.
1 Salk. 247.
S. C. 12 Mod.
76. S. C. by
the name of
Walker v.
Rumbald.
* Who was
the owner of
the goods dis-
trained,
though not
the tenant of
the land.

In trover, on not guilty pleaded, it was found, that *A.* was seised in fee of certain lands lying in two hundreds, and demised them to the plaintiff's father for two years at 40*l.* *per annum* rent, and that for 50*l.* arrear of rent, the defendant, by order of the bailiff or steward of *A.* who was beyond sea, distrained the goods in the declaration, being *levant* and *couchant* upon the lands, and gave notice thereof to the plaintiff*, who did not replevy them; and that after five days after such notice, the defendant, with the constable of one hundred, in the presence of the constable of the other hundred, caused the said goods to be appraised by two persons, sworn for that purpose, by the constable of one hundred, in the presence of the constable of the other hundred; and that he after sold some part, but not to the value of the rent arrear, and carried away the other goods in order to sell, when he should have an opportunity, & *si, &c.* The first exception taken to the verdict was, That it was not found, that the goods were sold with the concurrence of the sheriff or constable, who ought to be present as well at the sale as at the appraisement; because if any overplus, it is to be left in their hands. 2*dly*, That it was not found the goods were sold for the best price that could be gotten; and if sold at an under-rate, the party shall not be concluded. 3*dly*, That it was not found that the defendant had any direction to sell the goods, but only to take them, and it may be the landlord would have kept them still as a distress. But principally it was insisted, that notice to the plaintiff himself, who was owner of the goods, was not sufficient, but it ought to have been left at the most notorious place, by the express words of the act; and so the authority given by this act not pursued; and then the defendant is a trespasser *ab initio*, as he who works a distress: and the notice

ought to have been given to the tenant of the land, because he might have paid the rent and saved the goods; or if not, he might have replevied them, which he might have done, though he were not the owner thereof. Also, the goods are not duly appraised, for they were appraised by two persons, sworn by the constable of one hundred only; and though it were in the presence of the constable, yet that was not sufficient, because this distress was in the nature of an execution; and being taken in several hundreds, the constables of both hundreds ought to have caused the appraisement to be made; this act being an authority to them both for that purpose, where the distress happens to be in two hundreds, the constable of one hundred having no power over the goods taken in another hundred. But *per cur.* This statute was made for the benefit of the landlord, not of the tenant; and therefore notice to the owner of the goods was sufficient; for the only reason of directing the notice to be left at the mansion-house was, that the owner might have notice by the tenant to replevy them. And no need of notice to both, because either of them might replevy them; and as the owner of the goods is principally concerned, notice to him is much the best. And though the distress be taken in two hundreds, yet it is but one distress taken at one time, and for one entire rent; and both constables being present, there is a sufficient concurrence of both, though one only administer the oath, for two oaths were not to be administered. And the chief design of directing the presence of the constable, was for the sake of the landlord, to prevent any breach of the peace; and the presence of the other constable made it his act, though he were out of his own hundred; for the statute to this purpose gives him power to act in any place. It was therefore adjudged for the defendant.

If a landlord comes into a house, and seises upon some goods as a distress, in the name of all the goods in the house, that is a sufficient seizure of all; and though by the common law the landlord was to remove them in a convenient time, yet since the statute 2 W. & M. c. 5. they are to be removed immediately, except corn or hay, though the things in their own nature are not easily, or without damage removeable, as barrels of beer, &c. (a)

secured and sold on the premises chargeable with the rent, in like manner and directions, as under the statute of 2 W. & M.

6 Mod. 214.
per Holt C. J.
Ld. Raym. 54.
2 Ld. Raym.
1424. Barnard. K.B. 3,4.
2 Stra. 717.
(a) By 11 Geo. 2.
c. 19. § 10,
they may be
under the like

|| This statute does not affect distresses damage-feasant; consequently, they remain, as they were at common law, mere pledges; and the sale of them will make the party distraining a trespasser *ab initio*.||

For Lord
Hardwicke
C. J. in Dor-
ton v. Pickup,
sittings after

M. T. 9 G. 2. Selw. N. P. 624.

(E) Where a Distress shall be said to be wrongful and excessive: And herein of the Remedy which the Party injured hath.

⁵² H. 3. c. 4. **BY** the statute of *Marlbridge*, distresses must be reasonable, if the land-lord takes an and not too great.

unreasonable distress, an action lies upon this statute, but not an indictment or information, because a private offence. Mod. 71. 288. Lev. 299. Raym. 205. Vent. 104. [Nor will trespass lie for an excessive distress, except in one case, where the things distrained are of certain known value, as gold or silver; in all other cases the action must be on the statute. *Hutchins v. Chambers*, 1 Burr. 590. *Moir v. Munday*, Hil. 28 G. 2. B. R. cited in the last case, and by Lord *Kenyon* in *Crowther v. Ramsbottom*, 7 T. R. 658. *Lynne v. Moody*, Fitzgib. 85. 2 Str. 851.] No distress for homage or fealty shall be said to be excessive, for the high esteem these are of in the law; but Q. & vide 42 E. 3. 26. 4 Co. 8. b. *Bevill's* case, 2 Inst. 107., where, notwithstanding it is said, that the statute of *Marlbridge* is general. In 13 H. 4. Fitz. tit. *Avowry*, 239., it was held, that a distress of more than the value shall not be said excessive, for the expences of knights of parliament; because the king is party.

⁴¹ E. 3. 26. If forty sheep are taken for 2*d.* and sixteen oxen for 9*d.* this
¹ Ro. Abr. 674. is excessive.

²⁹ E. 3. 24. So, if two oxen are distrained for four pair of gloves, ten sheep
Ro. Abr. 674. for one pair, and ten for another, it is an excessive distress.

² H. 4. 15. But, if a man takes five horses joined in a cart for 3*d.* rent, this
² Vent. 183. is not excessive for the entirety.
S. P.

² Inst. 107. So, if the lord distrain an ox or an horse for a penny, if there were no other distress upon the land holden, the distress is not excessive; but, if there were sheep or swine, &c. then the taking of the ox or horse is excessive, because he might have taken a beast of less value.

Moore, 7. Cro. If for 10*l.* rent due on one day, a man distrains goods of the
Eliz. 13 S. C. value of 40*s.* only, and at the time of taking the distress there
Bro. Distress, are goods of a sufficient value upon the premises, he cannot, for
98. vide the same rent, distrain again; for it was his folly, that at the
¹⁷ Car. 2. c. 7. first he distrained no more; but, if there be rent in arrear at se-
§ 4., by which veral days, a distress may be taken for what was due at the other
it is enacted, days.

that where the cattle distrained shall not be found to be to the full of the arrears distrained for, the party to whom the arrears were due, his executors or administrators, may from time to time distrain again for the residue of the said arrears. [Whether or not there shall be more distresses than one depends upon the entirety and identity of the thing distrained for, not upon the value of the goods taken. One entire duty, or sum, shall not be split, and distrained for, part at one time and part of it at another time; for instance, if, as was the case in *Lutwyche*, the whole sum due be 77*l.* 10*s.*, a man shall not distrain for 62*l.* 10*s.* at one time, and afterwards distrain again for 15*l.* the residue of the 77*l.* 10*s.*, but he shall distrain for the whole 77*l.* 10*s.* at once. But if, from mistake or ignorance of their value, the goods at first distrained for the whole 77*l.* 10*s.* be not sufficient to satisfy it, he may distrain again in order to supply the deficiency, and to make up that sum. *Wallis v. Savill*, 2 Lutw. 1532. *Hutchins v. Chambers*, 1 Burr. 589.]

Macdonald [A distress may be taken for rent under a lease, though the
v. Weller, tenant entered before the commencement of it.]
¹ Str. 550.
⁶ Mod. 54. S. C.

If a distress be taken of goods without cause, the owner may rescue them. Co. Litt. 47. b. But a stranger cannot. 39 E. 3. 35. b. 1 Ro. Abr. 673. If a man distrains my cattle, together with the cattle of J. S. without cause, J. S. or I may justify the rescue of all. 39 E. 3. 35. b. *per Thorpe*.

||So, if the owner tender the rent before the distress taken.|| Co. Litt. 160. b.

But, if a distress be taken without cause, and put into a pound, the owner cannot break the pound and take it out, because it is in the custody of the law. Co. Litt. 47. b. And. 31. S. P. N. Bendl. 30. pl. 48. S. P.

Co. Litt. 47., where the writ *de parco fracto* will lie. F. N. B. 100. Winch, 80, 81.

If the lord, or another that has a rent, distrains several times for his service or rent, where none is in arrear, the tenant may by the common law have an *assize de sovent distress*. F. N. B. 178. But, if the lord distrains or fealty so often, that the tenant cannot manure his land, yet the tenant shall not have an *assize de*, &c. 4 Co. 8. b.

This action lay at common law, in which the writ is general and count special, that the lord distrained, &c. and judgment, not that the demandant *recuperet seisinam*, for he hath that, but *quod teneat absque multiplici districtione*. 8 Co. 50. a. b.

(F) Of distraining Things Damage-feasant.

SHOCKS of corn may, by the common law, be taken damage-feasant. 21. H. 7. 39. b. 11 H. 7. 14. a. Lat. 8. S. P. admitted *per cur.* Fitz. Avowry, 363. S. C. Bro. Distress, 30. S. C.

A greyhound may be taken damage-feasant running after conies in a warren: so may a ferret brought into a warren. 2 E. 3. Fitz. Avowry, 184. Ro. Abr. 664.

But, if a man brings nets and gins through my warren, I cannot take them out of his hands. 7 E. 3. Ro. Abr. 664. Cro. Eliz. 552. S. P.

If men are rowing upon my water, and endeavouring with their nets to catch fish in my several piscary, I may take their oars and nets, and detain them as damage-feasant, to stop their further fishing. Cro. Car. 228. But adjudged he could not cut their nets.

If a man rides upon my corn, I cannot take his horse damage-feasant. 7 E. 3. Avowry. Ro. Abr. 664. But *per Sid.* 440., it is said by the Chief Justice, that the horse upon which one is riding may be distrained damage-feasant; and it seems he shall be led to the pound with the rider upon him. See Vent. 36. *Vide supra*, letter (B), *contr.*

If a man takes my cattle, and puts them into the land of another man, the tenant of the land may take these cattle damage-feasant, though I who was the owner was not privy to the

Ro. Abr. 665. Robinson and Waller, *per totum curiam*.

Ro. Rep. 499. the cattle's being damage-feasant; and he may keep them against
S. C. and S. P. me till satisfaction of the damages.
per two justices.

Co. Litt. 161. If a man coming to distrain damage-feasant, sees the beasts on
9 Co. 22. a. his soil, and the owner, on purpose, chases them out before
S. P. that the they are taken, he cannot distrain them.
owner of the soil is not obliged to take the cattle damage-feasant, but may chase them out with a little dog.
Vide 4 Co. 38. b. 2 Ro. Abr. 566. pl. 15.

30. E. 3. 27. A commoner may justify the taking of the cattle of a stranger
vide head of upon the land damage-feasant.
Common,
supra.

46 E. 3. 12. b. So, if a man hath common for ten cattle, and he puts in more,
Bro. Avowry, the surplusage above the ten may be taken damage-feasant.
29. S. C.
[*Secus*, where the number is uncertain. Hall v. Harding, 4 Burr. 2426.]

Co. Litt. 142. A man may distrain cattle damage-feasant in the night, for
7 Co. 7. a. otherwise, perhaps, the cattle will be gone before he can take
S. P. 9 Co. them.
66. a. S. P.
2 Jon. 193. If turves lie upon a common damage-feasant; though for this
[The commoner's power of distraining is not mentioned in the case cited.]

Wigley v. [Goods brought to a market to be sold, cannot be distrained
Peachey and by the owner of it for toll as damage-feasant.
others, 2 Ld.
Raym. 1589. Sawyer v. Wilkinson, Cro. El. 628.]

Mayor of Lameceston's If a man hath a freehold in a market, and corn is brought
case, Cro. El. thither on the market-day, and set down, he cannot justify the
73. taking it there damage-feasant.]
Williamus, || If tithes are left upon the land an unreasonable time after
v. Ladnor, they have been set out, it would seem, that the owner of the
8 T. R. 72. land may distrain them as damage-feasant.||
Baker v.
Leathes, Wightw. Rep. 113.

(G) Of Distresses for Amercements.

Ro. Abr. 665, 666. **O**F common right, a distress is incident to every fine and
Ro. Rep. 201. amercement in a sheriff's torn or court-leet, whether the
11 Co. 45. a. same belong to the king or to a subject; if the offence, for which
Cro. Ja. 382. they were imposed, be of common right incident to the juris-
10 H. 7. 15. diction of such courts.
pl. 12. 10. H.
6. 7. cont. 11 H. 7. 14. a. 21 H. 7. 40. b. Salk. 175. Doct. & Stud. 138.

Vent. 105. But, if such offences were only the neglect of a duty created
Raym. 204. by custom, it is questionable whether it doth not require the
2 Keb. 701. like custom for a distress, though the duty be of a publick nature:
739. 745. By as, if there be a leet belonging to the manor of *A.*, and by
the report of the case in custom, time out of mind, the inhabitants of *B.* have used to
send

send a constable to the said leet, and they make default, upon which they are fined by the steward; whether a distress could be taken for this fine, without a special custom to distrain, was doubted, and the case adjourned, no special custom to distrain being alleged.

not be distrained for without a custom: also in Raym. it is said by *Twisden*, that when a duty is raised by custom, a distress for that duty must be maintained by the like custom.

But, if it be for the private benefit of a subject, no distress is incident to it without a special custom.

The sheriff or lord of a leet may, for such fines or amercements, distrain the goods of the offender in (a) any lands within the county or precinct of the leet, of whomsoever they shall be holden, except (b) only in such lands as shall be in the king's hands; these being wholly out of the jurisdiction of such courts.

13. Fitz. Distress, 15.

And such a distress may be taken in the highway; for the statute of *Marlbridge*, c. 15. which prohibits the taking of a distress there, is to be intended only of distresses taken for services due by way of tenure of lands.

Such fines and amercements being for a personal offence, no stranger's beast can lawfully be distrained for them, though they have been *levant* and *couchant* on the lands of the offender.

Owen, 146. Noy, 20. *contra*. Ro. Abr. 669. pl. 20. [Ro. cites for the contrary opinion the case in 41 E. 3. 26. b. which seems an authority (if any) *the other way*.]

It seems to be agreed, that where any such court is in the king's hands, the goods distrained for such fines and amercements may lawfully be sold, after they have been kept a reasonable time, as the space of sixteen days. And it seems the better opinion, that where any such court is in the hands of a common person, if the goods were distrained for an offence of a publick nature, they may be sold of common right, without any special custom for that purpose.

No bailiff can lawfully distrain for any such fine or amercement, without a special warrant for so doing; which must be set forth by him in an *arowry* or justification of such a distress.

Salk. 107. pl. 2. [In replevin the officer must state that "the defendant was guilty;" in trespass the conviction is a sufficient justification. It must appear, too, that the amercement was by the jury, and not by the court. *Stephens v. Haughton*, 2 Str. 347.]

[By prescription there may be a distress for toll in a fair or market. But toll is not incident of common right to a fair; and, therefore, if the fair is a new one, and toll is not expressly granted, a custom cannot support it.

If goods are fraudulently sold out of a market, in order to evade the toll, the owner of the market cannot distrain them for it.

Vent. the court inclined, that where a custom only enabled to set a fine, it cannot

Ro. Rep. 76.
11 Co. 44. b.
2 Hawk. P. C. 60.

(a) 2 H. 4. 24. b. 47 E. 3. 13a. Bro. Leet, 28. 41. Fitz. Arowry, 194. Ro. Abr. 670. 2 Inst. 104. (b) 47 E. 3. 12, Ro. Abr. 670.

2 Inst. 131.
47 E. 3. 13. And. 72.

47 E. 3. 13. a.
41 E. 3. 26. b. Bro. Distress, 3. F.N.B.100.

Hetley, 62.
Finch, 476.
3 H. 7. 4. b. 1 Ro. Rep. 76. Noy. 17. 1 Bulst. 53.

3 Mod. 138.
Cro. Eliz. 693. 748. Moor, 574. 2 Keb. 735.

Hob. 187. Ro. Abr. 66. Hol- loway, v. Smith, 2 Str. 1171.

Blakey v. Dinsdale, Cowp. 661.

DOWER AND JOINTURE.

Vide 2 Bl.

Comm. 129.

Dower by the

DOWER is the part of the husband's estate that comes to the wife upon the death of the husband. civil law was the portion the wife brought to her husband, either in land or money, whereof the *naturale dominium* belonged to the wife, and the *dominium civile* to the husband; so that the husband had only the *usus fructus* during his life in things immoveable, but could not alien them; in things moveable he might alien them, but must restore to the value; for these, upon the dissolution of the marriage, by the death of the husband, or divorce, came back to the wife. *Vide* Vin. 249. Corvin. lib. 23. tit. 3. Honorius, 114, 115. Donations *inter sponsum & sponsam propter nuptias* began about the time of *Constantine*, and were made before marriage; but by the *Justinian* constitution they were good after marriage, and were gifts from the husband to the wife, which, upon the dissolution of the marriage, came back to the husband as the dower did to the wife. Vin. 245. Inst. of Imperial law, 43. 117, 118, 119. Among the feudists, the rule was, *non uxor marito, sed uxori maritus offert*; and the reason was, that the husband and eldest son of the family being brought up in military exercise, the wife and youngest sons tilled and improved the land, and in their expeditions found provisions for the army; and having the third part in labour, she had the third part of the feud for the maintenance of her and her younger children during her life. Spelm. tit. Doarium, 175.

Co. Litt. 33. b.
39. b.

Dower is of five sorts: 1. At common law. 2. By custom. 3. *Ad ostium ecclesiae*. 4. *Ex assensu patris*. 5. *De la plus belle*. We shall begin with the first and chief.

Co. Litt. 30. b.
Perk. 301.

Dower, at common law, is the third part of all the lands whereof the husband has been seised during the coverture, of such an estate as the children by such wife might, by possibility, have inherited, and to which, by the death of the husband, the wife is entitled for her life. For the better understanding thereof, I shall consider it under the following heads:

(A) Who may have Dower, and who not: And herein of the Age, and other Disabilities of the Husband or Wife.

(B) Of what Estate a Woman may have Dower.

1. *Of the Quarentine.*
2. *Of the different Kinds of Inheritances.*
3. *Of the Nature and Quality of such Estate, whether sole, joint, or in common.*
4. *Of its Continuance; wherein, of Estates conditional, suspended, determined, or extinguished; and herein of Remitter to the Heir, and Recoveries by Title Paramount.*
5. *Of the Value and Improvement of the Husband's Estate, either in his Lifetime, or after his Death.*

(C) Of

(C) Of the Things requisite to the Consummation of Dower, *viz.* Marriage, Seisin, and the Death of the Husband.

1. *Of the Marriage, how long it must continue ; and herein of the several Sorts of Divorces.*
2. *Of the Seisin, either in Fact or in Law ; and herein of the Seisin in Fact, as it is continuing, or not continuing, as instantancous.*
3. *Of the Death of the Husband.*

(D) Of the Assignment of Dower.

1. *By what Persons.*
2. *Of the Manner ; and herein of assigning it by Metes and Bounds, &c.*
3. *By what Court.*

(E) Where the Wife shall have her Election to be endowed of one Thing or another, and where of both : And herein of Endowment *de novo*, and the *Dos de Dote*.

(F) What shall be a Bar of Dower, and what not : And herein of Acts done or suffered by the Husband solely, or by the Husband and Wife jointly, or by the Wife solely, either during the Coverture, or after : And herein of Elopement, and Detinue of Charters, or Heir.

(G) Of Jointures : And herein of their Origin ; the Statute of 27 H. 8. ; and the Rules to be observed so as to make them an effectual Bar of Dower.

1. *The Estate must take Effect immediately after the Death of the Husband.*
2. *It must be for Term of the Wife's Life or greater Estate.*
3. *It must be made to herself, and not to others, in Trust for her.*
4. *It must be in Satisfaction of her whole Dower.*
5. *It must be expressed to be in Satisfaction of her Dower ; and therein how far a collateral Recompence shall be a Bar of Dower or Jointure.*
6. *It must be made during Coverture.*

(H) How far the Wife's own or her Husband's Acts may defeat her of her Jointure.

(I) How far a Jointress is entitled to the Aid of a Court of Equity.

- (K) Where the Wife shall hold her Dower, subject to the Charges of her Husband, and where not: And herein of the Privileges of Tenant in Dower, and the Nature of her Estate as to Alienations made, or Actions brought by or against her.
- (L) To whom the Tenant in Dower shall be attendant, and by what Services.
- (M) Of the Proceedings and Damages in Dower *unde nihil habet*.
- (N) Of the Admeasurement of Dower.
- (O) Of the other Species of Dower.
1. *By Custom.*
 2. *Ad ostium ecclesie.*
 3. *Ex assensu patris.*
 4. *De la plus belle.*
-

- (A) Who may have Dower at Common Law, and who not: And herein of the Age, and other Disabilities of the Husband or Wife.

Litt. § 36.
Co. Litt. 33. a.
Doct. & Stud.
lib. 1. c. 7.
F. N. B. 149.
1 Ro. Abr. 675.
2 Inst. 234.
Brook, tit.

Dower, 36. 45. || (a) *Vide* Rast. Entr. 228. *novem annorum et dimid.* She ought to shew how much more she is than nine years. Hal. MSS. ||

AS to the age of the husband it is not material, but only the age of the wife; and if she be of the age of nine years (a) or more at the death of her husband, she shall have dower, though her husband be then but four years old. The reason the law would not allow women before this age to demand dower seems from their incapacity of having issue sooner.

The support of the children is part of the consideration whereon this allowance of dower is founded; and, as on the one hand it would be unreasonable to extend it to such women as are incapable of performing the conditions; so on the other hand it would not be reasonable to exclude women of sufficient age, by reason of the incapacity of their husbands; since that is the act of God, which ought in no sort to prejudice the wife. Much less can the husband, by his own act, prevent his wife of dower, if she attains the age of nine years during the coverture; and therefore, though he aliens his land before, yet, if she after arrives at nine years of age, her title is now consummate *ab initio*, and over-reaches his alienation: for dower being intended a provision for the wife and children, whenever she attains such an age as the law adjudges her capable of children, nothing farther is required; and therefore, though the husband die before he or his wife are of age of consent, yet, if she be nine years old,

13 Co. 22.
Co. Litt. 33. a.

Dyer, 313. 369.
Co. Litt. 33. a.

old, this is a sufficient marriage to entitle her to dower, and so ought to be certified by the bishop.

If a man marries a woman of 100 years old, and dies, she shall be endowed; for the law cannot determine the precise time of the failure of her capacity to have issue, which may vary according to the strength and other circumstances of the woman. Co. Litt. 40. Ro. Abr. 675. S. P.

If a woman alien, be she friend or enemy, marry a subject, she shall not be endowed, because by the policy of the law all aliens are disabled from acquiring any freehold amongst us. 7 Co. 25. Co. Litt. 31. a. But by the law of the crown, if the king marry an alien she shall be endowed.

If a Jew born in *England* marry a Jew born also here, and the husband be converted to the Christian faith, and after purchase lands, and enfeoff the other, and die, the wife shall not have dower. Co. Litt. 31. For R. 1. erected a court where all the real and personal estate of the Jews was registered, and upon the death of any Jew came to the king, though it was redeemable by their children paying a fine; and in this court she could not demand dower but against a Jew, and she could not demand it at common law against a Christian; and for this reason it shews, if the husband had not aliened, yet she could not recover against the heir of a Christian. Hollingshead, vol. 3. p. 15.

Women Papists seem not disabled to demand and recover dower within the words of 11 & 12. W. 3. c. 4.

If a woman be attainted of treason or felony*, she shall not have her dower; but, if pardoned, she shall be received to demand it, though the husband has aliened in the mean time, because by the marriage and seisin of her husband she was entitled to dower, and when the impediment is removed, her capacity is again restored. Perk. 349. Co. Litt. 33. a. 13 Co. 23. But, if she be only convicted of treason or felony, this seems no im-

pediment of her dower, for this forfeits no freehold, nor title to any freehold, though the king shall have the profits during the conviction. * See *infra*.

At common law if the husband was attainted of treason, murder, or felony, the wife lost her dower; because it was a condition annexed to all feuds, that the feuditary should not commit such crimes. Perk. 308. 387. F. N. B. 150. Brook 82. Co. Litt. 40. b. Plow. 262.

But afterwards the statute 1 E. 6. c. 12. § 17. ordained, that in all cases where the husband was attainted of treason or felony, the wife should notwithstanding have her dower: but 5 E. 6. c. 11. § 13. repeals that in all cases of treason; the words of which act being general, exclude the wife as well in case of petit treason as in case of high treason. But in case of misprision of treason, or attainder of felony only, the other act stands in force, and therefore, she shall have dower in all such cases. Stanf. 195. Co. Litt. 37. a. 392. b. 13 Co. 19. 3 Inst. 216. Finch 71. Moor, 639. Dyer, 97. 263.

If the husband seised of lands in fee makes a feoffment, and then commits treason, and is attainted of it, the wife shall not recover dower against the feoffee. Bendl. 56. Gate's case. Dyer, 140. S. C. Co. Litt.

III. a. S. P. And though the husband had been pardoned, yet should not the wife recover dower. Leon. 3. Mayne's case. But of land purchased by the husband after the pardon, the wife shall be endowed. Perk. 391.

The wife of a *felo de se* shall have dower.

Plow. 261. a. Dame Hase's case.

So,

Brook, 82.

Perk. 388.

Co. Litt. 31. a.

So, if the husband be outlawed in trespass, or any civil action; for this works no corruption of blood, or forfeiture of lands.

Co. Litt. 31.

So, if the husband be attainted of heresy, yet his wife shall be endowed; for this works no corruption of blood, or forfeiture of lands, being only a spiritual offence.

Id. ibid. If the husband be attainted in the *præmunire*, my Lord

If the husband or wife be excommunicated, yet the wife's dower is not hurt; because, being a spiritual punishment only, it does not affect their temporal possessions.

Coke says that she shall be endowed. *Ibid.*

(a) As in

5 Eliz. c. 14., which makes a second forgery, felony without clergy. So

8 Eliz. c. 3. which makes it felony to transport sheep, &c. So also in 31 Eliz. c. 4. which makes it felony to embezzle the king's armour to the value of 20s. So in 3 Ja. 1. c. 4. which makes it felony to serve foreign princes without first taking the oath of obedience. So also in 1 Ja. 1. c. 31. which makes any one's going abroad with the plague upon him, felony. And this loss of dower being only part of the judgment by implication may well be saved by an express proviso, without any repugnancy. 3 Inst. 47. 78. 80, 81. 90.

Perk. 313.

Co. Litt. 30.

But otherwise, if he had

been villein to the king. If a freeman marries a nief, she shall be endowed, but her lord may enter on the lands during her life. Co. Litt. 31. a.

Perk. 365.

If a woman being a lunatick kill her husband, or any other, yet she shall be endowed; because this cannot be felony in her who was deprived of her understanding by the act of God. So, though she be of sound mind, and refuse to bring an appeal of his death, when he is killed by another, yet she shall be endowed; for this is only a waiver of that privilege the law has given her to be avenged of her husband's murderer. So, it seems, if she refuse to visit and assist her husband in his sickness, yet she shall be endowed; for this is only undutifulness, which the law does not punish with the loss of her entire subsistence.

Perk. 364.

Co. Litt. 31. a.

And therefore if lands descend to an idiot or lunatick after marriage, and the king

If an idiot or lunatick marry and die, his wife shall be endowed; for this works no forfeiture at all, and the king has only the custody of the inheritance in one case, and a power of providing for him and his family in the other; but in both cases the freehold and inheritance is in the lunatick, and therefore the wife dowable.

on office found takes those lands into his custody, or grants them over to another as committee in the usual manner; yet this seems no reason why the husband should not be tenant by the courtesy, or the wife endowed, since their title does not begin to any purpose till the death of the husband or wife, when the king's title is at end; but for this *quære*, & vide Plowd. 263. b. 4 Co. 124, 125.

(B) Of what Estate a Woman may have Dower.

1. Of Quarentine.

THIS is a privilege the law allows to women to continue in the capital messuage or mansion-house, or some other house whereof they are dowable, 40 days after their husband's death, whereof the day of his death is counted one; and during this time they are to be provided with all necessaries at the expence of the heir, and before the end thereof to have their dower assigned to them. This privilege is confirmed by *Magna Charta*, c. 7. and seems to be only a compliance with that decency and ceremony which custom has introduced upon so melancholy an occasion, that widows, who are supposed to be under great affliction, may not be forced to appear abroad, and be put to their shifts for a maintenance; and for this reason, if they marry within the 40 days, their quarentine ceases, for then they have provided for themselves, and their sorrowful condition is supposed to be at an end.

which time her dower was to be assigned; and if she married before the year was out she forfeited her dower, and whatever her husband had left her.

In a writ of dower the demand was of three manors, the tenant pleads in abatement entry in part *puis darrein continuance*, and shews it in certain; the demandant replies that her husband in his lifetime was seised in fee of one of the said manors, &c. *super quo quidem manerio ipse et cadem pet. cohabitabant ut vir et uxor usque diem obitus sui*, and that he died, and this descended to the defendant as heir, and he entered, and that he and the demandant continually after the husband's death *hucusque commorabant et cohabitaverunt super dicto manerio*, and that she claimed at the will of the heir, *et non aliter*; and this was held no plea for the quarentine, because she did not shew the time of her husband's death in certain, and the 40 days after.

Co. Litt. 32. b. 34. b.
2 Inst. 16, 17. Brook, 107. Hob. 153. and F. N. B. 161. (E.) the writ *de quarentinâ habendâ*. By the old law before the Conquest, the widow was to continue in her husband's house a whole year after his death, within

Kettlesby and Ketillesby, Dy. 76. b.

2. Of the different Kinds of Inheritances.

Of a use a woman shall not be endowed; that is, of a use not executed.

[So, of a trust-estate of inheritance, or of an equity of redemption of a mortgage in fee, a woman shall not be endowed.]
Attorney General v. Scott, Ca. temp. Talb. 138. Sugden's Law of Vendors, &c. Append. 46. S. C. more fully reported. Goodwin v. Winsmore, 2 Atk. 525. Burgess v. Wheate, 1 Bl. Rep. 138. 161. Dixon v. Saville, 1 Br. Ch. Rep. 326. Curtis v. Curtis, 2 Br. Ch. Rep. 630. Forder v. Wade, 4 Br. Ch. Rep. 526. D'Arcy v. Blake, 2 Sch. and Lefr. 387.

Chaplin v. Chaplin, 3 P. Wms. 229.

Of an *annuity* to a man and his heirs, after a writ of annuity brought, a woman shall not be endowed: but, if a rent-charge be granted to a man and his heirs, and before any distress made the

Perk. 341. Co. Litt. 32. a. Moore, 83. Poph. 87. Co. Litt. 144. b.

the husband die, and the wife bring her writ of dower, the heir cannot, by claiming it to be an annuity, defeat her of her dower thereof: but, if he brings an annuity, and recovers judgment before the wife, then it is become an annuity *in perpetuum*, and the wife shall be barred.

4 Co. 22. Hob. Of *copyhold lands* a woman shall not be endowed, unless there
216. 5 Co. 116. be a special custom for it; but, if there be a custom to be en-
Shaw v. dowed thereof, then she shall have the assistance of such laws as
Thompson, are made for the more speedy recovery of dower in general, be-
Cro. Eliz. 426. ing within the same mischief, and therefore shall recover damages
Moore, 410. within the statute of *Merton*.

S. C. Co. Litt. 33. a. If the wife of a copyholder brings dower in C. B. the lord of the manor may plead *ne unques seisie que*, &c. and give the special matter in evidence.

Ro. Abr. 676. Of a *castle for defence of the realm*, or of the homage and ser-
Co. Litt. 30. b. vices appertaining to war, a woman shall not be endowed, be-
165. a. Perk. cause of no service towards her support and maintenance, and
406. 2 Inst. 17. she is supposed unable to assist in the defence of the realm. So,
Though this seems to be the doctrine of the books cited, yet it has been lately adjudged, that

a woman shall have dower of the capital messuage, though it be *caput baroniae*. The reasons given for the judgment are, 1st, That the *caput baroniae* spoken of in the ancient books was held by military tenure, which is now extinct, and was a castle of defence. 2dly, That the husband being made a baron after the marriage, this could not deprive the wife of her dower in any thing she was before dowable of; and therefore, though she had accepted 400*l.* *per annum* in lieu of her dower, as was pleaded; yet it not appearing to be in lieu also of her dower in the capital messuage called *Bromley Hall*, she had judgment, and this judgment affirmed in a writ of error. Also, the books before cited agree, that of a private castle for habitation only a woman may be endowed. So, of the capital messuage of her husband, if it be not *caput baroniae*. Lady Gerrard v. Lord Gerrard, 3 Lev. 401. Salk. 54. 253. S. C. 5 Mod. 64. S. C. Comb. 352. S. C. Ld. Raym. 72. S. C. Skin. 592. S. C.

Sty. Pr. Reg. Of *tithes* women were not dowable till 32 H. 8. c. 7. for before
122. 11 Co. 25. that statute tithes were not a lay fee, but now they are dowable
Co. Litt. 32. a. of them.

159. a. Ro. Abr. 682. Ro. Rep. 68. And the best way to assign dower of tithes is the third sheaf, or the third part of the tithes generally, because it is uncertain what part of the land will be sown; and therefore if the garbs of any third part of the land in certain should be assigned, the tenant may perhaps not sow that part at all, and so defeat the dower. [But the assignment is good, though tithes of the third yard-land be assigned. M. 9. Ja. C. B. Kettleby's case. Hale's MSS. Co. Litt. 32. a. n. 3. 13th edit.] || Dower demanded of the third part of the tithes of wool and lamb in three several towns, and it was asked of the court, how the sheriff should deliver seisin; and the court held it the best way for the sheriff to deliver the third part of the tenth part, and the third tenth lamb, that is the thirtieth lamb. 1 Brownl. and Goldesh. 128. The demandant recovered dower of tenths of wool and lamb, and how execution should be made was the question. And the justices intended, that the sheriff might deliver the tenth of every third yard land, and assign the yard lands in certain. But after it was conceived, that this would be uncertain and unequal; and for that the sheriff was directed to deliver the third part of all in general; and yet the first was agreed to be good, but only in respect of inequalities, as, in dower of a mill, the third toll-dish; and of a villein, the third day's work, as in 23 H. 8. 2 Brownl. 143.]

Perk. 341. Of *common of pasture in gross*, which is certain, a woman shall
342. F. N. B. be endowed, but not of common without number; because it
142. Co. Litt. cannot

cannot be divided without surcharging the common by two, which before was only in the power of one by the grant; and when one has power by the grant to put in as many cattle as he pleases, he alone is made judge of the number, which to divide, or delegate to another, would be unjust.

Dower of several lands, meadow and pasture, and common of pasture *cum pertinentiis* in *D.* and upon *ne unques seisie que* dower pleaded, and verdict for the demandant, it was moved in arrest, &c. that of common in gross without number a woman could not be endowed; which the court agreed; but here, it being after verdict, it should be intended common appendant, since otherwise the judge could not have directed the jury to find for the demandant; for though it be not said *eisdem spectans*, and though, if appendant, it was included in *cum pertinent.*, yet it is not *bis petitum*, but only an enumeration of the several things demanded.

In dower the demand was *de tertiâ parte liberæ faldæ*, and held not good for want of setting out in certain, for what cattle, as to their number and kind, and so like common without number.

A woman entitled to dower of a manor, in which were copyholders, demanded her dower by the name of certain messuages, certain acres of land, and certain rents, and not by the name of the third part of the manor, and recovered and kept courts, and granted copyholds; which the whole court held to be void, because she had no manor, having made her demand, as of a thing in gross. But, if the demand had been of the third part of the manor, then she would have had a manor, and might have kept courts and granted copies.

Of an *adworsen*, be it appendant or in gross, a woman shall be endowed, for this may be divided as to the fruit and profit of it, *viz.* to have the third presentation.

Cro. Eliz. 360. Ro. Abr. 683. 685. Co. Litt. 379. 3 Leon. 155.

Of a *villein in gross*, or *regardant*, a woman shall be endowed; as to have the third day's, or week's, or month's work of such villein, and the writ shall be *de libero tenemento*.

164. b. 307. a. Brook, 91. 2 Brownl. 143.

Of a *mill* a woman shall be endowed, though it cannot be divided, and therefore she shall have the third toll-dish, or *integrum molendinum per quemlibet tertium mensem*.

Bendl. 120. 4 Leon. 202. F. N. B. 149. Brook, 39. || If the judgment be, that she recover seisin of the third part of a mill, *per metas et bundas*, it is error. Gilpin v. Cookson, 1 Lev. 182. 2 Keb. 8. 41. S. C.||

Dower was brought *de tertiâ parte* of a mill, a kiln-house, &c. and judgment to recover the third part *in separalitate per metas et bundas*; and this judgment was reversed upon error brought, for it ought to have been of the third part generally, and if *per metas & bundas*, none of them can make any use of it.

Of

30. Ro. Abr.
675. 11 Co. 45.
Sty. Pr. Reg.
122.

Pruett v.
Drake, Cro.
Car. 300.
1 Ro. Abr. 675.
S. C. Sir W.
Jon. 315. S. C.
by the name of
Brewood v.
Drake.

Godb. 21.

Bragg's case,
Godb. 135.
[Owen, 4. S. C.]
Vide Perk. 341.
343. 244.
Cro. Ja. 621.
Palm. 264.
Brook, 102.
Co. Litt. 32.
165.

For which vide
Perk. 343. 344
F. N. B. 148.
B. 150. G.
Cro. Ja. 691.

Perk. 342. F.
N. B. 148. C.
Ro. Abr. 675.
Co. Litt. 32. a.
2 Brownl. 143.

Co. Litt. 32. a.
11 Co. 25.
Perk. 342. 415.
2 Brownl. 143.

Cookson, 1 Lev. 182.
2 Keb. 8. S. C.

Perk. 342.
 Sty. Pr. Reg.
 122. Co. Litt.
 32. Ro. Abr.
 676. F. N. B.
 149. Plow.
 379.

Of a *bailiwick* a woman shall be endowed, as to have the third part of the profits. So, of a fair or market, the third part of the stallage. So, of an office, as the office of the Marshalsea, to have the third part of the profits; and in such cases she shall be contributory to the third part of the charge. So, she may be endowed *de tertiâ parte exituum provenient. de custodia gaolæ Abbatiæ Westmon.* or of the third part of the profits of courts, fines, heriots, &c.

Co. Litt. 32. a.
 Plow. 379. b.

A woman may be endowed of the third part of the profits of a *park-keeper*, or of the third part of the profits of a *dove-house*, or of the third part of the profits of a *piscary*, as the third fish, or *tertium jactum retis*.

Buckeridge
 v. Ingram,
 2 Ves. jun. 652.

[So, a woman is entitled to dower of tolls arising from a publick navigable river.]

Stoughton v.
 Leigh,
 1 Taunt. 402.
 Hoby v. Hoby,
 1 Vern. 218.

|| So, a woman is entitled to dower of mines wrought during the coverture, whether by the husband, or by lessees for years; whether paying pecuniary rents, or rents in kind; whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the land of others. And dower may be assigned of mines, either collectively with other lands, or separately of themselves. It is to be assigned by metes and bounds, if practicable; otherwise, either by a proportion of the profits, or separate alternate enjoyment of the whole by short proportionate periods. If land containing an open mine be assigned, the tenant in dower may work it for her own benefit.

Ibid. The reporter makes a *qu.* of this, because there

is no possible enjoyment or pernaney of profit of mineral strata, granted in the land of another, but by working them. In a grove of oaks there is the herbage and pannage, and the timber is only an incident to the inheritance, though it may be the most valuable part of it; but the working of the strata is the only enjoyment of them.

3. Of the Nature and Quality of such Estate, whether sole, joint, or in Common.

Ro. Abr. 676.
 3 P. Wms. 263.

The husband must be seised of an estate in fee-simple, fee-tail general, or as heir of the special tail; which necessarily excludes descendible freeholds: therefore, if a man make a lease for life, rendering rent to him and his heirs, and after marry, and die, his wife shall not be endowed of this rent, because it is but a descendible freehold; nor of the land, because not seised during the coverture.

Saund. 261.
 Plow. 556.
 Bulst. 165.
 3 Co. 84.
 30 Co. 96. 98.

But, if tenant in tail bargains and sells his land to the husband and his heirs, the wife of the bargainee shall be endowed against his heir, but not against the issue in tail. So, if tenant in tail grant all his estate to one and his heirs, though it be of things which lie merely in grant, as rent, common, advowsons, &c. yet the wife of the grantee shall be endowed till the grant be

avoided by the issue in tail. The reason of which difference between those descendible freeholds, and these estates made by tenant in tail, seems to be, that, in the first case, the estate in its creation seems to be no greater than a freehold; but in the other nothing appears to the contrary, but that it may be an absolute fee, and till the issue comes in to shew it otherwise, and claim his right, it shall, to all intents, be regarded as such; and, by consequence, the wife of such grantee or bargainee is well dowerable thereof till the contrary appears.

If tenant in tail be attainted of treason, and the king grant the land to one and his heirs, the wife of the grantee shall be endowed; for the king had a qualified fee, so long as the tenant in tail had issue; and this qualified fee passed to the grantee. *Plow. 557.*

But, if tenant in tail covenant to stand seised to the use of himself for life, and after to the use of his eldest son in tail, and after marry, and die, yet his wife shall be endowed; because when he limits an estate for his own life, he hath executed all the power he had over the estate by such manner of conveyance, and the remainder is merely void; and he continues tenant in tail, as he was before. So, if he had covenanted that the land should descend, remain, or come to his son after his death; yet his wife should be endowed; for this is only a covenant to permit his son to have what he ought not to hinder him of, and makes no alteration of the father's estate.

body, for the life of the lessee, and after the lessor dies, living the lessee, the wife of the lessor shall be endowed, because this amounts to a surrender. *Ro. Abr. 677.*

If there be tenant in special tail, remainder to him in general tail or fee, and his wife die without issue, and he marry again, and die, his wife shall be endowed; for by the death of his first wife without issue, he was become tenant in tail after possibility, &c. which being but an estate for life was merged by the accession of the remainder in tail or fee; and so his second wife dowerable.

*Ro. Abr. 677.
Brook, 25.
Perk. p. 338.*

If *A.* seised in fee covenant to stand seised to the use of himself and his heirs, till *C.* his middle son take wife, and after to the use of *C.* and his heirs; and after *A.* die, and this descend to *B.* his heir, who dies, and then *C.* take wife; it seems the wife of *B.* shall lose dower, because the estate of the husband ended by express limitation made before her title of dower began; and therefore her dower, which is derived out of it, cannot continue longer than the original estate.

*Between Flavil and Ven-
trice; but qu.
for the court
was divided
upon it. Ro.
Abr. 676.*

Of an estate to a man and his wife, and the heirs of their two bodies; if such wife die, and he marry a second wife, and die, such second wife shall not be endowed, because the issue by her cannot inherit *per formam doni*.

*Fide Brook,
19. 36. Cro.
Ja. 615. Litt.
§ 53. 8 Co. 36.
Co. Litt. 19. a.
2 Inst. 336.
a. Perk. 302.*

Co. Litt. 31. Leon. 66. 3 Leon. 80. Noy, 66. Brook, 9. Dyer, 41. a. Perk. 302.

The husband must have the freehold and inheritance in him *simul et semel*, otherwise the wife shall not be endowed; there-
fore, *Ro. Abr. 677.
Perk. 335.*

Brook, 6. *Vide* fore, if lands are given to the husband for life, remainder to *B.*
 Cro. Eliz. 564. *A.* tenant for life, remainder in tail, remainder to the husband in fee or in tail, and he dies
 living *B.* or any of his issue, his wife shall not be endowed.
 to trustees for ninety-nine years, remainder to *A.* in tail; *A.* dies; his wife shall be en-
 dowed, notwithstanding the intermediate estate for years. Salk. 254. Bates's case, Ld.
 Raym. 326. See the next case but one.

Perk, 348. If a lease is made for life, rendering rent, and the lessor mar-
 ries and dies; his wife shall not be endowed either of the rent or
 Brook, 44. 60. of the land: not of the land, because her husband was not seised
 39. Co. Litt. of the freehold thereof during the coverture, and the rent was
 32. a. Perk, but a freehold for life. But, if a lease is made for years, ren-
 335. 336. Ro. dering rent, and the lessor marries, and dies, his wife shall have
 Abr. 678. dower of the third part of the reversion, and of the third part of
 Brook, 6. the rent, as incident to it; because he had the freehold and in-
 But, if a lease heritance in the land *simul et semel*; but she shall not be en-
 for life or dowled of the rent *per se*, merely because her husband was not
 years be made seised of any freehold or inheritance in it. But, if no rent be
 by the hus- reserved on the lease for years, then *cesset executio* during the
 band after the term; and therefore, if a lease be made for years, remainder to
 marriage, then *J. S.* and his heirs, the wife of *J. S.* shall be endowed; but *cesset*
 his wife shall *executio* during the time.
 have her
 dower dis-
 charged of
 them, as she
 shall from
 other charges of her husband. Co. Litt. 32. a.

Duncombe v. In dower upon *ne unques seisie que dower* pleaded, the case
 Duncombe, was thus: *A.* tenant for life, remainder to *B.* and his heirs for
 3 Lev. 437. the life of *A.*, remainder to the heirs male of the body of *A.*,
 (a) The books remainder over; *A.* marries, and dies without issue; and if the
 give no other remainder to *B.* and his heirs, during the life of *A.*, was such
 reason for an interposing estate between the estate for life to *A.* and the
 this distinc- remainder to him in tail, that his wife should not be endowed,
 tion, but that was the question? And for the demandant it was said, that all
 it would be the estate was really in *A.*, and the remainder to *B.* for the life
 giving the wife of *A.* was but a possibility; that if *A.* should commit a forfeiture,
 a larger estate then *B.* might take advantage of it to preserve the remainder;
 than the hus- and though, by reason of this possibility, the estate for the life
 band had, of *A.* is not merged, yet the tail is executed to such purpose
 whereas she is that his wife shall be endowed. But the court, on the first ar-
 in only in the gument, gave judgment against the demandant. The (a) reason
per, and contin- seems to be, because the husband was not seised of the freehold
 uance of and inheritance *simul et semel*.
 her husband's estate. [The true reason is, that the re-
 remainder to *B.* mainder to *B.*
 was an intervening *vested* estate, and not a possibility. Fearn's C. R. 509-10. 4th ed.]

Hooker v. [Lands were conveyed to the use of *A.* and his wife for life,
 Hooker, Ca. remainder to the use of *B.* the son of *A.* for life, remainder to
 temp. Hardw. the first and other sons of *B.* in tail, remainder to *A.* in fee; *A.*
 13. 2 Barnar- and his wife died in the lifetime of *B.*, who afterwards died with-
 dist. B. R. out issue, leaving a wife: the question was, whether the wife of
 200. 232. 379. *B.* was entitled to dower in the lands? And it was decreed
 S. C. she was; for that the estate for life in *B.* was merged by the
 descent

descent of the inheritance upon him, and the contingent remainder destroyed.]

If the husband is seised of a joint estate, and dies, his wife shall not be endowed; as, if lands are given to two men and their heirs, or the heirs of their two bodies, and one of them dies, his wife shall not be endowed, but it shall go to the survivor, who is then in from the first feoffor or donor, and may plead it as an original feoffment or gift to himself; and so is paramount to her title of dower, which is not complete till her husband's death.

estate to two, in order to prevent the mortgagee's wife of dower.

So, if lands are given to two men, and the heirs of the body of one of them, and he who hath the tail marries, and dies, leaving issue; yet his wife shall not be endowed, but the survivorship shall take place; nor, though the survivor die after, shall the wife be endowed, because the husband, during the coverture, was not seised of an estate whereof she was dowable.

Father and son jointenant, to them and the heirs of the son, were both hanged out of one cart for felony; the wife of the son brought dower, and upon *ne unque seisie que dower* pleaded, this matter was given in evidence; and further, that the son survived*, as appeared by shaking his leg; and adjudged she would be dowable.

I think there is a case in the civil law where father and son were lost at sea in the same ship, and adjudged the son survived, as being according to the course of nature, and it was reasonable to suppose (being of full age) he was able longer to resist the force of the waters than the father, who, being much older, might be presumed to be weaker.

Of a tenancy in common a woman shall be endowed, for there no survivorship takes place, but each moiety descends to the respective heirs of the respective tenant in common; and in such case a dower shall be assigned in common too, for she cannot have it otherwise than her husband himself had.

¶ A man seised of a copyhold in fee in a manor, by the custom of which the wife of every copyholder that died seised of any estate shall be endowed, becomes bankrupt; the commissioners bargain and sell the land; the bankrupt dies; the deed is enrolled. It was holden, that the wife should not be endowed: for now by relation he did not die tenant; and this confirms what Lord *Coke* says, that the estate shall pass by relation, even to strangers. So, if one bargains and sells land, and takes a wife, and dies, and then the deed is enrolled, the wife of the bargainor shall not have dower; for by the relation, the estate passed before she was his wife. And by the same reason, if the estate shall be said to pass as to strangers *ab initio* for their disadvantage, it shall pass for their advantage: and therefore if a bargain and sale be made to a man, and he die, and then the deed be enrolled, it seems his wife ought to be endowed.

Mr. Sugden's note (5) in page 208. of his edition of Gilbert's Uses,

Co. Litt. 37. b.
Br. Dower, pl.
4. 84. Cro.
Car. 191.
which last
book says it
was the an-
cient course in
mortgages, to
make the
wife of dower.

Perk. 334.

Broughton v.
Randal, Cr.
El. 503. Noy,
64. S. C. But
the case as
reported is
upon another
point. — * I

Co. Litt. 34. b.
37. a. Litt.
944, 45.

Parker v.
Bleeke, Cro.
Car. 568.
Gilb. Uses,
291-2.

Gilb. Uses,
96. and Sheph.
Touchst. 226.
contr. but see

Smith v.
Smith, 5 Ves.
189.

Where an estate had been purchased with a partnership fund, but conveyed to one partner under a specifick agreement that it should be his, and he should be debtor for the money, the right of the wife to dower out of this estate was established against the assignees under a joint commission of bankruptcy.||

4. *Of its Continuance ; wherein of Estates conditional, suspended, determined, or extinguished ; and therein of Remitters to the Heir, and Recoveries by Title Paramount.*

See Co. Litt. 241. a. note 4. As to its continuance ; in some cases this is material, and in some not : and therefore if donee in tail of rent or land marries, and dies without issue, and the donor enters ; yet the wife of the donee shall be endowed, though in this case the estate-tail has no continuance ; for dower is such an incident to an estate-tail, that if one make a gift in tail, upon condition that the wife of the donor shall not be endowed, this condition is repugnant and void.

Perk. 317.
Brook, 18. 86.
Bulst. 163.
Vaugh. 40.
F. N. B. 149.
8 Co. 34. Co.
Litt. 31. 6 Co.
41. Co. Litt. 224. a.
Dyer, 343. pl.
58. Perk. 348.
Brook, 44.
Co. Litt. 32. a.
241. a. Plow. 155. F. N. B. 149.

But, if a rent be reserved to the donor and his heirs upon such gift in tail, the wife of the donor shall be endowed of such rent no longer than the estate-tail continues.

Plow. 156.
Co. 87. Brook,
51. Perk. 327.

If one grant a rent out of his land to *J. S.* and his heirs, upon condition, that if the grantee die, his heir within age, that then, during such nonage, the rent shall cease ; if the grantee die, his heir being within age, yet the wife of the grantee shall be endowed ; but *cessabit executio* during the nonage of the heir ; for such condition is part of the original constitution and nature of the rent, and then the wife can have it in no other manner than her husband had it granted to him.

6 Co. 79.
7 Co. 65. S. P.

If the husband seized of a rent in fee, or fee-tail, release it to the tertenant, the rent is extinguished by it ; and yet, as to the wife, has such continuance, that she shall have dower thereof ; which the husband, by his own act, cannot debar her of.

Ro. Abr. 677.
(14, 15.) So, if a disseisor die seized, and the disseisee abate, yet the wife of the disseisor shall be endowed. So, if tenant for life surrender, or grant his estate to the husband in reversion upon condition, the wife of the reversioner shall be endowed till it be broken. Ro. Abr. 677. Brook, 74.

Leon. 168.
and *Anderson*
holds she shall be endowed after, which

If a feoffment be made to the use of *J. S.* and his heirs, till *J. D.* hath done such a thing, and then to the use of *J. D.* and his heirs ; if *J. S.* die, his wife shall be endowed till the thing performed.

seems not reasonable, because his estate is then determined by express limitation, to which it was at first subject ; but for this *vide* Perk. 317. Litt. § 357. 2 Co. 59. 79. Ro. Abr. 678. Brook, 62.

If land be mortgaged to the husband in fee, and the condition be broken; and after, upon agreement, the mortgagor have the land by payment of the money; yet the wife of the mortgagee shall be endowed; for by non-payment of the money at the day, the estate of the mortgagee was become absolute, and his wife entitled to dower thereof. So, if the money was paid at the day, yet if paid by a stranger, who was no ways privy to the condition, the wife of the mortgagee shall be endowed; for conditions being in law taken strictly, if they are not complied with, according to the terms thereof, it is as if they were not performed at all; and so the wife, who is a stranger, shall not be prejudiced thereby.

dower is avoided; for the husband's estate was *ab initio* incumbered with equity, and in that court the mortgagee is considered as a trustee for the mortgagor. Hard. 465. Abr. in Equity, 311.

If tenant in tail discontinue in fee, and after take a wife, and disseise the discontinuee, and die seised, his wife shall not have dower, because the issue is remitted to the ancient entail, which, being a restitution to an ancient right, must take place of the dower of the wife of a subsequent wrongful estate, in as much as the estate of which she is dowable is defeated.

So, if a man hath title of action to recover any land, and he enters, and disseises the tenant of the land, and dies seised, upon which his heir enters; now he is remitted to the ancient right which his ancestor had; and, by consequence, the wife of the ancestor shall lose her dower of the wrongful estate her husband had, which is determined and gone by act of law.

and his wife, mother of the tenant in special tail, and that after his father discontinued the tail by fine to a stranger, and took back an estate by grant and render in general tail, and had issue the tenant; and the first wife died, and his father married the demandant, and died, and so he is remitted to the first entail; to which the court clearly agreed, and gave judgment that the demandant should be barred. 44 E. 3. 26. Brook, 14. S. C. but *qu.* at this day, since the statutes of 4 H. 7. c. 24. and 32 H. 8. c. 28. if the issue shall be remitted upon such fine, for these statutes seem against it, and then the wife shall be endowed.

If there are father and son, and the father exchanges lands with a stranger, and dies, and the son marries, and enters into the land taken in exchange; and the stranger, being empleaded for his lands, vouches the son as heir, who enters into the warranty, and loseth, and thereupon execution is had accordingly, and then the son dies; his wife shall not be endowed of the lands taken in exchange; because the recovery thereof against her husband hath relation to the time of the exchange made, which was before her title of dower began.

If a disseisor makes a feoffment in fee with warranty, and the feoffee marries, and the disseisee brings a writ of entry in the *per* against the feoffee, who vouches the feoffor, &c. and each recovers in value against the other, and they have execution accordingly, and the feoffee dies, his wife shall have dower of the land recovered in value, but not of the land lost, because by title paramount: but, if one recovers in value against the husband

Ro. Abr. 679.
Perk. 392.
Brook, 11.
Cro. Car. 191.
though this be the express doctrine in the common law courts, yet in Chancery when the mortgagor comes to redeem, even the woman's

F. N. B. 149.
Co. Litt. 331. a.
332. b.

F. N. B. 149.
In dower, the tenant shews that land was entailed to his father, husband of the demandant,

Perk. 309.

Perk. 322.
F. N. B. 150.
If two coparceners in gavelkind make partition, and one marries, and the other is empleaded

for his part, husband by warranty of his ancestor, and the husband dies, his wife shall be endowed of the land recovered from him, because aid of the other coparcener, who joins in aid with him, and the demandant recovers, and the tenant hath *pro rata* of that which remains in the possession of the other coparcener, who after dies; his wife shall not have dower of that which was recovered *pro rata*, because the recovery hath relation to the death of the ancestor, which was paramount to her title of dower.

5. *Of the Value and Improvement of the Husband's Estate, either in his Lifetime, or after his Death.*

Co. Litt. 32. a. If the husband makes a feoffment in fee of land, and the
Perk. 328. feoffee builds thereon, and improves the same greatly in value;
If a disseisor yet the wife of the feoffor shall have dower only according to the
or feoffee upon condition, im- value it was of in the husband's time; for if such feoffment were
prove the with warranty, the heir would be bound to render only the value
lands of the as it was at the time of the feoffment.
husband by building, &c. and the husband enter on the disseisor, or for the condition broken, he shall have all the improvements, because the estate of the one was tortious, and the other uncertain; and it was their folly to make such improvements. But, if the husband had died before such entry, and his wife had recovered dower; Q. if she should have the third part of such improvements, for her husband was never seised.

Co. Litt. 32. a. If the heir improve the land by building or sowing it, the wife
2 Inst. 82. shall recover her dower with the improvement upon it, because
by her husband's death her title to dower was consummate, and
the improvements as to her part were *quasi* upon her land; for
which reason likewise, if the land be impaired in value in the
time of the heir, she shall share in the loss, unless it were voluntary by the heir himself, and then she shall recompence herself in damages against him.

Perk. 329. If If the husband himself, or his feoffee, pull down houses, &c.
the husband and then the husband die; it seems, the wife hath no remedy
sow part of the for those houses, because, before her title was consummate, the
land, and die, thing itself was destroyed.
and this part be assigned to the wife for dower, whether the wife or the executor of the husband shall have
the crop, Q. & vide Dyer, 316. 2 Inst. 81. || In the case of Fisher v. Forbes, Vin. Abr. tit.
Emblements, pl. 82. it seems to have been taken as settled, that a dowress is entitled to the
emblements, because dower is considered as an exerecence or continuance of the estate of
the husband.||

(C) Of the Things requisite to the Consummation of Dower, *viz.* Marriage, Seisin, and the Death of the Husband.

1. *Of the Marriage, how long it must continue; and therein of the several Sorts of Divorces.*

Perk. 306. It IF a man make a contract of matrimony with a woman, and die
was formerly before the marriage be solemnized between them, she shall
held that a have no dower, because she never was his wife.
woman married in a chamber should not have dower, 16 H. 3. and that the marriage should be celebrated

in facie ecclesiæ; but the law is now altered, and marriages in private houses, if all circumstances are complied with, are held good; and that God is not less present in such houses than in the most sanctified places. Perk. 306. F. N. B. 150. But see 26 G. 2. c. 33.

If a woman make a contract of matrimony with *J. S.*, and then marry with *J. D.*, who is seised of lands, and die, she shall have dower of the lands of *J. D.* Perk. 305. But, if a man marry a second wife, living the

first, and die, such second wife shall have no dower. So, if a woman marry a second husband, living the first, and the second husband die, she shall not have dower of his land. *Id.* 304-5.

Upon issue of *ne unques accouple en loyal matrimony*, the bishop ought to certify, that they were accoupled in lawful marriage, though the man be under fourteen, or the wife above nine, and under twelve years of age at his death, because it was a good marriage till avoided, which now cannot be after his death. But, if either disagree to the marriage at their age of consent, then it is avoided *ab initio*, and the wife shall have no dower. Co. Litt. 33. a. Dyer, 305. 313. 369.

In dower, upon *ne unques accouple en loyal matrimony*, and issue thereupon, a writ was awarded to the bishop, who certified that the demandant was accoupled *in vero matrimonio cum prædicto B. sed clandestino, & quod B. & E. (demandant) thori & mensæ participatione mutuo cohabitaverunt usq; ad mortem prædict. B. and judgment thereon given for the demandant, and error brought and assigned (inter alia) that there was neither day nor place of the marriage mentioned in the bishop's certificate: but the court held it not material nor issuable, because the certificate from the bishop is concluding. 2. That the certificate is not good, because it did not answer to the words of the issue, *ne unques accouple en loyal matrimony*; for that it was a true matrimony, and that they lived together at bed and board, is but argumentative that they were *legitimo matrimonio copulati*: but the court disallowed this exception; for *vero matrimonio*, though *clandestino, copulati fuerunt*, is as good as *legitimo matrimonio*, and hath all one intendment; and though it be *clandestino*, yet it doth not vitiate the marriage; and when it is added, that *thori & mensæ participatione cohabitaverunt, &c.* this proves they continued as husband and wife during his life, and therefore it is not to be questioned now; and the judgment affirmed. Wickham v. Enfield. Cro. Car. 351. But for this vide Brook, 54. Dyer, 313. 368. 305. Co. Litt. 33. b. 9 Co. 19.*

[A marriage in *Scotland* (supposing the parties not to go thither to evade the laws of *England*) is undoubtedly such a marriage as will entitle the woman to dower in this country. And as the lawfulness of it may be tried by a jury, a replication to a plea of "*ne unques accouple*" in a writ of dower, alleging a marriage in *Scotland*, may conclude to the country.] Ilderton v. Ilderton, 2 H. Bl. 145.

If there be a divorce *causâ adulterii*, yet the wife shall be endowed; for this does not dissolve the marriage, but only separates the parties *a mensâ et thoro*, and the marriage still so continues in force, that if either of them marry any other, such marriage is void. Powell v. Weeks, Noy, 108. adjudged. Godb. 145. [S. C. by the name of Lady

Stowell's case. 1 R. Abr. tit. Baron and Feme (A. pl. 21.) S. C. by the name of Stowell v. Wikes. Cro. Car. 463. S. C. cited. Co. Litt. 32. a. 33. b. But in R. Abr. tit. Dower, (P. pl. 13.) (which

13.) (which seems to be a report of Lady Stowell's case,) "if the wife be divorced for adultery, (which does not dissolve the bond of marriage by the canon law, nor of our church "in this realm, but is only *a mensâ et thoro*;) yet this shall bar her of her dower." The divorce for this cause is no bar of itself, because not *a vinculo matrimonii*; but adultery is a bar, and the divorce is evidence of it.]

Cro. Car.
492-3. Porter's
case. A wife
shall be en-
dowed not-
withstanding
a divorce *causâ*

So, a divorce *propter sævitiam* or *metum* is of the same nature, and does not dissolve the bond of matrimony, but is only a provision for the woman's safety, that she may avoid her husband's cruelty and ill usage: and therefore, the wife in such case shall be endowed the rather.

professionis, for which *vide* Ro. Abr. 681. 2 Leon. 169. Moor, 226. Cro. Car. 462. 2 Inst. 687. Co. Litt. 32. but *vide* 32 H. 8. c. 38. by which it seems that this and other scrupulous divorces are taken away.

Ro. Abr. 681.
Co. Litt. 32.
a. 33. b. 7 Co.
70. 5 Co. 98.
2 Leon. 169.

But, if there be a divorce *causâ præcontractus*, *causâ consanguinitatis*, *causâ affinitatis*, or *causâ frigiditytis*, the wife shall not be endowed; for these dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again. But, if either of the parties die before such sentence of divorce be actually pronounced, it cannot be pronounced after; and therefore if the husband die before such divorce, his wife *de facto* shall have dower, for it was *legitimum matrimonium quoad dotem*, and the bishop ought to certify that they were *legitimo matrimonio copulati*.

Fulliam v.
Harris, Cro.
Ja. 217.

In dower, the writ was *præcipe A. quod reddat B. rationabilem dotem suam* of the lands, &c. *dudum C. quondam viri sui*; and for not saying, *præcipe quod reddat B. quæ fuit uxor C. &c.* that so she might appear to have title of dower as his wife, it was held ill; and that *quondam viri sui* would not sufficiently help it.

2. *Of the Seisin, either in Fact or in Law; and herein of the Seisin in Fact, as it is continuing, or not continuing, as instantaneous.*

Perk. 304.
Co. Litt. 31.
358. Litt.
§ 681. 8 Co.
34. 36. F. N. B.
149. Stanf.
Prer. 41.
Brook, 66. 75.
* Though a
stranger
abates. Perk.
371.

The husband must be seised either in fact or in law, to entitle his wife to dower. But a seisin in law is sufficient for that purpose, because otherwise it would be in the husband's power to defeat his wife of a subsistence after his death, by his own negligence or malice, and she cannot enter to gain a seisin in his right, as he may do into lands descended to her; which is the reason, that of a seisin in law a man shall not be tenant by the curtesy; and therefore if the ancestor die seised, and the husband * die before he enter into the land, yet his wife shall be endowed, though he had but a possession or seisin in law.

Perk. 372.

So, if a lease be made for life, remainder to *J. S.* in fee, who marries, and the lessee die, and then a stranger enter and intrude upon the possession, and *J. S.* die before any entry made by him, yet his wife shall have dower.

Brook, 35. 66.
71.

If the husband purchase rent, and die before the day of payment, yet his wife shall be endowed, nay, though the day of payment be come, and the rent be tendered to the husband, who will

will not receive it, but utterly refuses it, and dies before any receipt thereof by him, or any other for him, and before any thing paid in the name of seisin thereof. Perk. 373.

But, if there be neither seisin in fact, nor seisin in law, in the husband during the coverture, but only a right of entry or action, then his wife shall not have dower; and therefore, if a man be disseised, and then marry, and die before any entry made by him, his wife shall not be endowed of that land. Perk. 366. So, if the father die seised, and a stranger abate, and then after the heir marry, and die

before entry, his wife shall not have dower; because by this abatement the seisin in law, which he had, was devested before his marriage; and so he was neither seised in fact, nor in law, during the coverture. Perk. 367.

So, if exchange be of lands between *A.* and *B.*, and *A.* enter into the lands of *B.*, and then *B.* marry, and die before any entry into the lands of *A.*, his wife shall not have dower of those lands. Perk. 369.

If one enfeof a stranger, upon condition to be performed on the part of the feoffee, and after marry, and then the condition be broken, and the feoffor die before any entry made, his wife shall not have dower; because there was no seisin at all in the husband, during the coverture. Perk. 368.

So, if a man make a bargain and sale to one and his heirs by indenture enrolled, with a *proviso*, that if such act be done, the bargain and sale shall be void; and after the bargainor take a wife, and then the condition be broken; and before entry the bargainor die; his wife shall not have dower; for though the estate of the bargainee vested by 27 H. 8. c. 10. of uses; yet, because the husband did not re-enter, the estate of inheritance in the bargainee was not devested, nor had the husband any seisin during the coverture. 6 Co. 34. Fitzwilliam's case; but, if the words had been, that after the condition broken, the bargain and sale should be to the use of the bargainor in fee,

Q. because then the statute revests the possession in him again according to the use.

In some cases, though the husband be seised in fact, yet his wife shall not have dower; as, of an instantaneous seisin (*a*); and therefore, if two jointenants are, and one of them makes a feoffment of his part, and dies, his wife shall not be endowed, because he was sole seised but for an instant when he made the livery. So, if *cestui que use* (*b*) after the statute 1 R. 3. c. 5. and before 27 H. 8. c. 10. had made a feoffment in fee, and died, his wife should not be endowed, because her husband was seised but for an instant. Co. Litt. 31. F. N. B. 150. Ro. Abr. 676. Moor, 56. (*a*) [The proposition, that in the case of an instantaneous seisin, the wife shall not be endowed, though here

laid down broadly, is by no means general. When, indeed, the same act which gives the husband the estate, conveys it out of him again; when he is the mere instrument of passing the estate; the transitory seisin gained by such an instrumentality does not in general seem sufficient to entitle the wife to dower. But when the land, in the language of Sir *Wm. Blackstone*, 2 Comm. 132., *abides* in the husband for a single moment, that is, as a later writer explains it, (Preston on Estates, tit. Dower,) when he has a seisin for an instant *beneficially for his own use*, the title to dower shall arise in favour of the wife. Thus, in the case put above, where lands descend on a man who is married, and a stranger enters by abatement immediately after the death of the ancestor — there the wife of the heir shall have her dower, and yet the husband has merely a seisin in law, and that for an instant only, for the abatement devested it from him. So, in the case above of the father and son jointenants, who were

hanged.

hanged out of one cart, where the question depended on the priority of their death. And, where a husband *tortiously* gains an instantaneous seisin, as against the person benefited by, and deriving an estate in virtue of, such tortious act, the wife is entitled to her dower. Thus, in Matthew Taylor's case in C. B. 34 El. cited in Sir W. Jon. 317. where tenant at will, or for years, makes a feoffment in fee, and dies, and his wife brings dower, the feoffee cannot plead that the husband was never seised; for as the court there say, in an instant he gained a seisin, or as it is better explained *supra* tit. *Disseisin* (A), since the feoffee received his estate from him, he is estopped to say that the husband was never seised: besides, in respect of the feoffee the feoffor had an estate, though in regard to the disseisee he is to be considered as a wrong-doer. (b) It may be questioned whether either of these instances will support the doctrine here advanced, *viz.* that there cannot be dower in the case of an instantaneous seisin. In the first, the husband is never *solely* seized during the coverture: for when he makes the feoffment he is seised *jointly* with his companion: the tenancy is not severed *until* the husband has made the conveyance, and departed with all his right and estate; and, consequently, during all the time he hath seisin of the estate, he hath it *jointly* with some other, and not *solely* by himself. In the other instance, *viz.* of the *cestui que use*, the husband hath not seisin of the land *at any period*: he had merely the *use* with the *power* in virtue of the statute of 1 R. 3. of transferring that quantity of estate in the *land* which he had in the *use*. Preston on Estates, *ubi supra*.]

Ro. Abr. 676. If lessee for life makes a feoffment in fee, or a lease *pur auter*
 Brook, 30. *vie*, and dies, his wife shall not have dower, because he gained
 Cro. Ja. 615. the fee but for an instant, and parted with it again, and this was
 [Seeus, of such no disseisin.
 a feoffment or
 lease by a tenant at will, or for years, for thereby he gains a freehold. Sir W. Jon. 317.
 Br. tit. Disseisor, &c. pl. 67. 12 E. 4. 12.]

Cro. Ja. 615. If tenant in special tail marries a second wife, who is not
 Amcotts v. dowable of the tail, and after makes a feoffment in fee, and dies,
 Catherick, his wife shall not have dower, because he gained the fee but for
 Ro. Abr. 676. an instant.
 S. C.

Co. Litt. 31. So, if conusee of a fine grant and render the land by the same
 Vaugh. 41. fine to the conusor, and die, his wife shall not be endowed,
 Cro. Car. 191. because he had seisin but for an instant.
 3 Leon. 11.

Sneyd v. [So, if a husband become entitled to estates by virtue of sur-
 Sneyd, 1 Atk. renders from tenants by copy of court roll, and grant them out
 442. again by copy of court roll, this instantaneous seisin of the free-
 hold will not entitle the wife to dower.]

3. Of the Death of the Husband.

F. N. B. 150. As to the death of the husband, this is either a natural or a
 Ro. Abr. 678. civil death; but upon a civil death the wife shall not be endowed;
 Perk. 307. Co. as, if the husband enter into religion, and be professed, his wife
 Litt. 33. b. shall not have dower till he be naturally dead; for though upon
 such profession his heir may enter, and a writ of *mortdancestor*
 lies; yet because he could not enter into religion without the
 assent of his wife, and if she had dissented, his profession would
 be void; therefore if she does assent, she in a manner vows
 chastity as well as her husband, and shall have no dower during
 his natural life.

Thorne v. In dower of the lands of A. her late husband, the tenant
 Rolfe, Benl. pleads in bar that A. the husband was in full life at such a place,
 81. Dy. 185. *et hoc paratus est verificare qualitercumq*; curia, &c. the demandant
 S. C. Moore, replies that her husband *obit* at such a place, &c. *et est in ecclesiâ*
 14. S. C. And *ibidem*

ibidem sepultus, et hoc parata est verificare qualitercunq; curia, &c. Ideo considerat. est quod prædict. M. (demandant) doceat de morte, and dictus R. (tenant) de vita viri, et super hoc dies datus est, &c. at which day the demandant examined two witnesses who did not speak directly to his death, but only of their great intimacy with him, and his being gone beyond sea for his religion, and that they had not heard of him in seven years, and concluded that in their consciences they rather think him dead, and the tenant examining no witnesses to prove him living, the demandant had judgment.

in Dyer a case is cited, where the death of the demandant's husband was proved by four witnesses, who agreed in all points, and at the day of the essoign of the tenant he produced

twelve witnesses *de vita viri*, who also agreed in all points; and this was held the stronger proof, and the demandant was barred; for in these cases the rule is *qui melius probat, melius habet*.

(D) Of the Assignment of Dower.

1. By what Persons.

IF a disseisor, abator, or intruder assign dower, this is good, and shall not be avoided, unless they be in of such estates by fraud and covin of the woman, to the intent she may be endowed by them, or recover dower against them, and then this shall be avoided by the entry of him who hath right, though the assignment be indifferently made by the sheriff after judgment of an equal third part.

Perk. 394,
395. 398.
Co. Litt. 35. a.
2 Co. 67.
3 Co. 78.
5 Co. 30.
6 Co. 58.
Plow. 54. b.
Brook, 15. 59.

The reason why such assignment shall bind is, because she had a right to be endowed thereof, and might have compelled them as tertendants to assign her dower thereof, and ought not to expect till the heir will re-enter or sue for recovery of his right; but, if there were covin in her, and yet notwithstanding this should bind the heir, it would encourage such violence and wrong to the heir as would put him to great trouble and expence to recover his right, without any default in him. But an assignment of a rent out of such lands by them shall not bind, because *de jure* not dowable of such rent. *Vide postea*.

If there be two or more jointenants of land, whereof a woman is dowable, and one of them assign her dower thereout, this is good, and shall bind the others, because they were compellable to assign it in such manner: but, if one of them had assigned her a rent thereout in lieu of dower, this should not bind the rest, because they could not be compelled to it by suit.

Perk. 397.
Co. Litt. 35.
2 Co. 67.
[This case of assignment of dower by one of two or more jointenants must be understood to be where the husband has been solely seised during the coverture, and afterwards conveys or devises the lands to two or more jointly and dies; for the wife of a jointenant is not dowable. *Vide supra*.]

If the husband makes several feoffments of his land to several persons, and one of them endows the wife of the feoffor of his part in satisfaction of all that she ought to have of the other feoffees, and she accepts it, this is good: but the others cannot take benefit of it, because strangers thereto, and cannot plead it, nor have they any means to bring the other into court to plead it. But, if the heir assigns her dower in satisfaction of dower out of his own lands, and the lands of the feoffees, then, if a writ of dower be brought against the feoffees, they may vouch the heir, who

Co. Litt. 35.
9 Co. 18.
Perk. 400.
402.

(a) *Per Dyer*, who may (a) plead this for his own safety, lest they recover in value against him.

the alience himself may plead this assignment by the heir. *Vide* Co. Ent. 172. and Cro. Eliz. 842.

Perk. 399. If the husband seised of lands in right of his wife, or jointly with his wife, of lands whereof a woman is dowable, assigns the third part of the same lands to the woman for her dower; this is good, and shall bind the wife, although she survives him, because they might be compelled to it by suit.

Perk. 403, 404. Co. Litt. 35. Brook 63. 94. Ro. Abr. 681. 6 Co. 57. Co. Litt. 38. b. 39. a. 9 Co. 16, 17. F. N. B. 148. (b) But a guardian in chivalry, though he have but a chattel, may after his entry into the land assign dower; for which *vide* Plow. 141. Ro. Abr. 682. Co. Litt. 35. 38. Brook, 20. 9 Co. 17. 2 Inst. 262.

2. Of the Manner; and herein of assigning it by Metes and Bounds.

Ro. Abr. 683. Moor, 12. 19. Which last book says that assignment by the sheriff in such manner is good, if it be equal in quantity.

Ro. Abr. 683. But to a writ of *habere facias seisinam* the sheriff cannot return that he delivered the demandant one of the manors in recompence of her dower.

Perk. 407. Co. Litt. 34. 4 Co. 1. Co. Litt. 169. Brook, 3. But, if the rent be granted by indenture, then it works by way of *estoppel*. So, if by deed poll, or by parol, and she agrees to it, and accepts the rent, she is concluded; *vide* Perk. 410. Dyer, 91. In dower, the tenant pleads in bar assignment to her of a rent out of the same land for her life, *virtute cujus* she was in *dominio suo ut de libero tenemento*, &c. But for not alleging that he was seised of the land at the time of the assignment, so that he might grant such rent, it was ruled against him. *Beaumont v. Dean*, Dy. 361. 2. Leon. 10. S. C. (c) [But see 2 H. 5. 12. the heir assigns dower of lands of which the husband was seised, but the wife not dowable, she is tenant in dower. 30 E. 1. Briefe. 884. If wife be endowed, and afterwards exchange with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband. *Per omnes justiciarios*. Hal. MSS. Co. Litt. 34. b. n. 9. 13th edit.]

Perk. 407. Co. Litt. 34. 4 Co. 1. Co. Litt. 169. Brook, 3. But, if the rent be granted by indenture, then it works by way of *estoppel*. So, if by deed poll, or by parol, and she agrees to it, and accepts the rent, she is concluded; *vide* Perk. 410. Dyer, 91. In dower, the tenant pleads in bar assignment to her of a rent out of the same land for her life, *virtute cujus* she was in *dominio suo ut de libero tenemento*, &c. But for not alleging that he was seised of the land at the time of the assignment, so that he might grant such rent, it was ruled against him. *Beaumont v. Dean*, Dy. 361. 2. Leon. 10. S. C. (c) [But see 2 H. 5. 12. the heir assigns dower of lands of which the husband was seised, but the wife not dowable, she is tenant in dower. 30 E. 1. Briefe. 884. If wife be endowed, and afterwards exchange with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband. *Per omnes justiciarios*. Hal. MSS. Co. Litt. 34. b. n. 9. 13th edit.]

Moor, 59. Dyer, 91. in margine. In dower the tenant pleads that he hath assigned to her, in recompence of her dower, 20 bushels of wheat yearly out of the same

same land for her life; and held a good bar, and in the nature of a rent: but sheep, horses, &c. assigned in recompence of dower are no bar, because they neither issue out of land, nor are of the nature of land.

A woman recovers dower, and hath a writ to the sheriff, who returns that he hath delivered 84 acres to the demandant of the land mentioned in the writ; and afterwards a *scire facias* is brought, suggesting that 60 acres of the 84 assigned to her by the sheriff are a stranger's, not mentioned in the record, and therefore she ought to have a new division; the tenant says that the other 24 acres were parcel of the land recovered, and that she had entered and accepted the 24 acres; and upon demurrer it was adjudged, that she was barred by her acceptance and entry into the 24 acres. Moor, 679.

A woman entitled to dower cannot enter till it be assigned to her, and set out either by the heir, tertenant, or sheriff, in certainty. Ro. Abr. 681. Dyer, 343. Plow. 529. Brook, 16.

Co. Litt. 34. b. 37. a. b. And the reason seems to be from the partiality every one is presumed to have for himself and his own interest; and therefore the law will not allow her in such case to be her own carver. Another reason may be for the better direction of strangers, that they may more certainly know against whom to bring their *præcipe*, which they cannot be so well apprised of, if she might enter privately, and take what part she pleased. But she need not stay for the return of the writ of *habere facias seisinam*, nor for the second judgment. Palm. 265. Howard v. Cavendish. And though she once refuses to accept the part assigned to her by the sheriff, yet may she afterwards enter into it. Dyer, 278.

The assignment of dower must be absolute, and not subject to be defeated by any condition, nor lessened by any exception or reservation; for the wife comes to her dower in the *per* by her husband, and is in, in continuance of his estate, which the heir or tertenant are but ministers or officers of the law to carve out to her; and therefore such conditions or reservations are either totally void, and her estate absolutely discharged from them, or else the estate assigned with such condition or reservation is no bar to her recovery of dower, in an action brought for that purpose; as, if the trees are excepted in an assignment of lands whereof she is dowable, the exception is void. Ro. Abr. 682. 7 Co. 37. Plow. 25. b. 2 Inst. 153. Hob. 153. Co. Litt. 34. b. 241. a. [The dowress holds of the heir; but by the institution of law she is in of the estate of her husband; so that after the heir's assignment, she holds by an infeudation from the immediate death of her husband. Hence it is, that dower defeats descent, because the lands cannot be said to descend as demesne which are in tenure; and the assignment of dower being in the nature of infeudation, and taking place immediately from the death of the husband, there are only two-thirds which descend as demesne. Gilb. on Dower, 395.]

In dower the tenant pleads that he by indenture granted a rent out of the said land to the demandant in recompence of her dower, which she accepted; the demandant confesses the grant of the rent, and her acceptance, but says that in the same indenture was a condition, that if the rent was not paid within such a time after it became due, the rent should cease, and the indenture be void, and shews a breach; and upon demurrer it was adjudged for the demandant, because it was pleaded as a grant; and also because it was upon condition; for rent assigned in recompence of dower, and which comes in lieu of the land, ought to be as absolute as the assignment of the land itself; and therefore

Cro. Eliz. 451. Wentworth's case. Ro. Abr. 684. Co. Litt. 34. b.

therefore the condition annexed is void; or if it should be good, yet it is only annexed to it as a grant, and upon breach thereof she is restored to her writ of dower.

Perk. 414. It is a rule, that when the wife brings a writ of dower, and Ro. Abr. 682. recovers, the sheriff ought to assign it by metes and bounds, if Co. Litt. 34. the thing recovered may be severed; and if the sheriff does not Benl. 87. But return seisin by metes and bounds, it is ill, (a) unless closes certain are assigned by name, or a manor which is known, and an assignment, in a different manner, certain, in lieu of dower of other manors. by the consent of the demandant may be good. Coots v. Lambert, Ro. Abr. Dower, (X) pl. 3. [Sty. 276. S. C. Rowe v. Power, 1 N. R. 1. S. P. According to the report of Coots v. Lambert, in Style, a special verdict found, that the tenant said to the widow thus, viz. *I do endow you of a third part of all the lands my cousin J. S. your husband died seised of.* Roll C. J. to which Nicholas and Ask, justices, agreed, held, that it may be assigned generally of the third part in some cases, and the parties may agree against common right, and that here both parties agreed to take dower in this manner; but *Jermain e contra.* But per Roll C. J. if the sheriff assigns dower, and does it not *per metas et bundas*, it is error, if it might have been so assigned; and where a feme cannot be endowed *per metas et bundas*, she may enter without assignment.] (a) For this *vide* Ro. Abr. 683. Perk. 332. Brook, 72. Co. Ent. 171.

Palmer, 265. Upon recovery of dower, and seisin awarded, the sheriff returns, that he had assigned to the demandant for her dower of a In Longvill's case, Keb. 743. house the third part of each chamber, and had chalked it out to the sheriff was committed for refusing to make an equal allotment of dower, and taking 60*l.* to execute his writ of execution, and an information ordered against him; and equity will relieve against a partial and fraudulent assignment of dower by the sheriff. 1 Vern. 218. 2 Ch. Ca. 160. S. C.

Perk. 411. The wife of a tenant in common shall not be endowed by F. N. B. 149. metes and bounds, for she being in *pro tanto* of her husband's Co. Litt. 32. estate, cannot have it in other manner than he himself had. 34. 37. Brownl. 127. A writ of dower will lie against the heir of a tenant in common, before partition made; for otherwise they might perhaps make no partition at all, and so defeat the wife of dower. Sutton v. Rolfe, 3 Lev. 84.

Co. Litt. 34. || There needeth neither livery of seisin nor writing to any Rowe v. Power, 1 N. R. 1. assignment of dower, because it is due of common right. ||

3. By what Court.

Stainfield v. Viscount Bindon, Cro. Eliz. 364. An assignment of dower by commission *de dote assignandâ* out of the Court of Wards was held no bar of dower at common law, but it ought to have been by writ *de dote assignandâ* out of Chancery, the jurisdiction of which court is not given to the Court of Wards in such case by 32 H. 8. c. 46.

Dyer, 363. Sir Thomas Arundell being attainted of felony, and his wife's Lady Arundell's case, *vide* Co. Ent. 173. *le Record de cel case*, and 2 Mod. 18. S. C. cited. dower saved by act of parliament, she brought her writ of dower against the Earl of Pembroke, and he making default after appearance, a termor prayed to be received, and shewed his lease after the coverture, &c., and the attainder, &c., and that E. 6. granted a commission under the seal of the court of augmentations, to assign the third part of the land of the said Sir Thomas

Thomas Arundell to his wife in dower; and shewed further that, by virtue of the commission, the third part of the rent reserved on the said lease was assigned to her, and this assignment confirmed by letters patent under the great seal, and shewed her agreement and acceptance thereof, and said that this suit was by collusion to defraud him of his term. In this case it was held, *1st*, That the court of augmentations had no power to assign dower to the demandant, or any other woman, but it must be in Chancery. *2dly*, That the assignment of the rent was not warranted by the commission, and then the confirmation could not make that good which was merely void; and it was adjudged for the demandant.

As to endowments in Chancery, it appears by our books, that in former times the widow of a tenant who held of the king *in capite*, whose heir was in ward to the king, was to sue in Chancery by petition for her dower; and after office found that she was the tenant's widow, then she was to make oath in Chancery that she would not marry again without the king's licence; and upon that there went a writ out of the Chancery *de dote assignandâ* to the escheator, to assign to her dower of the third part of all the lands whereof her husband was seised, &c. But, if the heir were of full age at the time of the tenant's death, and the king had the lands only for his premier seisin, then could she not sue in Chancery, because the king was not then guardian, but had the lands only to such special purpose; and therefore to remedy this, was the statute *de prerogativa regis*. c. 4. made, which gives power to the king to assign dower to the widow, though the heir were of full age at the time of the tenant's death. But this power was not so absolutely lodged in the king as to exclude the widow from suing at common law for her dower, by reason of the words *si viduæ illæ voluerint*, which left her at liberty in such case, either to sue to the king in Chancery, or, if she thought fit, to sue the heir in the Common Pleas. But, if the king had committed the wardship to another *durante minore ætate* of the ward, then also at common law the widow had election to sue either to the king in Chancery, because notwithstanding such commitment he still continued guardian; or she might sue the committee at common law, and recover against him, without making the king a party by *ayde prier*, or otherwise, which was ordained by the statute of *bigamis*, c. 3. for avoiding delays in such cases: and when she recovered against the committee, she took no such oath as when she sued to the king in Chancery: yet nevertheless she could not marry without the king's licence, it being against the policy of those times to permit such a widow to marry whom she pleased, since then she might have brought in enemies or foreigners into the king's feud: and in the king's case the fines for alienation still continued.

Another prerogative the king had in those times, that if the heir of his tenant *in capite* entered before livery sued, this was looked upon as an intrusion, and his wife lost her dower by it, by the express provision of *prerog. regis*, c. 13. But this was

Stanf. Prer. 16.
F. N. B. 164.
Brook, 66. 76.
2 Inst. 18.
Keilw. 133.
Brownl. 126.
Co. Litt. 38. b.
9 Co. 16, 17.
7 Mod. 43.

Stanf. Prer. 41.
Brook, 66.
Co. Litt. 30. b.
F. N. B. 149.

meant

meant only of intrusion after office found, which gave the king a title; for if he entered before office found, and died, his wife should be endowed.

(E) Where the Wife shall have her Election to be endowed of one Thing or another, and where of both: And herein of Endowment *de novo*, and the *Dos de Dote*.

Perk. 318, 319.
F. N. F. 149.
Co. Litt. 31. b.

IF the husband seised of lands in fee exchange the same lands with a stranger for other lands, and die, the wife hath election to be endowed either of the lands given or taken in exchange, because her husband was seised of both during the coverture. But she shall not have dower of both; for that would be unreasonable.

Leon. 285.

Husband seised of lands in right of his wife, they both join in exchange of those lands with a stranger for other lands, which exchange is executed; then the husband and wife alien the lands taken in exchange by fine: two judges held, the wife after the husband's death might well enter into her own lands, notwithstanding the fine which was of the other lands; and resembled it to the case of Dyer, 385. where the husband after marriage made a jointure to his wife, and then they both levied a fine thereof *sur conusans de droit come ceo que il ad* of the gift of the husband; and this was adjudged no bar of her dower, because the election to claim jointure, or dower, is not till after the husband's death: and in the principal case judgment was given for the wife.

Perk. 320.

(a) But, if the tenancy escheat by the act of God, as by the death of a tenant, she shall have dower of the tenancy only.

Perk. 321.

The reason is, because

the seignory is determined, during the coverture by act of law, and it is not any disadvantage to the wife to be endowed of the tenancy, for if she be put out of possession of part or all, by more ancient title, the seignory shall be revived in part or in all, &c. *Ibid.*

Perk. 324.

If the husband seised of lands in fee makes a feoffment thereof to a stranger in fee, rendering to him and his heirs 3s. rent, with clause of distress, and dies, and the feoffee endows the wife of the feoffor of the third part of the land for her dower, she shall hold it discharged of any rent, and the whole rent shall issue out of the residue of the land, because the wife shall be endowed of the best possession of her husband during the coverture; and the husband had the land discharged of the rent after

the coverture; and yet because he had also an estate in the rent during the coverture, it seems she may be endowed of that, if she think fit, and waive her dower of the land; but the rent reserved on the feoffment is no more a bar to her to demand dower of the land, than if none at all had been reserved, if she chooses the land.

In some cases, a woman shall be endowed a-new; as, where the lands, &c. assigned to her for dower, are lawfully evicted by elder title; and therefore, if one be seised of two acres by good title, and another by disseisin, and marry, and die, and his wife be endowed of the acre had by disseisin, and after the disseisee enter into the said acre, now she shall be endowed of the third part of the two remaining acres. So, if the disseisee in such case had recovered the acre against the wife, she should have been endowed of what remained, and the entry or recovery being by title paramount to her title of dower, it is as if her husband had never been seised thereof; and therefore she shall only recover the third part of what is left, and not a full recompence for the acre lost.

If one seised of two acres in one county marries, and enfeoffs a stranger of one acre with warranty, and hath issue, and dies, and the issue enters into the other acre, and the wife brings dower against the feoffee, who vouches the issue as heir, and he loses by default; and thereupon the wife hath a conditional judgment, *viz.* against the vouchee if, &c. and the demandant sues execution against the heir, and after is evicted by elder title; she shall have a *scire facias* upon the first recovery against the tenant, to be endowed of the two parts left. Also, upon such eviction she may be endowed *de novo* against the heir. And the same law, if the endowment was in Chancery.

As to the *dos de dote*, if there be grandfather, father, and son, and the father, or, after his death, the son endow the grandmother, the mother shall not be endowed of the grandmother's thirds after her decease, because the grandmother's dower defeats the descent to the father, and by consequence, the father was seised of no more than two-thirds of that land; and therefore the wife of the father was entitled to a third of these two-thirds only, and no more. But, if the grandfather had enfeoffed the father of the whole land, and died, and the grandmother had been endowed, either by recovery or assignment, there the mother should be endowed of the grandmother's third after her decease, because by the feoffment the father was seised of the whole estate, which gave a title to his wife to be endowed of that whole estate: and though the grandmother recovered one-third out of that estate during her life, yet such recovery doth not defeat the operation of the livery, since by that conveyance the reversion of that third is claimed; and, by consequence, the mother shall be endowed of that third when it falls in possession, since the father was actually seised of it during the coverture, by virtue of such livery. If there be grandfather, father, and son, and the two first die, and the mother be endowed by the

Perk. 419.
F. N. B. 149.
Ro. Abr. 684.
4 Co. 122.

Perk. 321. Ro.
Abr. 684.
Brook, 65.
9 Co. 17.

Perk. 315, 316.
4 Co. 122.
Bustard's case.
F. N. B. 149.
Ro. Abr. 677.
Co. Litt. 31.
42. a.

son of a third part of the whole, either by assignment *en pais*, or upon a recovery in a writ of dower, and the grandmother bring a writ of dower against the mother, and recover, she leaves the reversion in her; for the dower was vested in the mother by the assignment or recovery, and is only defeated during the life of the grandmother, whose estate as to the mother is less than her own estate; and, therefore, the reversion is in the mother, and she, after the grandmother's death, may enter into that third recovered from her; and by consequence, the heir may re-enter into the second dower assigned to the mother, upon such recovery against her by the grandmother; for she cannot have both.

Ro. Abr. 677. *A.* seized of land marries *B.*, and aliens to *C.*, who marries *D.*, and then aliens to *E.* and dies, and after *D.* is endowed, and then *B.* hath dower assigned to her of the third part of all the lands, and brings a *præcipe* thereof against *D.*, who vouches to warranty *E.*, who counterpleads upon the matter, and says that *D.* ought not to be endowed, *quia non potest habere dotem de dote*; and adjudged accordingly.

Hitchens v.
Hitchens,
2 Vern. 403.

[Lands, subject to a title of dower, were devised to a person in fee who died leaving a widow; this widow sued for her dower, and recovered a third part of the whole without any regard to the title of dower in the widow of the testator, who did not put her claim in suit. It was holden by the court, that the testator's widow not having recovered her dower, it was to be laid out of the case, and the dower of the devisee's widow was not *therefore* to be looked upon as *dos de dote*.]

(F) What shall be a Bar of Dower, and what not:
And herein of Acts done or suffered by the
Husband solely, or by the Husband and Wife
jointly, or by the Wife solely, either during the
Coverture, or after: And herein of Elopement,
and Detinue of Charters, or Heir.

2 Inst. 349.
Perk. 376.

IF a recovery be had against the husband by collusion, this shall not bar the wife of dower; as, if the recovery be by collusion or reddition, which are always understood to be by collusion, the husband always acting and concurring in obtaining them. But it seems to have been a very great doubt whether a recovery by default should not be a bar; and the better opinion being that such recovery was a bar at common law, therefore the statute of W. 2. c. 4. was made, which ordains, that notwithstanding such recovery by default, &c. pleaded, the tenant shall moreover in bar of the dower shew his right to the tenements recovered; and if it be found that he had no right, then shall the demandant recover her dower, notwithstanding such recovery by default against her husband.

By

By the statute W. 2. c. 4. it appears, that if the recoverer had right, then the wife is barred; therefore, if the heir of the disseisor be in by descent, and the disseisee enter upon him, and marry, and the heir of the disseisor recover by default or reddition in a writ of entry, in nature of an assise, and the husband die, his wife shall not have dower, because he who recovered had right to the possession by the descent: *aliter*, if this disseisin, descent, &c. were after marriage, because the husband was seised before of a rightful estate during the coverture, whereof his wife had title of dower, which cannot be defeated by the disseisin, descent, and recovery, which all happened during the coverture. may say, that long time before her husband was seised, *que lui dower poit*, &c.

Perk. 379, 380.
Ro. Abr. 681.
So, if the husband make a feoffment in fee, and disseise the feoffee, who recovers in assise against him, the wife shall not falsify this recovery directly, but she
Brook, 22. 38.

If a recovery be against the husband by verdict, the wife shall not falsify in the point tried; but she may say, that he might have pleaded a better plea, *viz.* a release of all actions, or of all the right of the demandant; or she may confess and avoid the recovery, but cannot falsify in the point tried against her husband.

2 Inst. 349.
Perk. 382.
Brook, 24.
vide Perk. 383,
which seems
cont.

If in a *præcipe*, brought against the husband, he loses upon a dilatory plea, as upon non tenure, jointenancy, misnomer of the town, &c. the wife may falsify upon a writ of dower brought, by shewing that the demandant had no right. But, if he had right, she cannot falsify the recovery, by shewing that her husband might have pleaded jointenancy, misnomer, &c. for these would have been only in abatement of the writ, and make nothing to the right. But, if she shews that her husband was tenant of the land recovered, and that the demandant had no right or cause of action, but jointly with a stranger, which stranger by deed *in cur. prolat.* released all his right to the husband before the action brought; this is a good falsification of the recovery for one moiety of the land recovered.

Brook, 26.
Perk. 381, 385,
386. A recovery in a *cessavit* shall bar the wife, Perk. 389. If the husband aliens in mortmain, and the lord enters, *quod*, whether this be a good bar? Perk. 390.

If the husband levy a fine with proclamations of his lands, and die, his wife is bound to make her claim within five years after his death; otherwise she shall be debarred of her dower; for though her title of dower was not consummate at the time of the fine levied, yet, it being initiate by the marriage and seisin of the husband, the fine begins to work upon it presently after the husband's death; and if she does not claim it within five years after, she shall be barred.

2 Co. 93.
10 Co. 49. 99.
3 Inst. 216.
Hob. 265.
Moore, 53. 639.
Dyer, 224.
13 Co. 20.
2 Ro. Rep. 69.
409. all against
Plow. 373.

Vide 3 Leon. 50., by which it appears, that though she brought her writ of dower within five years, yet because she did not pursue it till after six years were past, it was adjudged that she could not by a new writ revive her ancient claim, which was barred by the five years lapsed after the husband's death; and it was held, that assignment of dower in the court of wards was no sufficient claim of dower, because she could not have a writ of dower there.

If the husband and wife join in levying a fine, or suffering a common recovery, this shall bar her of her dower totally, because in both cases she is examined upon record by the judges as to her consent; and she having nothing in the lands in her own right, her joining in such acts can be to no other purpose but to bar her dower. But, if the husband be seised in fee, and

Eare v. Snow,
Plow. 515.
10 Co. 49. b.
Cro. Eliz.
Brook, 77.

a stranger levy a fine to him and his wife *sur consance de droit come ceo*, &c. of these lands, and the husband and wife grant and render the same lands to the stranger and his heirs; it seems the wife shall not be barred of her dower, because she is not examined in this case, as she is in the other; and therefore, if this fine *sur grant & render* be pleaded in bar, she may say that she had nothing in the lands at the time of the fine levied.

Bulst. 173.
Leon. 285.
Dyer, 358.

If a jointure be made to the wife during the coverture, and after the husband and wife levy a fine thereof; yet this is no bar to her dower of any other lands of her husband's, because the jointure being made after the marriage, she had election after the death of the husband to refuse it, and claim dower, and not before; and then the fine, levied of the jointure before her time for election of dower was come, can be no bar to her electing of dower when it is come.

Perk. 350.
F. N. B. 149.
Moore, 31. If
lessor marries
the lessee for
years, and dies,
it is said she
shall have

If a woman takes a lease for life of her husband's lands after his death, she shall have no dower, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have dower during these years, because it was her own act to suspend the fruit and effect of her dower during that time.

dower during the term; but it should seem she can have no fruit thereof till the term ended, she having the whole already for years, unless upon recovery of dower the term be merged for the third part so recovered in dower.

Perk. 352, 353.
3 Co. 27.

Though by
this contri-
vance all wo-
men may be
defeated of
their dower as
to estates pur-
chased after
the marriage.

If lands are given to the husband and wife, and to the heirs of the husband, who dies, the wife may disagree to this estate made during the coverture, and then it will be an estate to the husband and his heirs *ab initio*, and so she shall have her dower thereof. But, if the estate be made to the husband and the wife for the life of the husband, remainder to the right heirs of the husband, it should seem she cannot in this case disagree, because the estate upon the husband's death is determined and gone.

4 Co. 1. Ver-
non's case.
Dyer, 91. Co.
Litt. 34. 36.
Brook, 97.
2 Brownl. 132.

By the common law, a woman could not be barred of her dower by any assignment or assurance to her of other lands, or of a rent issuing out of other lands, whereof she was not dowerable (except in the case of dower *ad ostium ecclesiæ*, or *ex assensu patris*); for though such assignment or assurance were made by the husband before marriage or after, or by the heir after his death; and they were expressly said to be in full bar and recompence of her dower; yet might she recover her dower notwithstanding; for she having a right to be endowed of the third part of all her husband's lands vested and fixed in her immediately upon the marriage, and the husband's seisin thereof, this right, like all others, could not be transferred or extinguished, but by a release thereof; and if no such release were made, it continued still in being, for want of the proper means to destroy it; and if it still existed, her remedy was open to recover and reduce it into possession.

One devises lands to his wife during her widowhood, and dies, the wife enters under the will, and afterwards marries again, and brings dower; and this devise was pleaded in bar; and it was held no bar. 1st, Because a will imports a consideration in itself, and cannot be averred to be in bar of dower, without it be so expressed (a). 2dly, Dower cannot be of less estate than for life. And a third reason may be, because her right cannot be barred by collateral recompence. and no averment ought to be taken out of the words of the will. 4 Co. 4. a.—According to the report of this case by *Moore*, it was holden by *Weston* and *Benlows J.* against *Dyer J.* that the devise was a bar of dower.]

Moore, 31. Co. Litt. 36. b. 4 Co. 4. a. (a) [A better reason than this is, that the whole of a will concerning lands must be in writing,

¶ Where a provision in bar of dower was made for the wife after marriage, and, consequently, she was not bound to accept it; it was holden, that if she agreed to such a provision by entry after the death of her husband, she might be barred in a writ of dower by plea "*quod intrando agreeavit.*" By the entry she made her election, and the election bound her, though the agreement did not.]] 3 Leon. 272.

In ejectment the case was, that a man devised his land to his wife till his daughter *M.* should arrive at the age of 19 years, and after to *M.* in tail, remainder over in fee, and devised farther that *M.* should pay after her age of 19 years, to his wife 12*l.* *per annum* in recompence of her dower; and if she failed in payment, that then his wife should have the land for her life: the wife, before the daughter came to the age of 19, brought a writ of dower, and recovered a third part, and after the daughter came to 19, and for non-payment of the 12*l.* the mother entered; and the question was, whether her entry was lawful? It was argued that it was, and that by bringing her writ of dower she had not waived the benefit to have the lands by the devise, because then she had no title to it, but her title accrued after for non-payment of the 12*l.* But, it was adjudged, that she having recovered a third part in dower, she should not have the rent by the will; for it is against the intention of the will that she should have both, and the acceptance of one is a waiver of the other.

Gosling v. Warburton, Cro. Eliz. 128.

One seized of lands in fee held in socage, and of other lands in tail held *in capite*, devises by will in writing the third part of all his lands to his wife in recompence of her dower, and dies; she enters into the third part of the fee-simple lands without bringing her writ of dower; and held, that she was barred from claiming any more.

Dyer, 220. 4 Co. 4.

A man marries an orphan of *London* who had a great portion in the orphan's court there; the husband dies before taking it out, but makes his will, and devises this money to his wife, provided that she should not claim her dower; and yet after his death she brought her writ of dower; and thereupon a bill was brought in Chancery to compel her to release her dower, or renounce the devise, and for an injunction in the mean time; but to no effect, the money belonging to her in her own right, by the custom, for want of the husband's altering the property thereof;

Phaesant's case, 2 Ventr. 340. Chan. Ca. 181. S. C.

(a) If lands, money, goods, &c. are devised to a woman, with-
 thereof; and though he had, yet it was admitted it would have
 been no bar of dower, being totally collateral thereto, though it
 should seem she would in such case have (a) forfeited the money
 by suing for dower.

out saying in lieu or satisfaction of dower, &c. the wife shall have both, because a devise implies a consideration; but, if it be said in lieu or recompence of dower, there the wife cannot have both, but may waive which she pleases; and this has been often adjudged in Chancery. *Axtel v. Axtel*, 2 Chan. Ca. 24. *Lawrence v. Lawrence*, 2 Vern. 365. 1 Eq. Ca. Abr. 218. S. C. 2 Freem. Rep. 234. S. C. 1 Br. P. C. 591. S. C. *Lemon v. Lemon*, Vin. Abr. tit. Devise, (T. c.) pl. 45. *Hitchin v. Hitchin*, Pr. Ch. 133. *Galton v. Hancock*, 2 Atk. 427. *Tinney v. Tinney*, 3 Atk. 8. *Incedon v. Northcote*, id. 436. *Ayres v. Willis*, 1 Ves. 230. *Charles v. Andrews*, 9 Mod. 152. *Broughton v. Errington*, 7 Br. P. C. 12. [However, notwithstanding these cases, devises have been frequently deemed a satisfaction of dower, where the will has been silent, on account of strong and special circumstances; as, where allowing the wife to take a double provision would be inconsistent with the dispositions of the will. *Arnold v. Kempstead*, Ambl. 466. and 1 Br. Ch. Rep. 292. *Villareal v. Lord Galway*, Ambl. 682. and 1 Br. Ch. Rep. *ubi supr.* *Jones v. Collier*, Ambl. 730. *Wake v. Wake*, 3 Br. Ch. Rep. 255. *Boynton v. Boynton*, 1 Br. Ch. Rep. 445. In such case the widow must make her election. But she shall not be put to this election, unless there be a declaration plain, or a clear incontrovertible result from the will that the testator meant that she should not take both. *Foster v. Cooke*, 3 Br. Ch. Rep. 347. *French v. Davies*, 2 Ves. jun. 572. Nor shall she in any case be obliged to make her election till the account be taken, and it appear out of what estates she is dowable. *Boynton v. Boynton*, *ubi supr.* nor shall she be precluded from making it by having accepted an annuity for three years under the will, she during that time having claimed both her dower and the annuity. *Wake v. Wake*, *ubi supr.*] [The law upon this point is so clearly stated by Lord *Redesdale* in giving judgment in *Birmingham v. Kirwan*, that I shall extract the passage from the report of that case:—The principle, that the wife cannot have both dower and what is given in lieu of dower, is acknowledged, both in law and in equity, and the only question in these cases is whether the provision alleged to have been given in satisfaction of dower, was so given, or not. If the provision results from contract, the question will be simply, whether that was part of the contract. But, if the provision be voluntary, a pure gift, the intention must either be expressed in the form of the gift, or must be inferred from the terms of it. It is however to be collected from all the cases, that as the right to dower is in itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated, either by express words, or by clear and manifest implication. If there be any thing ambiguous or doubtful, if the court cannot say, that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported; and to make a case of election, that is necessary, for a gift is to be taken as pure, until a condition appear. This would seem to be the ground of all the decisions. *Hitchin v. Hitchin*, (*ubi supra*), proceeds clearly on this ground, and all the cases seem to have followed it; and the only question made in all is, whether an intention not expressed by apt words could be collected from the terms of the instrument. Cases of this description can be used only to assist the judgment of the court in deciding what may be deemed sufficient manifestation of intention; and the result of all the cases of implied intention seems to be, that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds, &c. That is the ground on which Lord *Camden* decided the case of *Villareal v. Lord Galway*, Ambl. 682. 1 Br. Ch. Rep. 292. notes, S. C. the claim of the annuity was considered as utterly inconsistent with the claim of dower; the directions in the will with respect to the management of the whole estate, the payment of the annuity, and the accumulation during the minority of the child, were inconsistent with the setting out a third part of the estate by metes and bounds; and therefore his lordship thought the implication manifest, that the testator did intend the annuity as a provision in lieu of dower. *Per Lord Redesdale*, in *Birmingham v. Kirwan*, 2 Sch. and Lefr. 452. See also *Pitt v. Snowden*, before Lord *Hardwicke*, 1 Br. Ch. Rep. 292. *Pearson v. Pearson*, id. *ibid.* *Arnold v. Kempstead*, Ambl. 466. and 1 Br. Ch. Rep. 292. *Jones v. Collier*, Ambl. 730. *Boynton v. Boynton*, 1 Br. Ch. Rep. 445. *Wake v. Wake*, 3 Br. Ch. Rep. 255. *Foster v. Cooke*, id. 347. *Middleton v. Cater*, 4 Br. Ch. Rep. 409. *Estcourt v. Estcourt*, 1 Cox's Rep. 20. *Thompson v. Nelson*, id. 447. *Strahan v. Sutton*, 3 Ves. 249. *Conch v. Stratton*, 4 Ves. 391. *Greator v. Cary*, 6 Ves. 615. *Chalmers v. Storil*, 2 Ves. and Beam. 222. *Walker v. Walker*, 1 Ves. 54. *Warde v. Warde*, Ambl. 299. *Garthshore v. Chalie*, 10 Ves. 20. *Birmingham v. Kirwan*, 2 Sch. and Lefr. 444. Lord *Dorchester v. Earl of Effingham*, Coop. 319. It seems to be now settled, after a very considerable difference of opinion, that a gift of a rent-charge to a wife out of the very estate in which she claims dower, will not let in the presumption that the husband meant to exclude her from taking her dower;

Pearson v. Pearson, *ubi supra*. Foster v. Cooke, *ubi supra*. Strahan v. Sutton, *ubi supra*. Greator v. Cary, *ubi supra*. nor will the gift of an annuity out of a fund composed of the produce to arise by sale of the real and personal estates mixed together, have that effect. French v. Davies, 2 Ves. jun. 572. ||

A woman had title to dower of lands, whereof one is tenant for life, remainder to another in fee; the woman releases to the remainder-man all her right of dower: this is a good bar in dower brought against the tenant for life, though she had no present cause of action against him in the remainder, till after the death of the tenant for life. So, of a release to tenant for life, he in the reversion or remainder shall take advantage thereof, because her dower accrues not only out of the estate for life, but also out of the reversion or remainder, and both as to her make but one estate; so that if she discharges either, she discharges the whole.

1 Co. 112 b.
Co. Litt. 265
8 Co. 151.
Edward Altham's case.

In dower the tenant pleads a release from the demandant to such a one tenant *in possessione tenementor. predict. existen.*, and because not said that he was *tenens liberi tenementi*, it was held no plea; and adjudged for the demandant; for a release of dower to tenant for years, or at will, can be no bar of dower, because she cannot demand it against them.

Cro. Ja. 151.

If a woman pretends herself *ensient* by her husband, when in truth, she is not, by which the heir is disturbed of his inheritance; she shall lose her dower if she acknowledge it before the justices.

2 Inst. 436.
But this case may admit of so many distinctions, that

it is hard to make law of it, as it is put, and harder yet, that it should be a bar of her just right. And see the writ *de ventre inspiciendo*.

By the custom of some places the wife shall be barred of her dower, if she receives part of the money for which her husband sold the land, whereof she was otherwise dowerable. So, by the custom of some places, if a widow marries, she shall have no dower of her second husband's lands.

Davies, 30. b
Brook, 53.
tit. Customs

As to elopement, this was no bar of dower at the common law (a), though a divorce were sued and obtained for the adultery: but now by the (b) statute of W. 2. c. 34. it is expressly provided that in such case the wife shall lose her dower; and though she does not go away *sponte*, but is taken against her will, yet, if after she consents and remains with the adulterer, she shall lose her dower; for the remaining with him without reconciliation is the bar of dower, not the manner of going away.

2 Inst. 435.
Co. Litt. 32.
F. N. B. 150.
Ro. Abr. 680.
(a) [Nor is a jointure now forfeitable by elopement or adultery.
Sidney v. Sidney, 3 P.

Wms. 268. Neither will the circumstance of a wife's living separate from her husband in adultery prevent a court of equity from decreeing a specific execution of articles in her favour. Blount v. Winter, in Canc. July 19. 1781. || cited in Mr. Cox's note, 3 P. Wms. 277. Where a bill was filed by a married woman, claiming under a bond given by her husband to a trustee for her separate maintenance, and admitted to have been destroyed by the husband and trustee, by reason of subsequent acts of adultery, the bill was retained, with liberty to the widow to bring an action on the bond. Seagrave v. Seagrave, 13 Ves. 439. || (b) The words of the statute are *si uxor sponte relinqueret virum suum, et abierit et moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, quæ ei competere posset de tenementis viri sui, si super hoc convincatur, nisi vir suus sponte et absq; coercionis ecclesiæ eam reconciliet, et secum cohabitare permittat, in quo casu restituitur ei actio.* Vide Dyer, 107. a precedent of such elopement pleaded, and issue taken upon the reconciliation of the husband, and there held, that the defendant cannot give in evidence any other elopement but that pleaded.

Perk. 354.
Brook, 12.
cont.

Ro. Abr. 680.

2 Inst. 136.

Co. Litt. 32.

13 Co. 23.

If she elope,
and live in
adultery on
any other the
manors or

lands of her husband, she shall lose her dower. 2 Inst. 436. But *vide* Perk. 355. F. N. B.

150. Ro. Abr. 680. *cont.* For the husband is to take care that none such live there. If the husband be reconciled by church censures, yet she shall lose her dower. Ro. Abr. 680.—

* Co. Litt. does not warrant this part of the position.

Dyer, 106. in
margine.

2 Inst. 435.

Ro. Abr. 680.

If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower; but, if after such ravishment she consent to remain with him, she shall lose it. So, if she voluntarily go away from her husband, though she remain all her life-time with the adulterer against her will, or if she remain not with him, but he turn her away, yet shall she lose her dower: but, if she be reconciled as the statute ordains, then she shall be endowed, though the husband aliened * the land in the mean time.

If a man grants his wife with her goods to another, and she lives with the grantee all the lifetime of the husband, yet she shall lose her dower, by reason of living with him in adultery. And where such a grant was pleaded, it was holden, 1st, That the grant was void. 2dly, That it did not amount to a licence; or if it did, that it was void. 3dly, That after the elopement there shall be no averment admitted *quod non fuit adulterium*, though the grantee and the woman married after the husband's death. And though in this case they brought sentence of purgation of the adultery from the spiritual court, yet it was not allowed against such presumption.

Green v. Har-
vey, Ro. Abr.
680.

If the husband's relations keep him from his wife, so that she does not know what is become of him, and give out that he is dead, and thereupon procure her to release all marriages and interest which she can have in him as her husband, and also persuade her to marry again, which she does with one who has notice that her first husband is alive, but she herself has no notice of it; though she lives in adultery with this man, and though her husband be not out of the realm, nor beyond the seas, so that she ought to have taken notice of his being alive, yet because *non reliquit virum sponte*, as the statute says, but by persuasion of his friends, not knowing herself but that he was dead, this is no such an elopement as will bar her of her dower.

4 Co. 17, 18.

Plow. 85.

Perk. 356. 360.

5 Co. 75.

Ro. Abr. 679.

Brook, 1. 4.

39. 41. 47. 48.

53. 57. 67.

Hob. 39. 113.

199. Bendl.

pl. 215. Dyer,

37. pl. 42. 230.

pl. 52. The

reason why

such detinue

of charters is

a good plea

for the heir,

It is a good plea in bar of dower, that the demandant detains from the heirs such charters, shewing them in certainty, unless they are in a bag sealed, or box locked; and then it is sufficient to say that she detains from him such bag or box of charters. But, if the bag or box be open, then the defendant must shew the charter in certain, and after such plea he must add, that if she will deliver them to him, he is, and always hath been, ready to render her dower. Upon this, if she delivers them to him, she shall have judgment for her dower presently; but, if she deny such detainer, and it be found against her, she shall be barred for ever. And it is to be observed, 1st, That these charters ought to concern the land, or the reversion of the land whereof dower is demanded. 2dly, That such detainer is no bar of dower for more lands than the charters concern.

3dly, That

3dly, That none can plead this plea but the heir, and not a stranger, who is tenant of the land, though he hath the charters conveyed to him.

seems to be, because the inheritance by law is cast

upon him immediately after his ancestor's death, without any act of his concurring; and therefore he cannot provide against the injury done him by any precaution or covenant whatsoever: but a stranger, who comes to the land by conveyance, and his own act, ought to take care to have all the deeds and writings, necessary for the defence of his title, delivered to him at the same time, or to secure himself by proper covenants; and if he has not so done, it is his own folly; and he shall take no advantage thereof by pleading it in bar of the demandant's right, but must pursue his remedy by an action of detinue, &c. In what cases the heir himself shall be considered as a stranger, and cannot plead detinue of charters, *vide* 9 Co. 18. Perk. 258. Dyer, 230.

If two coparceners are of land, and after partition made between them the mother brings dower against one of them, she [the daughter] may well plead detinue of charters, because the charters concern her inheritance, though they do also concern her sister, who both make but one heir. Perk. 359.

If the daughter enter into the land after her father's death, who left his wife *ensient*, and the wife bring dower against the daughter as heir, she cannot plead detinue of charters, because it may be that the wife is *ensient* with a son, who will be heir, and therefore may justly detain the charters for him. Perk. 360. Ro. Abr. 679. Brook, 8.

Detinue of a transcript of a fine is not a sufficient cause to detain dower, because another transcript may be had in the treasury. Perk. 360. Ro. Abr. 679. *cont.*

Detinue of charters is no good plea after imparlance: resolved upon a demurrer to such plea in the court of *Durham*, and confirmed on a writ of error in *B. R.* Burdon v. Burdon, Salk. 252. Comb. 183. S. C.

The guardian in chivalry may plead detinue of the heir, because the wardship of the heir belongs to him: but he cannot plead detinue of charters, because they belong to the heir for defence of his inheritance. And the reason why he is allowed to plead detinue of the heir in bar of dower seems, because the writ of dower lies only against him during the minority of the heir; and since the demandant does wrong in detaining from him the wardship, it is but reasonable she should be delayed of her right against him, till she restores it; and therefore he concludes his plea, that if she will deliver to him the ward, he hath been and still is ready to render her dower. So, if the wife takes away the ward, and delivers him to another, so that the guardian cannot have him, this is a good cause to bar her of her dower. So, if the guardian comes in by voucher, he may plead the same plea. And this is a good plea in bar of dower *ad ostium ecclesiæ*, or *ex assensu patris*; if the wife does not enter, but brings her writ, claiming it as dower, whereof she was *nominatim dotata* by her husband. And in these cases if she cannot render the ward unmarried, she shall lose her dower, because she hath thereby deprived the guardian of what was most valuable, *viz.* the marriage of his ward. Dyer, 230. pl. 52. Perk. 360. 363. Ro. Abr. 679. Brook, 47. 67. 9 Co. 18, 19. 10 Co. 94. Co. Litt. 39. a.

If a woman, as mother to the heir, brings him up, and one claims the wardship of him as guardian in chivalry, and takes him from her; this is no cause for the rightful guardian to detain her dower, because she was not in fault. Perk. 362.

Perk 363.

If the mother takes the heir out of the possession of those who had the education of him, and they retake him, so that she cannot deliver him to the guardian, this is a good cause to detain her dower for the wrong done in the eloignement at first, when the wardship did not belong to her.

(G) Of Jointures : And therein of their Origin ; the Statute of 27 H. 8. ; and the Rules to be observed so as to make them an effectual Bar of Dower.

2 Bl. Comm.
137. More v.
Grice, 1 Ch.
Ca. 125. Co.
Litt. 36. b.
4 Co. 2. b.

THE most usual method of barring dower at present is by jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife ; but, in common acceptation, extends also to a sole estate limited to the wife only, and is, according to Lord *Coke's* description, “ a competent livelihood of “ freehold for the wife of lands or tenements, to take effect presently in possession or profit after the death of the husband, “ for the life of the wife at least, if she herself be not the cause “ of the determination or forfeiture of it.”

Gilb. Uses,
Sugden's edit.
48. 321.

A woman, as we have seen above, was not dowable of a use at common law ; for the privilege of dower was only to freeholders' wives, and a use being no freehold, was not within that law, and the Chancery does not allow the feoffees to be seised to the use of any but of those that are particularly named in the trust. It became therefore a practice, for the wife's friends, upon her marriage, to procure the husband to take a conveyance to himself and his wife of some specifick property, as a provision for her after his death. And this was the origin of jointures.

But, though this method was an effectual security to the wife, yet was it highly injurious to the husband and his heirs ; for the maxims of the common law, that no right could be barred before it accrued, and that a right or title to a freehold could not be barred by the acceptance of a collateral satisfaction, allowed her to claim both her dower and the benefit of any settlement that was made upon her. It was foreseen too, that the mischief would be increased by the operation of the statute of uses ; for as every man who had the use of the land would by that statute become seised, a title of dower would accrue to his wife, and if she had already an estate in jointure, she would take a double provision. Clauses therefore were introduced into the statute itself to obviate this injustice, and thus jointures were made a legal satisfaction of dower.

By the 27 H. 8. c. 10. § 6. it is enacted, “ That where divers “ persons have purchased, or have estates made and conveyed “ of and in divers lands, tenements, and hereditaments, unto “ them and their wives, and to the heirs of the husband, or to “ the husband and the wife, and to the heirs of their two bodies “ begotten, or to the heirs of one of their bodies begotten, or to “ the

“ the husband and the wife for term of their lives, or for term
 “ of the life of the said wife; or where any such estate or pur-
 “ chase of any lands, tenements, or hereditaments, hath been
 “ or hereafter shall be made to any husband and to his wife in
 “ manner and form above expressed, or to any other person or
 “ persons, and to their heirs and assigns, to the use and behoof
 “ of the said husband and wife, or to the use of the wife, as is
 “ before rehearsed, for the jointure of the wife; that then in
 “ every such case every woman married having such jointure
 “ made, or hereafter to be made, shall not claim nor have title
 “ to have any dower of the residue of the (a) lands, tenements,
 “ or hereditaments, that at any time were her said husband's, by
 “ whom she had any such jointure, nor shall demand or claim
 “ her dower of and against them that have the lands and inheri-
 “ tances of her said husband; but if she have no such jointure,
 “ then she shall be admitted and enabled to pursue, have, and
 “ demand her dower by writ of dower, after the due course
 “ and order of the common law of this realm; this act or
 “ any law or provision made to the contrary thereof notwith-
 “ standing.”

(a) A jointure
 made of copy-
 hold lands is
 no bar of
 dower within
 this statute.
 Cro. Car. 44.
 4 Mod. 85.

§ 7. Provided, “ That if any such woman be lawfully expelled
 “ or evicted from her said jointure, or from any part thereof,
 “ without any fraud or covin, by lawful entry, action, or by dis-
 “ continuance of her husband, then every such woman shall be
 “ endowed of as much of the residue of her husband's tenements
 “ or hereditaments whereof she was before dowable, as the same
 “ lands and tenements so evicted and expelled shall amount or
 “ extend unto.”

§ 9. Provided also, “ That if any wife have, or hereafter shall
 “ have, any manors, lands, tenements, or hereditaments unto
 “ her given or assured after marriage for term of her life or
 “ otherwise, in jointure, except the same assurance be to her
 “ made by act of parliament, and the said wife after that for-
 “ tune to overlive the same her husband in whose time the said
 “ jointure was made or assured unto her; that then the same
 “ wife so overliving shall and may be at liberty after the death
 “ of her said husband to refuse to have and take the lands and
 “ tenements so to her given, appointed, or assured during the
 “ coverture, for term of her life or otherwise, in jointure, except
 “ the same assurance be to her made by act of parliament, as is
 “ aforesaid, and thereupon to have, ask, demand, and take her
 “ dower by writ of dower or otherwise, according to the com-
 “ mon law, of and in all such lands, tenements, and heredita-
 “ ments, as her husband was and stood seised of any estate of
 “ inheritance any time during the coverture; any thing,” &c.

To make a good jointure within this statute, the six following
 things are to be regarded,

1. *The Estate must [and even be so limited that it must] take Effect immediately from the Death of the Husband.*

Sherwell's
case, Hutton,
51. 4 Co. 3.

Therefore if an estate be made to [*J. S.* for life, remainder to] the husband for life, remainder to the wife for her jointure, this is no good jointure, for it is not within the words or intent of the statute; for the statute designed nothing as a satisfaction of dower, but that which came in the same place, and is of the same use to the wife; and though *J. S.* dies during the life of the husband, yet this is not good; for every interest not equivalent to dower, being not within the statute, is a void limitation to deprive the wife of her dower.

4 Co. 2.
Hob. 151.

So, if an estate be made to the use of *A.* for life, the remainder to the wife for life, this is not good, though *A.* dies, living the husband.

Hut. 51.
Winch. 33.

So, if an estate be made to the husband for life, the remainder to *J. S.* for years, the remainder to the wife for her jointure, this is not good, though the years are expired in the life-time of the husband; [and yet here the wife had the immediate freehold.]

4 Co. 3.

But, if an estate be made to the husband for life, the remainder to *J. S.* for the life of the husband, to support contingent remainders, remainder to the wife for life, this is a good jointure, though not within the express words of the statute, for it is within the equity and design of it.

Winch. 33.
(a) That a jointure within this act by the first limitation must take effect for life in possession or profit presently after the death of the husband, laid down in Co. Litt. 36. b. 4 Co. 2. a. Cro. Ju. 489.

If a man makes a feoffment to the use of himself for life, remainder to the son and his wife, and the heirs of the body of the son, this is no good jointure, though the wife hath an immediate freehold; for to be within the cases of the statute whereby dower is barred, the wife must have (a) a sole property after the death of her husband.

Sid. 3, 4. *per*
Bridgman
Ch. J.

A feoffment in fee to the use of the feoffee for life, the remainder to the use of his second son for life, remainder to the use of such wife as the son shall take, remainder to the heirs of the son; the father dies, the son marries, and dies: the wife is not by this settlement barred of her dower; for this at the time of the creation was no certain provision for the wife's life, for the son might have married and died in the life of the father.

Co. Litt. 133.
Moore, 851.
3 Buls. 188.
Ro. Rep. 400.

A jointure limited to take effect immediately on the death of the husband shall take effect as well on a civil as a natural death; therefore, if the husband enters into religion, is banished, or abjures the realm, the wife shall have her jointure.

2. *It must be for Term of the Wife's Life or greater Estate.*

Co. Litt. 36. b.
4 Co. 2. b.

Therefore, if an estate be made to the wife for the life or lives of many others, this is no good jointure; for if she survives

survives such lives, as she may, then it would be no competent provision during her life, as every jointure within the statute ought to be.

So, if a term for 100 years be limited to the wife, if she so long live, or absolutely, this is no good jointure; for the statute provides, that when the wife hath an estate for life by settlement, she shall be barred of her dower at common law; if she hath any greater estate, she hath an estate for her own life included in it; but, if she hath any less estate, it is out of the statute. Co. Litt. 36.

If an estate be limited to the wife upon condition, [she may waive it, but] her acceptance of such a conditional jointure makes it good; for this estate supports the wife well enough, and it is in her power to continue it during her life; therefore, an estate limited to the wife (a) *durante viduitate* is a good jointure; for it cannot determine but by her act. 4 Co. 3. a. Dy. 228. (a) So, says my Lord Coke, if limited to her upon condition that she shall perform

the will of her husband, &c. this is a good jointure within the words and intention of the act, for that her estate cannot determine without her default. 4 Co. 2. b. 3. a But for this vide Moore, 31. Leon. 311. N. Bendl. pl. 247.

3. That it must be made to herself, and not to others, in Trust for her.

This rule, my Lord Coke says, is so necessary to be observed, that though the wife should assent to a jointure made in trust for her, yet it would not be good; for the statute only bars the dower when by it the possession (which was formerly a use) is executed in her. Co. Litt. 36. b. 1 Atk. 563.

But, as the intention of the statute was to secure the wife a competent provision, and also to exclude her from claiming dower, and likewise her settlement, it seems that a provision or settlement on the wife, though by way of trust, if in other respects it answers the intention of the statute, will be enforced in a court of equity. ||Any provision, however precarious, whether secured out of realty or personalty, which an adult, pre-

viously to her marriage, accepts in lieu of dower, will be a good jointure in equity. Jordan v. Savage, *infra*. Charles v. Andrews, 9 Mod. 152. Williams v. Chitty, 3 Ves. 545. 4 Br. Ch. Rep. 513. S. C. And infants are within this statute, and may be barred of dower by a legal jointure; Drury v. Drury, 3 Br. P. C. 570. 4 Br. Ch. Rep. 506. S. C. Wilmot, 177. S. C. and by an equitable jointure also, provided it be not precarious, but be as certain a provision as is required to operate as a legal bar. Caruthers v. Caruthers, 4 Br. Ch. Rep. 500. Smith v. Smith, 5 Ves. 189. ||

4. It must be in Satisfaction of her whole Dower.

The reason hereof is, that if it be in satisfaction of part only of her dower, it is uncertain for what part it is in satisfaction, and therefore void in the whole: but, if it be expressed of what part, *quære* if good. Co. Litt. 36. b.

If an estate be made to the wife in satisfaction of part of her dower before marriage, and after marriage other lands are conveyed, wherein it is said to be in full satisfaction of all her dower; if she waives the lands conveyed to her after marriage, she shall have dower of all the lands of her husband, notwithstanding the settlement is in satisfaction of part. 4 Co. 5.

5. That

5. *That it must be expressed to be in Satisfaction of her Dower ; therein how far a collateral Recompence shall be a Bar of Dower or Jointure.*

Co. Litt. 36. b. My Lord *Coke* says, that it must be expressed or averred to be in satisfaction of her dower. But *quare* ; for this does not seem requisite, either within the words or intention of the statute.

Owen, 33., and there said, that it had been so likewise ruled between the Queen and
Therefore where an assurance was made to a woman to the intent it should be for her jointure, but it was not so expressed in the deed, the opinion of the court was, that it might be averred that it was for a jointure, and that such averment was not traversable.

Dame Beaumont. So, *Charles v. Andrews*, 9 Mod. 152.

Mich. 6 G. 2. *J. S.* seised of copyhold lands belonging to the manor of *Whitchurch*, in which manor there is the following custom, *viz.* that the first wife of every tenant shall have her free bench in all the lands whereof her husband was ever seised during the coverture ; the second wife a moiety, and the third a third part, so long as she keep her husband above ground ; *J. S.* in consideration of a marriage and marriage-portion covenants with trustees, that within two months after the marriage he would settle all his lands to the following uses, *viz.* as to part of the lands to the use of himself and his wife for their lives, remainder to the first son, &c. in tail male ; and as to the other moiety, to the use of himself for life, remainder to his first son, &c. with a proviso that the lands so settled on the wife should be in lieu of her customary estate ; and one of the points in this case was, whether this jointure not being made expressly in lieu of her dower, but only said so in the proviso, and she being an infant at the time of making the articles, and not a party to them, she should be excluded from claiming her free bench ; and it was holden, that she should be obliged to abide by her jointure. And the case of *Vizet and Longdon* was cited, where a sum of money was settled upon a woman before marriage for her provision and maintenance ; and the Master of the Rolls was of opinion she should have both that and her dower ; but the Chancery reversed the decree, and confined her to her settlement.

Babington v. Greenwood, 1 P. Wms. 5301. || But it hath been holden, that a jointure of land made by a freeman of *London* on his wife, said only to be in bar of her dower, but not expressed to be in bar of her customary part, will be no bar of the customary part. ||

Meredith, v. Jones, 1 Vern. 463. [*A.* in consideration of a portion, articulated to settle a jointure but died before the portion was paid, or the settlement was made. The widow took out administration, and so entitled herself to the portion : she then filed a bill against the heir of the husband to have her jointure settled. But the court said, the plaintiff shall not have the money as administratrix, and the jointure too, which

which was agreed to be made in consideration of the money, and in expectation that the husband should have received it; and therefore dismissed the bill with costs. But the reporter adds a *quære de hoc*; for she is entitled to these two demands in distinct capacities; and the debts may appear hereafter to exhaust the assets; and in case the husband had actually received the portion, and it had been in his possession, she would have had it as his administratrix.]

¶ And upon this maxim, *quando duo jura in uno conveniunt, æquum est ac si essent in diversis*, where *A.* had covenanted that in consideration of 1200*l.* he and all claiming under him would convey to *B.* or pay back the money; and a conveyance being accordingly made, *B.* was evicted by a jointress, who claimed under a settlement made by her late husband, the former owner of the estate; and afterwards *B.* made the jointress his executrix and died; it was adjudged, that she should have both the money and the land; the last as executrix of *B.* the first under her marriage-settlement.

Where by articles made on marriage of an infant in consideration of a sum of money then paid to the husband, a suitable jointure was to be settled on her when of age in bar of dower, and she was to convey her lands to be limited to the husband in fee, and the jointure was accordingly settled, and the wife when of age was party to the deed, but she never conveyed her own estate, nor was she ever required by the husband so to do, though her dower exceeded her jointure; and upon the death of her husband she entered on the settled land; it was decreed, that she was entitled to keep her own estate and the jointure, not being bound either by the articles, or by her acceptance of the jointure.

Where *A.* charged lands in *D.* with a portion for a daughter by a first venter, and then married again, and settled part of those lands for the jointure of a second wife, who had no notice of the charge; and then believing, that the portion would take place of the jointure, devised other lands to the wife in lieu thereof; and the wife by combination with the heir refused to accept the devise; it was decreed that the daughter should hold such part of the lands devised as should be equal in value to the lands comprized in the settlement of the jointure, until her portion was raised.¶

Jason v. Jarvis, 1 Vern. 284.

Lucy v. Moore, Mosel. 59.
3 Br. P. C. 514.

Reeve v. Reeve, 1 Vern. 219. 2 Vent. 363. S. C. rather differently reported. Recognized by Lord Hardwicke in Lanoy v. Duke and Duchess of Athol, 2 Atk. 447.

6. That it must not be made during the Coverture.

¶ Although it be said that the very words of the act require this, yet Lord Coke, whose authority is referred to, says, it may be made either before or after marriage. If it be before marriage, she is sole, and as such, under no man's power; if after marriage, she takes a jointure in satisfaction of dower, she may waive it after her husband's death; but, if she enters and agrees thereto, she is concluded; for though a woman is not bound by any act when she is not at her own disposal, yet if she

Sugd. Gilb. Uses, 333.
Co. Litt. 36.
4 Co. 3.

(a) What shall she (a) agrees to it after she is at liberty, it is her own act, and be said an she cannot avoid it.
agreement or refusal, 3 Co. 26. a. 3 Leon. 272. And. 352. Poph. 88. Gouls. 4. 84, 85.

Co. Litt. 36. b. If a jointure be made to the wife before coverture, and the husband and wife alien by fine, the wife shall not afterwards be endowed of any lands of her husband's; for since she quitted her dower when she was at her own disposal, she can claim nothing but the jointure, and that she has passed away by the fine levied. But, if the jointure was made during the coverture, [otherwise than by act of parliament,] and then she relinquished it by fine, yet she shall have her dower of the other lands; for the acceptance of a jointure during the coverture is no bar of her dower, and her passing it by fine cannot be construed an acceptance of property in them, since that is capable of another construction, *viz.* to bar her of her dower in those lands.

Moore, 717. The husband after marriage settled lands to the use of himself
4 Br. Ch. Rep. and wife in (b) tail, for her jointure, and during the coverture
506, note. part of the lands were evicted, and the husband died, and the
(b) But wife entered into the residue; and upon a reference out of the
whether the court of wards to the two chief justices, it was resolved, that she
part settled in recompence should have a recompence for the part evicted.
should be in tail, or for life only, *quare*; & vide 4 Co. 3. b.

3 Leon. 272. A seignory was granted to the husband and wife, and their
3 Co. 27. heirs, the tenant attorns, the husband dies, and the seignory survives to the wife, and she brought her writ of dower, in bar of which the heir pleads acceptance of homage from the tenant; and this was holden a good bar; for though she might have disagreed to such estate made during the coverture, yet by the acceptance of homage she hath concluded herself; and this case differs from the assignment by the heir *in pais* and her acceptance; because if he gives her a wrong estate, and she accepts thereof, this is no bar of her rightful estate; but here she having two titles, either as a purchaser to have the whole, or as a wife to have the third part, her acceptance of the one is a waver of the other, because she cannot have both out of the same land.

Perk. 352, 353. If lands are given to the husband and wife, and the heirs of
3 Co. 27. the husband, who dies, the wife may disagree to this estate made during the coverture, and then it will be an estate to the husband and his heirs *ab initio*, and so she shall have her dower thereof. But, if an estate be made to the husband and wife for the life of the husband, remainder to the right heirs of the husband, it hath been said that she cannot in this case disagree, because the estate upon the husband's death is determined and gone. [Yet it seemeth, saith Perkins, that she may disagree by bringing a writ of dower, notwithstanding that the estate were determined; for otherwise, by such means, the wife may be ousted of her dower in every purchase made by her husband; and yet during the marriage she is always by law under the government of the husband, in such manner and form as that she cannot give away

any manner of profit arising out of the lands without the leave of her husband; and she cannot disagree to the same estate during the marriage.]

If an estate be made to the wife for her jointure during the coverture, the remainder to *J. S.* in fee, and the wife wave this jointure, *J. S.* shall have the remainder; for here was a particular estate at the time of creating the remainder, so that it had the circumstances of a remainder, being the residue of a particular estate then in being; and since the particular estate was defeasible by an act that could not hurt the remainder, the remainder upon such destruction of the particular estate comes in being. Co. Litt. 29. b.

A man covenants to stand seised to the use of himself in tail, the remainder to his wife for life, the remainder to *B.* in tail, and then he makes a feoffment in fee to the use of himself and his wife for their lives, as a jointure, the remainder to *C.*, and dies without issue: the wife is remitted, for where a later and defeasible, and a former and indefeasible title concur in the same person, there must be a remitter. Co. Litt. 348. a.

But in this case the wife hath two titles, both waveable by her; the first indefeasible by any third person, the latter defeasible by a third person; for upon her claiming by the second title she waves the first, and, consequently, the remainder in *B.* commences, and he shall have his action; and therefore she must be in of her former title, to save the contention and trouble of the action. Co. Litt. 348. a.

But, if an estate is made to the husband in tail, the remainder to the wife for life, the remainder to the right heirs of the husband, the husband afterwards makes a feoffment in fee to the use of the husband and wife for their lives, the remainder to the right heirs of the husband; the husband dies without issue; the wife may claim by which she pleases, and is not remitted *volens*, because here are not two titles, the one indefeasible and the other defeasible, by a third person, but both equally firm; for the right heir of the husband, upon the waver of the first estate by the wife, can claim nothing in the land contrary to the feoffment of his ancestor; and therefore that estate which the wife claims is indefeasible, and no stranger is prejudiced by being put to his action. Co. Litt. 357. Dyer, 351.

But, if she makes no election, she shall be supposed to be in of her elder estate, because every one is presumed to choose what is most for his benefit. 2 Ro. Abr. 422.

If the wife has an old right before the coverture, and afterwards takes a jointure of the same lands, she shall be remitted. Cro. Ja. 490.

An estate settled to the husband for life, remainder to the wife for a jointure, except such of the lands as the husband should devise; this exception is repugnant to the grant, because the settlement might be avoided by the husband devising the whole. Hob. 72.

(H) How far her own or her Husband's Acts may defeat her of this Provision.

Co. Litt. 26.

Dyer, 358.

(a) So, a recovery as well

as a fine by a

feme covert is

sufficient to

bar her, be-

cause the *præcipe* in the recovery answers the writ of covenant in the fine to bring her into court, where the examination of the judges destroys the presumption of law, that this is done by the coercion of the husband, for then it is to be presumed they would have refused her. 10 Co. 43. 2 Ro. Abr. 395.

IT has been already observed, that if a man make a jointure on his wife, either before or after marriage, and they both join in a (a) fine, that she is so far bound thereby, that if the jointure was made before marriage she is barred to claim dower in any other lands of the husband's; but, if the jointure was made during coverture, she may claim dower in the other lands.

2 Inst. 673.

Hob. 225.

But, if a wife joins with her husband in a bargain and sale of the lands by deed indented and enrolled, yet it shall not bind her; for a wife cannot be examined by any court without writ, and there is no writ allowed in this case.

2 Chan. Ca.

162. (b) And

the money

shall be paid

out of the per-

sonal estate of

the husband.

But, if a feme covert joins with her husband in levying a fine to raise a sum of money by way of mortgage, this shall bind her; yet in this case she doth not absolutely depart with her estate for life, but there results a trust to the wife to (b) redeem, and to reinstate herself in her jointure.

Vern. 41. 191. 213. 2 Vern. 436. — So, if a jointure be made of lands which are in mortgage, the wife may redeem, and her executor shall hold over till repaid with interest. Chan. Ca. 271. 2 Vent. 343. S. P. decreed.

Chan. Ca. 119,

120.

If tenant in tail of a trust makes a mortgage, or acknowledges a judgment or statute, and then levies a fine, and settles a jointure, the jointress shall hold it subject to the mortgage or judgment, in the same manner as if the mortgagor or consor had been tenant in tail of the legal estate, and, after the mortgage or judgment, had levied a fine, and made a jointure; because the subsequent declaration of the use of the fine is merely the act of the tenant in tail, and he cannot, by any act of his own, make a subsequent conveyance take place of a precedent; and the rather, because the feme claims under that fee which tenant in tail got by the fine, and that fee was subject to all the charges he had laid upon it.

(I) *How far a Jointress is entitled to the Aid and Assistance of a Court of Equity.*

IF a man before marriage articles to settle a jointure on his intended wife, and the marriage is consummated, and the husband dies before any settlement made, an execution of the articles will be decreed in (a) equity.

2 Vent. 343.
2 P. Wins. 222.
1 Str. 596.
9 Mod. 12.
(a) That a jointress in

equity is considered as a purchaser for valuable consideration, who may set aside a prior voluntary conveyance as fraudulent against her. Chan. Ca. 100. — But, where by a marriage agreement the son's intended wife was to have more than would have been left for the father, (though indebted,) his wife and two daughters unpreferred, the court of Chancery would not decree it, principally, by reason of the extremity of it, but left the party to her remedy by law. 2 Chan. Ca. 17.

So, where *A.* gave a voluntary bond after marriage to make a jointure to his wife, and he made a jointure accordingly, and then the wife delivered up the bond, and the jointure was evicted; the court held, that it should be made good out of the personal estate, especially as there were no creditors affected by it; for the delivery of the bond by a feme covert could no way bind her.

Vern. 427.
Beard and Nuthal.

So, if a jointress brings her bill to have an account of the real and personal estate of her late husband, and to have satisfaction thereout, for a defect of value of her jointure lands, which he had covenanted to be and to (b) continue of such value, and the defendant insists that this is a covenant which (c) sounds only in damages, and properly determinable at law; though it be admitted that a court of equity cannot regularly assess damages, yet in this case a Master in Chancery may properly inquire into the value of the defect of the lands, and report it to the court, who may decree such defect to be made good, or send it to be tried at law upon a *quantum damnificat*.

Abr. Equ. 18.
(b) If a man covenants to settle lands of such a value as a jointure, and this covenant is omitted in the settlement, yet it subsists in equity; but the value of the lands is not to be esti-

mated according to the present value, but as they were at the time of the jointure settled, unless the covenant be so. Vern. 217. *Speake v. Speake*. (c) An action on the case brought at law for not making a jointure. 2 Ro. Rep. 488.

If there be a jointress, and a covenant that her jointure shall be of such a yearly value, and it fall short, though her estate be not without impeachment of waste, yet she may commit waste so far as to make up the defect of the jointure, and equity will not (d) prohibit.

Abr. Eq. 221-2.
Carew and Carew.
(d) But on a motion to restrain a jointress

tenant in tail after possibility, &c. from committing waste; the court held, that she being a jointress within the 11 H. 7. c. 20., ought to be restrained, being part of the inheritance which by the statute she is restrained from aliening, and therefore granted an injunction against wilful waste. Abr. Eq. 221. *Cook and Winford*. But see *Williams v. Williams*, 15 Ves. 419. 12 East, 209.

J. S. made a settlement on his eldest son for life, with remainder to his first and other sons in tail, remainder over, with power to his son to appoint any of the lands not exceeding 100*l.* per annum to any wife he should afterwards marry, for a jointure, (the father being under an apprehension that he was then married to a woman whom the father disliked, and had no intention

Abr. Eq. 222.
Hil. 1701.
Fothergill and Fothergill.

his son should provide for;) the father died, and the son married that very woman, (though there was strong presumptive proof that he was married to her before,) and after marriage appointed certain lands to trustees in trust for her, for a jointure, and covenanted, that if they were not of 100*l. per annum* value, that upon request made to him any time during his life, he would make them up so much out of other lands in his power. He lived several years, and no complaint was made that the lands were not of that value, nor request to make it up, and died; upon issue on a bill brought by the widow to have the jointure made up 100*l.* my Lord Keeper said, that a provision for the wife or children was not to be considered as a voluntary covenant, and therefore decreed the deficiency to be made up, notwithstanding the circumstances of the case, and her neglect in not requesting it during coverture; for the laches of a feme covert cannot be imputed to her.

Lady Clifford
v. Lord Bur-
lington,
2 Vern. 379.

|| Where tenant for life, with power to make a jointure of 1000*l. per annum*, gave a particular of lands mentioned to be 1000*l. per annum*, which were settled for the jointure, but which proved to be only 600*l. per annum*; it was decreed, that the jointure should be made up 1000*l. per annum* against the issue in tail, though neither privy to the marriage, nor guilty of any fraud.||

Towers v.
Davys, Vern.
479. || So
Petre v. Petre,
3 Atk. 511.
Senhouse v.
Earl, 2 Ves.
450. She is
not obliged to

If a bill is brought by an heir at law, or any other person against a jointress, whereby the party would avoid the jointure, under pretence that his ancestor was only tenant for life, &c. and he seeks for a discovery of deeds and writings, whereby he would avoid the title of the jointress, he shall never have such a discovery, unless he by his bill submits to confirm her title, and then he shall.

discover upon the offer to confirm, but may wait till the act done. Leach v. Trollop, *Id.* 662. Without an offer to confirm, she may plead the settlement in bar; but the plea must set it forth with sufficient certainty. Chamberlain v. Knapp, 1 Atk. 52.||

So, if a jointress prays a discovery against an heir at law of deeds and writings, if the heir submits by answer to confirm the jointress's title, she shall have no such discovery.

(K) Where the Wife shall hold her Dower, subject to the Charges of her Husband, and where not: And herein of the Privileges of Tenant in Dower, and the Nature of her Estate as to Alienations made, or Actions brought by or against her.

4 Co. 64. 66.
10 Co. 49.
* The widow
of a mortgagor
not barred of
her dower, if

THE wife shall hold her dower discharged of judgments, recognizances, statutes, mortgages*, or any other incumbrances made by the husband after marriage, because after his death her title, which is now consummate, has relation to the marriage and seisin of her husband, which were before the incumbrances.

cumbrances. But, if she joins in a grant of a rent by fine out of such land, or makes a lease for years rendering rent by fine to the husband and his heirs, she shall hold her dower subject to such rent or term, because she was examined upon the fine, and by such means might bind her own inheritance.

she did not join in the mortgage.
4 W. & M. c. 16. § 5.

If the husband die indebted to the crown, yet his wife's dower is by law privileged from any distress; and if she be distrained, she may have a writ to the sheriff, commanding him not to distress her, or to re-deliver the distress, if any be taken, unless such debts were contracted before her title of dower accrued, for then it will be liable thereto. And the reason she shall not be distrained for debts to the crown, contracted after the marriage, seems to be, her prior title by relation.

Co. Litt. 31. a.
F. N. B. 150.
per tout.

If the husband seised of three manors grant a rent-charge out of all, and die, and the wife have one manor assigned to her by the heir in lieu of dower of all the three manors, she shall hold it charged for a third part of the rent, because this endowment was against common right, by which she ought to have had the third part of each manor. But, if she had recovered her dower, and such assignment had been made by the sheriff, she should have held it discharged, because she pursued the proper means to obtain it clear, and then it is not reasonable the sheriff's act in mis-executing the judgment of the court should prejudice her, especially when the heir is not more hurt by the whole charge falling upon the two manors, than he would, if it had fallen upon two parts of all the three manors.

Perk. 330.
332. Ro. Abr.
633, 684.

A wife may demand dower of a rent-charge granted to her husband and his heirs, without shewing the deed, because the deed belongs not to her, but her estate is created by the law.

Plow. 41. a.
81. b.

Tenant in dower is allowed by the statute of Merton, c. 2. to devise the corn growing upon the land at the time of her death, of which before that statute it was doubted if she might; and the word *blada* there extends likewise to hemp, flax, and other things, which grow by the industry of man, but not to grass, trees, &c. which come *suapte natura*.

2 Inst. 81.
Keilw. 125.

In dower against an infant who makes default upon the *grand cape* returned; it was held *per tot. cur.* that judgment shall be given upon the default: for the infant shall not have his age in dower, which being but for life the widow may be totally defeated of it by his frequent defaults: though some of the books say, that if judgment be given upon the *grand cape* before appearance, this is error: *secus*, if he appears by guardian, and after loseth by default; for then if any default be in the guardian, he shall recover against him in a writ of *disceit*: and other books doubt if the infant shall not be allowed his age in dower; but the contrary seems the more reasonable opinion.

Cro. Ja. 111.
392. Cro. Eliz.
399. 331. 557.
567. 638.
Moore, 342.
847, 848.
2 Brownl. 118.
2 Leon. 59.
189.

In error to reverse a fine levied by the plaintiff and her husband the heir is summoned as terretenant, and appears, and pleads that he is within age, and prays that the parol may demur; plaintiff counterpleads the age, shewing that she was entitled to have dower before the fine levied, and now is barred of her

Herbert v.
Binion, Cro.
Ja. 392.

dower by this fine, which is erroneous, and sets forth the errors, and seeks to be restored to her writ of dower; but upon demurrer and solemn argument it was held in this case, that the parol should demur.

(L) To whom the Tenant in Dower shall be attendant, and by what Services.

Perk. 424,
425. 9 Co. 135.
But though in
most cases she
shall be at-
tendant to him
in the rever-
sion by the third part of the services, by which he holds over, yet may she be attendant to others, and by other services; and therefore if lord, mesne and tenant are by knights' service, and 3s. rent, and the tenant marries, and dies, his issue within age, and the mesne seises the ward of the body and land of the heir, and endows the wife, she shall be attendant to the mesne by 1s. rent; and if he dies during the minority of the heir, then she shall be attendant to his executors in the same manner till the full age of the heir, because till then the profits belong to the guardian and his executors in their own right; but for this *vide* Keilw. 124. 129. Ro. Abr. 685. Brook, 64.

Perk. 427. If the heir grant the reversion of the tenancy in dower to a stranger, and the tenant in dower attorn, she shall be attendant to the grantee by her own agreement.

Co. Litt. 46. a.
241. a. Brook,
54. Perk. 431. If one makes a gift in tail, rendering 20s. rent, and dies, and the donee marries and dies without issue, and his wife is endowed by the heir of the donor, she shall be attendant to him for a third part of the rent, though the estate-tail and the rent are both determined; for her estate being a continuance of her husband's, and the donor thereby kept out of possession for a third part during her life; it is but reasonable she should pay her proportion of the rent reserved. So, though the lord had released to the tenant who was donor, all his right in the tenancy, yet the wife of the donee should be attendant in the same manner, by reason of the express reservation; and she is a stranger to the release.

Perk. 434. If tenant holds by fealty, and a horse of 40s. price, his wife, being endowed, shall be attendant to the heir by the third part of the 40s. only: but, if it was of a horse to be rendered yearly, she should render to the heir a horse every third year.

(M) Of the Proceedings and Damages in Dower *unde nihil habet*.

2 Inst. 124. BEFORE the statute of Marlb. c. 12. in dower *unde nihil habet* there were days of common return, as in other real actions, which was mischievous to the wife, by reason of the long delay, she claiming but an estate for life; but this is now remedied by that act, and four days of return in the year are given at least, and that act extends likewise to the vouchee, but not

not to a writ of right of dower, nor to dower *ad ostium ecclesie*, nor *ex assensu patris*; but 32 H. 8. c. 21. extends to, and gives the same return in every writ of dower.

In dower the tenant at the day of taking the inquest, after the jury had appeared, and before they were sworn, made default, and a *petit cape* was awarded, and the tenant at the day *in banco* informed the court that he was but tenant for life, and the reversion in one *A.* who at the day in bank ought to be received, and the court appointed him to plead his plea at the return of the *petit cape*, before which time his appearance seems idle. Brownl. 126.

In dower of lands in *L.*, *M.*, and *N.*, the sheriff returns *plegii de proseq. A., B., C., D.*, and the names of the summoners *E., F., G., H.*, and that after the summons made, and 14 days and more before the return of it, at the most usual church door of *L.*, where part of the lands lay, such a *Sunday* after sermon ended, he publickly proclaimed all and singular the things contained in the writ, to be proclaimed according to the form of the statute in that case made, and indorses his name to the return; and exception was taken to this return, because proclamation was not made at all the church doors: but *per cur.*, proclamation at any of the church doors is sufficient. But the return was held ill, because he says he had proclaimed all and singular the things in that writ contained, without saying what. Allen v. Walter, Hob. 133. The proclamation by the 31 Eliz. c. 3. ought to be at the parish church door, though it be in another county than where the land lies. Cro. Eliz. 472. Error of a judgment in dower, in that

the proclamation is said to be at *H. in the Spring*, and it doth not appear that it is within the parish of *W. H.*, where the demand is: but by *Weston* for the defendant, this is cause why no grand cape should issue, by 31 Eliz. c. 3., but it is no cause of error; and the judgment was affirmed *nisi*. Keb. 529. Upon a writ of summons in dower it was returned *ad ostium ecclesie proclamari feci juxta formam statut. secundum exigen. brevis*, and held good by two justices against one, though what the error was does not appear. Keb. 680. On a motion for a supersedeas, to stay proceedings on a grand cape in dower, *quia erronee emanavit*; 1st, because the return of the summons was not according to the statute of 31 Eliz. c. 3. for the statute is after summons. 2dly, The land lies in a vill called Heroick, and the return is of a proclamation of summons at the parish church of Halifax, and it does not appear that the lands lie within the parish. 3dly, The return is *proclamari feci secundum formam statuti*, and it is not returned to have been made upon the land; for all which causes it was held erroneous, and the grand cape was superseded. Furnis v. Waterhouse, 1 Mod. 197.

Error to reverse a judgment in dower at the grand sessions in *Wales*: it appeared by the record that the tenant appeared at the return of the summons, and day was given over, & *ad tunc venit per attornat. & nihil dicit in barram*; whereupon *considerat. est quod tertia pars terrar. & tenement. capiatur in manus d'ni regis*; and upon day given *ad audiend. judicium*, judgment was given *quod recuperet*, and error assigned that they ought not to have awarded a *petit cape*, because the defendant appeared, and then they ought to have given judgment upon the *nihil dicit*; for the *petit cape* is always upon default after appearance, and is only to answer the default, as the *grand cape* is before appearance to answer the default and demand. But it was held no error, being only an awarding of more process than needs be, and it was an advantage to the tenant by delaying the demandant; and *per Twisden*, if erroneous, they might now give judgment upon the *nihil dicit* in this court. Williams v. Gwynn, 1 Ventr. 60. 2 Saund. 46. S. C. 2 Keb. 450. 551. 605 S. C.

Lomax v. Ar-
moror, Vent.
267. 2 Lev. 98.
123. S. C.
3 Keb. 277.
326. 421. S. C.

Brook, 96.

Michell v.
Hyde, Leon.
92.

Whelpdale's
case, 3 Lev.
169.

Bernes & Ux.
v. Rich, 3 Lev.
220. Note: in
dower the
view is ousted
by W. 2. c. 48.
in these words,
*In brevi de
dote cum peti-
tur dos de te-
nemento quod
vir uxoris alie-
navit tenenti*

Error of a judgment in dower in the court of *Newcastle*; be-
cause the proceeding was by plaint, and no special custom
certified to maintain it; and it was held error, because pleas
of frank tenement cannot be held without original writ, unless
there be a special custom for it.

In dower, if tenant makes default, by which *grand cape* issues,
the demandant shall make her demand, for no certainty appears
before the demand made.

In dower, one appears upon the *grand cape*, who in truth was
but lessee for years, and so might plead non-tenure; and if now
he might wage his law of non-summons, and the writ be abated,
was the question; because it was said, that by wager of his law
he affirms himself to be tenant: but two justices only in court
held, that he would be at no mischief, for being but lessee for
years, if judgment and execution were against him, he might,
notwithstanding, enter upon the demandant. Another matter
was, that where the writ of dower was, *de tertia parte rectorie
de D.*, and the *grand cape* made upon it accordingly; yet the
sheriff by colour thereof took the tithes severed from the two
parts, and carried them away; and *per cur.*, this is not such a
seizure as is by the writ intended, for he ought only to have
seised generally, but not to carry them away; and the court had
a mind to have committed him for a misdemeanour.

In dower, tenant demands the view; demandant counter-
pleads the view, because her husband died seised, & *hoc parat.
est verificare & petit judicium & dotem suam de tenement. prædict.
sibi adjudicari*; tenant *protestando*, that the husband did not die
seised, demurs and shews for cause that the counterplea *male
concludit*, for it ought to have been & *petit judicium & quod tenens
de visu excludatur*, and the counterplea is but dilatory, and ought
not to conclude peremptorily for final judgment; and of this
opinion was *Levinz*, but two other justices held it not ill. Also,
the demand was of three messuages, &c. where it ought to have
been only of the third part of them; and if this might be
amended was doubted.

In dower, *unde nihil*, &c. tenant demands the view, demandant
counterpleads it, because the husband *alienavit tenement. prædict.
to the tenant & hoc*, &c. and it was demurred, because *alienavit*
does not shew what estate he aliened, for it may be a lease for
years: but *per cur.*, alienation implies all the estate which he
had, and the statute W. 2. 48. ousts the view, where the hus-
band aliens to the tenant, or any of his ancestors; and this is in
the very words of the statute; and a *respondeas ouster* awarded,
but no notice taken whether the view was allowable in dower
unde nihil habet.

*aut ejus antecessori, cum ignorare non debet tenens quale tenem. vir uxoris alienavit sibi vel an-
tecessori suo, licet vir non obiit seiscitus, nihilominus tenenti de cætero non erit visus concedendus*;
and my Lord Coke in his exposition thereof says, it extends not to a writ of dower *unde nihil
habet*, for thereon no view lay at the common law, because the demandant should not be
delayed, having nothing to live on; but it extended to other writs of dower, whether for
dower at common law, *ad ostium ecclesiæ*, *ex assensu patris*, or by the custom; and where

the view has been granted, it is to be intended in those cases. *Vide* 2 Lev. 117. 3 Keb. 360. Dyer, 179. 2 Ro. Abr. 725. 2 Inst. 481.

At the common law, before the statute of W. I. c. 49. if a ^{2 Inst. 261.} woman had accepted any part of her dower, though never so small, of any one tenant in any one county or town, she had no other remedy for the residue, but by a writ of right of dower; for if she brought a writ of dower *unde nihil habet*, it was a good plea in abatement, that she had accepted such a part of such a tenant in such a town or county. This being a great mischief to the woman is remedied by that statute, which provides that it shall be no plea in abatement, to say that she hath received part of her dower of any other person before the writ purchased; and this extends as well to guardian in chivalry as to the tenant of the land, because such guardian is to render her dower.

In dower the tenant pleads, that after marriage the husband had settled other lands on the demandant for life, for her jointure, and that she after his death agreed thereto, and entered accordingly; the demandant replies, that it was a voluntary settlement of her husband, and traverses that it was for her jointure; and issue thereupon; and at the *nisi prius* the tenant made default, and a *petit cape* awarded, and returned, and judgment, that the demandant have seisin; and the demandant suggests that her husband died seised, and prays a writ to inquire of the damages, returnable such a day; the sheriff returns that he hath delivered seisin of the lands particularly, and also an inquisition which finds that the lands are worth 114*l.* 11*s.* *per annum*, and that her husband had been dead six years and three quarters, and that she had sustained damages *occasione detentionis dotis ultra valorem præd. & ultra misas & custag. sua* 195*l.* & *pro misis & custag.* 20*s.* and upon this the demandant *gratis* releases the 195*l.* and demands judgment only for the 20*s.* and judgment is given that the demandant recover *tam valorem tertie partis prædict. from the death of her husband*, which came to 257*l.* *quam the* 20*s.* and 11*l.* *de incremento, in toto* 269*l.* and the tenant brings error, for that the damages being released by the demandant, there ought to have been no judgment against him for the value of the land. But the whole court resolved, that the release was only of the damages sustained *occasione detentionis dotis*, and not of the mesne profits of the lands, for they are two distinct things, as appears by Co. Litt. 33. a. Rast. Entr. 237. where the writ is to inquire not only of the value of the land, but also of the damages *ratione detentionis*; and the judgment is always entered accordingly, and a *feri facias* lies for the damages; and therefore the judgment was affirmed.

As to damages in dower, they are given by the statute of Merton, c. 1. but that statute extends only to the possessory action of dower *unde nihil habet*, and not to the writ of right of dower; because they are intended to be given for the detention of the possession; and on writs of right, where the right itself is questionable, no damages are given, because no wrong done

Harvey v. Harvey, Sir T. Raym. 366.

Note: The mesne values and damages are to be recovered against the tenant in a writ of dower, and so it appears in the judgment of this case, and in Co. Litt. 33. a. and Bendl. 155.

Co. Litt. 32. Dyer, 284. pl. 33. Yelv. 112. Dr. and Stud. lib. 2. c. 13. f. 166. 2 Inst. 80. The words of till

this statute are, *Quod viduæ quæ post mortem virorum suorum expelluntur de dotibus suis, & dotes suas vel quarentenam suam habere non possunt sine placito, quod quicumque deforcierit eis dotes suas vel quarentenam suam de tenementis de quibus viri sui obierint sciiti, & ipsæ viduæ postea per placitum recuperaverint, ipsi qui de injusto deforciamiento convicti fuerint, reddant eisdem viduis damna sua, scilicet valorem totius dotis eis contingentis a tempore mortis virorum suorum usque ad diem quo ipsæ viduæ per judicium curiæ seisinam suam inde recuperaverint.*

till the right be determined. Also, that statute extends only to lands, whereof the husband died seised; and therefore judgment for the damages was reversed, because the jury did not find that the husband died seised; for otherwise she shall have no damages: as, if the husband aliens and takes back an estate for life, the wife shall recover dower, but no damages; because this dying seised was only of an estate of freehold; but, if he makes a lease for years only, rendering rent, she shall recover a third part of the reversion with a third part of the rent and damages, because there he died seised as the statute speaks.

Co. Litt. 32.
(a) [But the statute is express that the widow shall have her damages, viz. *valorem totius dotis ei contingentis a tempore mortis viri sui*, and in a modern case, which underwent a great deal of discussion, damages were awarded her from the death of her husband, though she had delayed bringing her writ of dower for above two years. *Dobson v. Dobson*, Ca. temp. Hardw. 19. 2 Barnard, K. B. 180. 207. 443. S. C. In that case, however, it is to be observed, the tenant did not plead *tout temps prist*. And though he plead such plea, yet the widow shall recover damages from the teste of the original to the execution of the writ of entry. *Vide cases supr.* and Bull. Ni. Pr. 117.] Note; the statute of Merton extends to copyholds, whereof the wife is dowable by custom. 4 Co. 30. Co. Litt. 33.

Damages must be after demand of dower (a), for the heir is not bound to assign this provision till demanded, because the law casts the freehold of the whole upon him, which cannot divide without the concurrence of the wife. But a demand *in pais* before good testimony is sufficient; and if the heir appear the first day on summons, and plead that he hath been always ready, and still is, to render her dower; she may plead such request; and issue may be taken upon it. But the feoffee of the heir cannot plead *tout temp prist*, because he had not the land all the time since the death of the ancestor, and therefore she shall recover the mesne profits, and damages against him; and if he hath not provided his indemnity and recompence against the heir, it is his own folly.

Co. Litt. 33. a.

If the heir or feoffee assign dower, and the wife accept thereof, she loseth her damages, because having the dower, which is the principal, she cannot sue for the damages, which are but consequential or accessory.

Belfield v. Rous, Co. Litt. 33. a. Moore, 80. S. C. Bendl. 153. S. C.

In dower the tenant, as to part, pleads non-tenure, and to the residue, detainee of charters, and issue taken upon both pleas, and both found against the tenant; and it was found further, that the husband died seised such a day and year, leaving issue a son, which son, together with the demandant, as his mother and guardian, took the profits for six years after the husband's death, and that such a time the son died without issue, and the land descended to the tenant as uncle and heir to him, and that he entered and took the profits till the purchase of the original writ; and the yearly value of the land was found, and damages were assessed for the detaining of dower and costs; and the plaintiff had judgment for the damages from the death of the

husband without any defalcation. In this case my Lord Coke says there are many things observable, but the most material seems to be the recovery of damages from the husband's death, though there was no demand of dower, and though the demandant herself took the profits for six years, which seems to be the consequence of the tenant's pleading non-tenure, which being found against him, the other matter found was superfluous, except as to the damages, for which he then remains deforceor.

In dower upon default, a *grand cape* was awarded, and on suggesting that her husband died seised, a writ of inquiry of the value of the lands was awarded likewise, and inquisition taken and returned, and 60*l.* damages for the value of the land; and it was moved to stay the filing of the writ of inquiry, because no notice was given to the tenant thereof, nor of the execution of it; and though it was answered that in real actions no personal notice is to be given, but the tenant ought to take notice, because the summons is always executed on the land, and not elsewhere; yet *per curiam*, the *grand cape* is a judgment, and by that the suit is determined at common law, and the damages for the value of the land are added by the statute of *Merton*, and personal notice ought to be given of the writ, and of the execution of it, as in other cases of writs of inquiry; and therefore for want of notice they discharged the inquisition, and awarded restitution of the damages. But *Levinz* makes a *quere* of it, and says the practisers informed him that it is not usual to give notice of the executing of the writ of inquiry in case of dower.

infant said his guardian would not let him assign dower; resolved *per tot. cur.* upon debate; 1st, That it was demandable of the heir, though he had been under age. 2dly, That his guardian was but in nature of a guardian in socage, and that the dower was not demandable of him, but of the heir, though not in the custody of the guardian; and that if the heir had entered upon the land to assign dower, he had been no trespasser upon the guardian, though the custody of the land during such nonage was committed to such guardian. 3dly, That his not assigning dower upon demand, though he did not refuse to do it, was a refusal in law, to entitle the plaintiff to her damages. Hil. 29 & 30 Car. 2. in C. B. between Corseilles and Corseilles. Bull. Ni. Pri. 117.

In dower, the tenant to part pleads non-tenure, and to other parts detainue of charters; and judgment for the demandant; but it was reversed in error, because the tenant, being within age, appeared by attorney, where it ought to be by guardian. Then a new writ of dower was brought, and the tenant pleads *tout temps prist*; the demandant pleads the first record to estop him; tenant rejoins *nul tiel record*, because it is reversed; which the court agreed; but they held that the demandant might take issue that he had not been *tout temp prist*, and give in evidence the first record to prove it.

and occupied for five years, and then the tenant re-entered, and she brought dower; and agreed that in such case the tenant need not say *tout temp prist* generally, but shew the abatement and re-entry, for the time of her occupying shall be considered and recouped in damages.

Perkins v. Lamb, 3 Lev. 409. Upon a trial at bar the issue was, whether there was a demand of dower, and refusal, to entitle the plaintiff to damages? the plaintiff proved an actual demand of the heir, being of the age of 14 years, then in her custody, though by his father's will committed to another; the

Rich's case, Dalis. 100. 3 Leon. 52. S. C. Note: The case in truth was, that after her husband's death she entered and abated without assignment of dower,

Walker v.
Nevil, 1 Leon.
56.

In dower, judgment was given upon *nihil dicit*, and because the husband died seised, a writ of inquiry of damages was awarded; by which it was found that the third part of the value of the land was 8*l. per ann.* and that eight years had elapsed *a die mortis viri sui proxime ante inquisition. & assident damna* to 8*ol.* and upon the record it appeared that after the judgment in the writ of dower the demandant had execution by *habere fa. seisinam*, and that damages were assessed for eight years; whereas it appeared upon all the records, that the demandant had been seised for part of the eight years; and therefore error was brought and assigned, 1st, That damages are assigned till the time of the inquisition taken, where they ought to be but to the time of the judgment; but this was disallowed. 2dly, That the value being found but 8*l. per annum*, the damages for eight years are but 64*l.*; but *per cur.*, it may be that by the long detaining of dower demandant had sustained more damages than the bare value; but because it appeared that damages were assessed for the whole eight years, where the demandant herself was seised for part of them, by force of the judgment and execution, it was held erroneous.

Penrice v.
Penrice,
Barnes, 234.

(a) The opinion of the court in this latter point is contrary to the preceding case, and to the express words of the

statute of Merton, c. 1., and also to the cases of Spiller v. Andrews, 8 Mod. 25. Dobson v. Dobson, Ca. temp. Hardw. 19. 2 Barnard. K. B. 180. 207. 443. and Kent v. Kent, 2 Barnard. 357. || In the case of Atwood v. Lamprey, 3 P. Wms. 128. note, land was mortgaged on condition to pay a widow 2*ol. per annum* in satisfaction of her dower; whereupon the court held, that this being an annual payment secured on land should answer taxes in proportion as the land paid; but refused to make the widow refund in respect of the payments she had received tax-free, and for which the party paying had omitted to deduct.||

Brook, 49.
73. 78. 93.

In dower if demandant recovers by confession, or otherwise, yet she may after, upon suggestion and averment, that her husband died seised, have a writ to inquire of the value and damages.

Brown v.
Smith, Hil.
25 & 26 Car. 2.
Bull. Ni.
Pri. 117.

[If the heir sell to J. S. and the widow recover her dower against him, he must pay the whole mesne profits from the death of the husband, though he have not himself been half the time in possession: she is entitled by the statute, and can recover only against the tenant.]

Aleworth v.
Roberts,
Lev. 38.
Sid. 188.
S. C. Keb. 85.
S. C. 646. 711.
Brownl. 127.
cont.

In dower *unde nihil habet*, the demandant had judgment, and a writ of seisin executed, and the tenant brought error, and the judgment affirmed; but pending this, the tenant aliens the land, and dies: and now the demandant brings *seire facias* against the heir of the heir, and against the alienee, to have her damages, suggesting that her husband died seised; the tenants severally plead

plead the matters aforesaid; and judgment against the demandant; but therein agreed that the judgment is complete at common law without the damages, and error lies of it before the damages given, and that it is time enough to suggest the dying seised of the husband, in order to recover damages after the judgment given for the dower; but the statute of Merton gives damages *contra deforciantes*, which here neither the heir of the heir, nor the alience are; and therefore they are lost by the death of the heir, and are not a lien upon the land to pass with it. For if they should be recovered, from what time must this recovery be? Not from the husband's death, because none of the present tenants had the land from that time; nor from the death of the heir, against whom the judgment was, for none of the now tenants are deforcors; and therefore they are like damages in trespass, which die with the party; and when the tenant dies before judgment for the damages, the judgment for the dower remains as at common law.

A widow brought a writ of dower, and recovered, and this judgment was affirmed in a writ of error, after which she took out a writ of inquiry of damages, but died before the same was executed; the damages are lost, being no duty till they are assessed; and therefore a *scire facias* by her administrator in this case was held not maintainable.

[If the defendant plead *ne unque seise que dower*, the demandant may give in evidence a release to her husband, or a surrender to him by one who was seised as jointenant with him. So, if the demand be of an advowson or rent-charge, she may give a grant of the advowson or rent-charge in evidence, and that her husband died the day before payment or presentation.

render to another, by reason of the unity of possession. Perk. § 586, 587. 21. 41. b. *contr.* See also Watk. on Descents, 33. note.

If the tenant plead *ne unques accouple in loyal matrimonie*, it shall not be tried by a jury, but a writ shall issue to the bishop to certify it. To a demand of dower as the widow of *J. R.*, the defendants pleaded *ne unques accouple*; the plaintiff replied a sentence of the ecclesiastical court in a cause of divorce brought by Sir *W. W.* against her, charging that she was his wife, and had committed adultery with *J. R.*; to which she pleaded, that she was the lawful wife of *J. R.*, and not of the said Sir *W. W.*; and that afterwards *J. R.* died, and the cause coming on to be heard, the judge declared, that the plaintiff had been the wife, and was then the widow of *J. R.*; and she prayed judgment whether the defendants were not estopped to plead *ne unques accouple*. The court held it no estoppel, as the bishop's certificate in an action between the plaintiff and other defendants would have been.

In dower, the defendant pleaded, that *T. D.* was seised in fee, and made a lease to *J. C.*, but did not shew when seised in fee,

Mordant v. Thorold,
3 Mod. 281.
Salk. 252. S.C.
Carth. 135.
S. C. 1 Show.
97. S.C. 3 Lev.
275. S. C.
2 Ro. Abr.
676. pl. 10.
Bull. Ni. Pri.
118. But *qu.*
as to the sur-
render in this
case? For one
jointenant
cannot sur-
See 40 E. 3. pl.

Robins v. Crutchley,
2 Wils. 118.
127.

Green v. Roe,
Com. Rep.
581. A re-

covery in
dower will
estop the ten-
nant, and all
claiming under
him, from giving
a prior term in evidence
on an ejectment afterwards
brought by the
widow under the judgment.

Booth v. Marquis of Lindsey, 2 Ld. Raym. 1293.
fee, or that the term was assigned to him; so it might be after
coverture. After judgment for demandant, the said *J. C.* claim-
ing by lease for years from *T. D.*, father of the demandant,
prayed to be received, but the court would not admit him.

By 16 & 17 Car. 2. c. 8. § 3, 4. execution shall not be
stayed by writ of error upon any judgment after verdict, unless
the plaintiff in error become bound to pay damages and costs,
in case the judgment be affirmed, or the plaintiff discontinue, or
be nonsuited: and the court wherein execution ought to be
granted upon such affirmation, discontinuance, or nonsuit, shall
issue a writ to inquire as well of the mesne profits, as of the da-
mages by any waste committed after the first judgment; and
upon the return thereof judgment shall be given, and execution
awarded for such mesne profits and damages, and also for costs
of suit.

Kent. v. Kent,
2 Str. 971.
2 Barnard.
357. 386. 441.
Ca. temp.
Hardw. 50.

Where there are two tenants in dower, and one dies after
judgment for damages, and his heir and the other bring error,
the whole of the original damages shall be recovered against the
survivor. But the value from the time of the judgment to the
affirmance cannot be recovered against the surviving plaintiff
only; nor can the court compute such damages after the rate of
the damages found by the first jury, but they must award a writ
of inquiry.

Doe v. Roach,
Andr. 153.
Ca. temp.
Hardw. 373.

If the judgment be affirmed in *dom. proc.* and costs given, the
defendant in error may bring an action upon the recognizance
for such costs, without suing out a writ of inquiry.

(a) Wallis v.
Everard, 3 Ch.
Rep. 87.
(b) Curtis v.
Curtis, 2 Br.
Ch. Rep. 634.
Mundy v.
Mundy, 4 Br.
Ch. Rep. 294.
and 2 Vcs.
jun. 122.
Mitf. Eq. Tr.
97, 98.

[A purchaser
shall not pro-
tect himself
against the
claim of dower
by a term at-
tendant on
the inheri-
tance, unless
he has pro-
cured an as-
signment of it
in that very
transaction,
though the

The writ of dower is now little in practice, and will prob-
ably in a short time fall quite into desuetude. The court of
Chancery seems at length to be in possession of a concurrent
jurisdiction with the common law courts in all cases of assign-
ment of dower. That the court of Chancery had jurisdiction
in matters of dower, for the purpose of assisting the widow to a
discovery of the lands or title-deeds, or of removing any impe-
diments to her rendering her legal title available at law, seems
indeed never to have been doubted. But (a) it has been ques-
tioned, whether it could give relief in those cases, in which there
appeared to be no obstacle to her legal remedy? However, the
language of that court now is (b), "that the widow labours un-
der so many disadvantages at law, from the embarrassments of
" trust terms, &c. that she is fully entitled to every assistance
" that a court of equity can give her, not only in paving the
" way for her to establish her right at law, but also by giving
" complete relief when the right is ascertained." And in the
exercise of this jurisdiction it will enforce a discovery (c), even
against a purchaser, for a valuable consideration without notice.
And though (d) the widow should die before she had established
her right at law, it will, in favour of her personal representative,
decree an account of the rents and profits of the lands, of which
she

she afterwards appeared dowable;] || and the account of arrears it will carry back to the time her title accrued, unless some reason be shewn to bar her. || [But courts of equity consider themselves as so far proceeding merely on a right which may be asserted at common law, that, as in a court of common law no costs can be given on a mere writ of right of dower, or a writ to assign dower, so no costs are given in a court of equity on a bill brought for the same purpose (e),] || unless there has been a vexatious resistance to the claim; and there indeed the widow would be entitled to costs at law under the statutes of Merton (20 H. 3. c. 1.) and Gloucester (6 E. 1. c. 1.) ||

2 Atk. 282. 3 Atk. 124. 130, 131. Worgan v. Ryder, 1 Ves. & Beam. 20. Co. Litt. 32. b. note (4), 14th Edit. Lucas v. Calcraft, 1 Br. Ch. Rep. 134. 1 Ves. & Beam. 20. notes. S. C. || (c) Williams v. Lambe, 3 Br. Ch. Rep. 264. (d) Wakefield v. Childs, 8th July 1791, cited in Fonbl. Eq. Tr. 20. (e) Mitf. Eq. Tr. 98.

term has in a prior transaction been declared attendant on the inheritance. Maundrel v. Maundrel, 7 Ves. 567. 10 Ves. 246. Oliver v. Richardson, 3 Ves. 222. Dormer v. Fortescue, Co. Litt. 32. b.

(N) Of the Admeasurement of Dower.

IF the heir within age assign to the wife more land in dower than she ought to have, he himself shall have a writ of admeasurement of dower at full age by the common law. So, if too much be assigned in dower by the heir within age, or his guardian in chivalry, and the heir die, his heir shall have such writ to rectify the assignment: but the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, because till then the interest of the guardian continues; and if any wrong be done, it is to the guardian himself, and not to the heir. If a disseisor assigns too much, the heir of the disseisee shall have admeasurement by the common law.

If the heir within age, before the guardian enters, assigns too much in dower, the guardian shall have a writ of admeasurement of dower, by the statute of W. 2. c. 7. before which statute the guardian had no remedy, because the writ of admeasurement, being a real action, lay not for the guardian, who had but a chattel. Also, by the same statute it is provided, that if the guardian pursue such writ faintly, or by collusion with the wife, the heir at full age shall have a writ of admeasurement, and may allege the faint pleading or collusion generally.

If the wife after assignment of dower improves the lands, so as thereby they become of greater value than the other two parts, no writ of admeasurement lies. So, if they be of greater value, by reason of mines open at the time of the assignment, no writ of admeasurement lies, because the land in quantity was no more than she ought to have; and then it is lawful to work the mines which were open at the time of such assignment.

If the sheriff assigns too much in dower, by one book it seems that the heir shall have a writ of admeasurement. But *qu.* whether he shall have that or a *scire facias* upon the recovery, which was of no more than the third part?

F. N. B. 148.
Co. Litt. 39. a.
2 Inst. 367.
Stoughton v. Leigh,
1 Taunt. 403.

2 Inst. 367.

F. N. B. 149.
2 Inst. 368.
5 Co. 12.
Saunders's case.

Palm. 266.
[Br. tit. Dower,
pl. 83. Extent,
pl. 13. Fitzh.
Execution,

165. 2 Ld. Raym. 1294-5.] || The heir in such case shall have a *scire facias* to obtain an assignment, *de novo*. Stoughton v. Leigh, 1 Taunt. 402. When the feme recovers dower, and the sheriff assigns it by award of the court, and by the inquest of twelve men, the sheriff is no wrong-doer though he assigns more than her share, so that the heir can have no assize against him, but he must apply himself to the court for a new inquest, and therefore must call in the tenant in dower by *scire facias*. Gilb. Dower, 389.]

Stoughton v. Leigh, (*ubi supra*). || If the heir, being of full age, assign excessive dower, he has no remedy at law.]

F. N. B. 148. (a) || It was *vi-contiel*, because it was presumed, that the first assignment was in the court of the heir; and if there was any mistake there, it was to be rectified in the court of the sheriff. *Vide* 13 E. 3. *Admeasurement*, 17. Yet *Bracton* saith, if she hath lands in dower in divers counties, there it ought to be *coram justiciariis*. And note, there the tenant shall have several writs. Gilb. Dower, 382.]

These writs of admeasurement of dower are *vicontiel* (a), and not returnable; and the parties may plead before the sheriff in the county, if they think fit: but if they are removed in *C. B.* by a *pone* as the plaintiff may, without shewing any cause, and the defendant upon shewing cause, and thereupon process goes out, *viz.* summons, attachment, and *distringas*, then the sheriff cannot make admeasurement, but ought to extend all the lands particularly, and return it in *C. B.*, and upon that admeasurement shall be made.

(O) Of the other Species of Dower.

1. Dower by the Custom.

Co. Litt. 33. b. Cro. Eliz. 825. Leon. 62. 133. THIS kind of dower varies according to the custom and usage of the place, and is to be governed accordingly; and where such custom prevails, the wife cannot waive the provision thereby made for her, and claim her thirds at common law, because all customs are equally ancient with the common law itself.

Co. Litt. 33. b. 111. a. F. N. B. 150. Stanf. Præc. 44. b. Ro. Abr. 558. Brook, tit. Dower, 70. Brook, tit. Custom, 67. 69. 72. 2 Jon. 6. Sid. 136. Lambart's perambulation, 555. [But authorities are not wanting to shew, that not only child-bearing, a casual consequence of fornication, and the detection of it in this publick manner, but the commission of the act of fornication itself is a forfeiture of her estate. Rob. Gavell. 165. and the authorities there cited.]

By the custom of gavelkind in *Kent*, the wife shall have the moiety so long as she keeps herself chaste and unmarried. The reason of this provision for the wife seems to be founded on the equal distribution, which is observed in this kind of inheritance in the same family for their equal support; and therefore when she proves unchaste, or marries again, and thereby contracts a new alliance, this provision as to her ceases, and returns again into the family. But the presumption of her chastity is to continue till it be proved she was delivered of a child, begotten during her widowhood, which may be in any action brought by or against her.

Hunt & Uxor v. Gilburn, Leon. 62. Cro. Eliz. 121. S. C. adjudged. Dower, and demands the third part of the lands of *A.*, her late husband, lying in *Kent*, &c. defendant pleads that the custom there is, that wives shall have the moiety of their husbands' lands in dower, so long as they live chaste and unmarried, and

non

non aliter, or *non secundum cursum communis legis*; and that the demandant, after the death of her first husband, had married the other demandant, &c.; *et per cur.*, the custom is good, and is the law in *Kent*; and therefore she can claim no other dower, nor in any other manner, and the rather, by reason of the negative conclusion.

By the custom of Borough-English, the widow shall have the whole of her husband's lands in dower, which is called her free-bench.

son seems to be, that in these boroughs the eldest son was introduced into the trade of his father, and therefore the youngest son inherited the land, and, consequently, the wife, that was entrusted with the younger children of her husband, had the whole during her life.

Upon a special verdict, the case was this: a custom of a manor was found to be, that if a copyholder in fee died seised, his wife should hold it during her life as *frank bank*; the lord enfeoffed the copyholder, who died seised; and adjudged that her customary estate was gone, because by the accession of the freehold the copyhold estate was extinguished, and so her husband did not die seised thereof. *Secus*, if the lord had enfeoffed a stranger, for then the copyhold remained so still, and the custom with it.

Custom of a manor was, that the wives of copyholders for life should enjoy their husband's estates during widowhood; and the case was, that *A.*, a copyholder for life, purchased the freehold and inheritance of his copyhold, but took the conveyance to *B.*, and his heirs during the life of *A.*, remainder to *A.* in fee, and then *A.* dies: adjudged that his wife should have her customary estate, because the customary estate of *A.*, her husband, continued during his life, and was not extinct, nor altered by the purchase of the freehold, which, during his life, was in *B.*, and then all customary incidents to such customary estate remain, whereof this is one, and grows out of it as an excrescence or fruit, and she may enter (*a*) without admittance.

because, as she takes the *whole* of her husband's estates, the law casts the possession on her, as it does on the heir in cases of descent. But, when she takes only a *part* of the estates, it should seem that the possession is not cast upon her any more than at common law; and, consequently, that she will not be warranted in entering without assignment. And as she shall hold that portion of the lord, and not of the heir as at common law, it should seem also that the regular mode for her to obtain assignment is by plaint in the lord's court; upon judgment in which she shall also recover damages by the statute of Merton. For it has been determined that copyholds are within that statute in this respect, and that the manor-court may award damages under it as far as the demandant is damaged, to whatsoever amount. 2 Watk. Copyh. 90. Gilb. Ten. 183. Shaw v. Thompson, 4 Co. 30. b. Cro. Eliz. 426. S. C. Moore, 410. S. C.||

Custom of a manor was, that the copyholders' wives should have their free-bench of all copyholds whereof their husbands died seised; and a copyholder, being married, surrenders to *A.* in fee by way of mortgage, for securing *70l.*, and this surrender was presented to be enrolled; but, before admittance, the surrenderer dies, and after his death *A.* is admitted; and if the wife should have her free-bench, was the question? For the wife

Moore, 260. S. C. adjudged, Cro. Eliz. 825. S. P. and S. C. cited.

Co. Litt. 33. b. 110. b. F. N. B. 150. Cro. Eliz. 415. The rea-

Lashmer v. Avery, Cro. Ja. 126. Dugworth v. Radford, Sir W. Jon. 462.

Howard v. Bartlett, Hob. 181. Cro. Ja. 573. S. C.

(a) || She may enter before admittance,

Benson v. Scot, 3 Lev. 385. 4 Mod. 251. S. C. Salk. 185. pl. 3. S. C. Carth. 275. S. C. Skin. 406. 12 Mod. 49.

it

it was said, that, till admittance, the copyhold remained in the husband, and then he died seised, and so his wife within the custom; and though the admittance after his death has relation to the time of the surrender, yet that is only by fiction of law between the parties, but shall not prejudice the wife who is a stranger: also, the admittance hath relation to the marriage, which was before, and is perfected by, the death of the husband, and so her title was begun and perfected too, before the title of the surrenderee. But the court denied that the wife had any initiate title by the marriage in this case, as women have to their dower at common law; but she hath only a conditional inception of a title subject to the husband's power of preventing it by alienation, as here he might have done; for she is not to have her free-bench but where the husband (*a*) dies seised; and this, by the relation of the surrender, he did not; and adjudged accordingly.

(*a*) || *Hinton v. Hinton*, 2 Ves. 631. *Godwin v. Winsmore*, 2 Atk. 526.

Rex v. Inhabitants of Lopen, 2 T. R. 580. *Brown v. Raindle*, 3 Ves. 256.||

Hinton v. Hinton, 2 Ves. 631. 638. *Brown v. Raindle*, 3 Ves. 256.

|| If the husband contract for the sale of his copyhold, and die without any actual surrender, a court of equity will compel the widow to relinquish her dower.||

Salisbury v. Hurd, Cowp. 481. *Fareley's case*, Cro. Ja. 36. S. P. *Anon. Freem.* 516. S. P.

[The custom of a manor was to grant copyholds for three lives: the first life had a power of surrendering the whole estate, and the widow of a tenant, who died seised, was entitled to her free-bench. *F.*, a copyholder for three lives, surrendered to *H.*, the deceased husband of the defendant; who afterwards by licence from the lord, demised to *J. S.* for ninety-nine years by way of mortgage: then *H.* died, and *J. S.* assigned to the plaintiff. At the trial, only one instance of a lease by licence was given in evidence; whereupon it was insisted for the defendant, the widow, that there being no special custom to let by lease, the only way of transferring the copyhold was by surrender. And therefore in this case, if the estate of *H.* the husband was not determined according to the custom of the manor, he must be deemed to have died seised of the copyhold, and the widow still entitled to her free-bench. But the court said, that here, the right of the husband was confined to such estate as he should die seised of; consequently, as between lord and tenant, they might defeat the wife's estate when they pleased.]

Parker v. Blecke, Cro. Car. 569. *Sir W. Jones*, 450. S. C.

The custom of a manor was, that the wife of a copyholder dying seised should have her widow's estate; a commission of bankruptcy is taken out against the copyholder, and his estate sold by the commissioners, but before the vendee was admitted the copyholder dies; and yet adjudged that the widow's estate was gone, because her husband did not die seised, his estate and right being bound by the sale, to which the admittance after has relation, and devests the widow's estate.

Ro. Abr. 562. *Dav.* 30. b.

If the custom of a manor be, that if any of the tenants marry a widow she shall have no dower; this is good; but a custom, that the wife of tenant in fee shall not be endowed, is not good.

If there be a custom, that where the husband sells his lands and his wife receives part of the money, or if it be expended in the family, that his wife shall be barred of her dower, this may be good. Ro. Abr. 562. Brook, tit. Custom, 53. 78.

Ancient rent, or common in Borough-English, gavelkind, &c. is of the nature of the land there, and women shall have dower accordingly; and so it seems to be of rent, common, &c. newly granted, though some have held the contrary; and in all these cases, whether it be of land or rent, the custom must be shewn specially. Brook, tit. Custom, 44. 58. 65. 69.

If the custom be, that the wife shall have for her dower the moiety of the lands and tenements of her husband, &c. she shall not be endowed of a fair or bailiwick, because the custom shall be taken strictly, and these are no tenements: *secus*, if they were appendant to a manor, whereof she is dowable, for then she shall have a moiety of the profits as appendant to a moiety of the manor. Perk. 435, 436. 2 Sid. 139.

2. Dower ad Ostium Ecclesiæ.

Dower *ad ostium ecclesiæ* is where a man of full (a) age, seised of lands in fee, after marriage endows his wife at the (b) church-door of (c) a moiety, a third or other part of his lands, declaring them in certainty; in which case, after her husband's death, she may enter into such (d) lands without any other assignment, because the (e) solemn assignment at the church-door is equivalent to the assignment *in pais* by metes and bonds: but this assignment cannot be made before marriage, because before, she is not entitled to dower. Litt. § 39. Co. Litt. 34. a. 36. b. 37. a. (a) Cannot be made by one under age. Perk. 438. (b) Dowment *ad ostium camere* is not good. F.N.B. 150. Co.

Litt. 34. (c) It was formerly held that it could not be of more than a third part of the husband's estate. F. N. B. 150. Co. Litt. 34. b. 36. a. (d) This dower cannot be of the capital barony held of the king *in capite*, or of the capital messuage held by knight's service. (e) This dower, before the statute of frauds and perjuries, was held to be good without deed, or without livery and seisin. Perk. 437. Brook, 7. 80. Dyer, 18. pl. 108. Co. Litt. 34. a. 35. a.

If this dower be assigned, with a clause, that, notwithstanding any divorce that shall happen, the wife shall hold it for her life, this is good, because *modus & conventio vincunt legem*. Co. Litt. 32. a.

If tenant in tail assigns such dower, this shall not bind his issue against the statute *de donis*, nor him in the reversion after the estate ended. Co. Litt. 38.

3. Dower ex Assensu Patris.

Dower *ex assensu patris* is where the father is seised of lands in fee, and his son and heir (f) apparent after marriage endows his wife by the father's assent, *ad ostium ecclesiæ*, of a certain quantity of them; in which case, after the death of the son, his wife may enter into such parcel, without any other assignment, though the father be living: but this assent of the father must be by deed, because his estate is to be charged *in futuro*, and this may likewise be of more than a third part. Litt. § 40. Co. Litt. 35, 36. Perk. 444. Brook, 7. 80. Plow. 304. b. Cro. Ja. 169. Dower *ex assensu matris* is as good. Perk. 441. Co.

Co. Litt. 35. This endowment of a reversion expectant on an estate for life is not good, nor of lands held by the father in jointenancy, because not dowable of them. Co. Litt. 35. a. Perk. 445. F. N. B. 150. (f) Can be only by the heir apparent. Perk. 442. F. N. B. 150. 3 Co. 38. 6 Co. 22. Co. Litt. 35. But it is good, though the heir apparent be within age, for the estate does not move from him. Co. Litt. 35. b. 38. a. Brook, 80.

4 Co. 1. Co. Litt. 36. Brook, 97. 3 Leon. 272. These dowers, *ad ostium ecclesiæ*, or *ex assensu patris*, if the wife enters and assents to them, are a good bar of her dower at common law; but she may, if she will, waive them, and claim her dower at common law, because being made after the marriage she is not bound by them.

Co. Litt. 35. F. N. B. 150. These dowers ensue the nature of dower at common law, and the wife may have a writ of dower for them, though they are certain, as well as for her dower at common law, and as well against the guardian as the terretenant.

Co. Litt. 30. a. 37. a. These dowers are good, though the wife be under the age of nine years at the time of her husband's death, being made by consent.

Co. Litt. 37. a. 41. Stanf. 195. a. But they are forfeited for high or petit treason in the husband; and so they were anciently, if he were attainted of felony or murder; though now in these last cases they are saved by the statutes 1 E. 6. c. 2. and 5 Edw. 6. c. 11., but remain forfeitable by his attainder of high or petit treason.

4. *Dower de la plus Belle.*

Litt. § 48. Co. Litt. 38, 39. a. b. *Dower de la plus belle* is where there is a guardian in chivalry, and the wife occupies lands of the heir as guardian in socage, if the wife brings a writ of dower against such guardian in chivalry, he may shew this matter, and pray that the wife may be endowed *de la plus belle* of the tenements in socage; and it will be adjudged accordingly. And the reason of this endowment was to prevent the dismembering of the lands holden in chivalry, which are *pro bono publico*, and for the defence of the realm.

Litt. § 49. After judgment given, the wife may take her neighbours, and in their presence endow herself of the fairest part of the tenements, which she hath in socage, for her life.

Perk. 450. If the lands, which the wife hath as guardian in socage, are not of value sufficient for her dower; or if a rent-charge be issuing out of them; upon her shewing this matter, she shall recover of the guardian in chivalry to make it up.

Perk. 451, 452. If all the lands which the husband had were holden in socage, and his wife hath them as guardian in socage, she shall be allowed the third part of the profits upon her account in allowance of dower. But she cannot endow herself of the third part thereof, because that would be to make herself judge in her own cause; neither can the heir, in a writ of dower brought against him, plead that she is guardian in socage, and may endow herself.

3 Co. 30. Guardian by tort in socage cannot endow herself *de la plus belle*, because the law will not encourage such wrong and violence.

DURESS.

- (A) For what Duress or Degree of Restraint or Terror, a Man shall avoid his Deed or Contract.
- (B) On whom and by whom the Duress must be committed.
- (C) What Contracts or Securities may be thus avoided.
- (D) The Manner of avoiding them.

(A) For what Duress or Degree of Restraint or Terror, a Man shall avoid his Deed or Contract.

IT seems clearly agreed, that where a person is illegally restrained of his liberty by being confined in a common gaol, or (a) elsewhere, and during such restraint enters into a bond, or other security, to the person who causes the restraint, that he may avoid the same for duress of imprisonment.

Co. Litt. 253-
Jenk. 166.

(a) For every restraint of the liberty of a freeman is an imprison-

ment. 2 Inst. 482.

But, if a man be imprisoned by order of law, the plaintiff may take a feoffment of him, or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment: for this is not by duress of imprisonment, because he was in prison by (b) course of law; for it is not accounted in law duress of imprisonment, but where either the imprisonment, or the duress that is offered (c) in prison, or at large, is tortious and unlawful; for *executio juris non habet injuriam*.

2 Inst. 481.

(b) That duress of imprisonment is intended only where the party is wrongfully imprisoned till he makes a bond, and not where

a man is lawfully imprisoned for another cause, and for his delivery makes a bond. 3 Leon. 239. *per cur.* (c) If a man be lawfully in prison, yet, if he makes an obligation against his agreement and will, he may avoid it by duress. 43 E. 3. 10. b. Ro. Abr. 687.—

Where after judgment the defendant, having no good cause of action, caused the plaintiff to be arrested and detained in prison, threatening him that if he would not seal a release to him, he should lie there and rot; and thereupon he sealed one, and was discharged; it was ruled at *Guildhall* by *Bridgman C. J.* that this release could not be avoided by duress, because he was in custody in the course of law by the king's writ when he sealed, but he offered it should be found specially if *Baldwin* would pray it, which he did not; and therefore the release was held good. Lev. 69.

My Lord *Coke* says, that for menaces, in four instances, a man may avoid his own act. 1st, For fear of loss of life. 2dly, (d) Of loss of member. 3dly, Of mayhem. 4thly, Of imprisonment. 2 Inst. 483. (d) 2 Ro. Abr. 124. S. P.

2 Inst. 483.

Br. Abr.

Duress. pl. 16.

Sumner v.

Ferryman,

11 Mod. 203. cited in 2 Str. 917. *contr.* Ro. Abr. 687. pl. 3.

But menacing to commit a battery, or to burn his houses, or spoil his goods, is not sufficient to avoid the act; for if he should suffer what he is threatened, he may sue and recover damages in proportion to the injury done him.

Cro. Eliz. 646.

Stepney and

Lloyd. 4 Inst.

97. S. C. Cro.

Car. 596.

(a) So, where

the arrest was

by the pursui-

vant of the

high commis-

sion by their

Abr. 687.

If a man is taken by virtue of a process issuing out of a court that hath no power to grant such process, and for his enlargement gives bond to appear in the said court, this may be avoided, because taken by duress. Adjudged in an action upon such bond, given by one who was taken upon an attachment under the privy seal of the court of requests; for that court had (a) no power to grant such process, and therefore it was no warrant to the sheriff to take his body.

command, until he entered into a bond to appear, &c. it was held void. Ro.

Allen, 92.

Ruled by *Roll*

accordingly

upon the trial

of an issue on

the duress.

If *A.* falsely charges *B.* with felony for stealing his horse, and procures a warrant from a justice of peace to a constable, whereby he is taken, and being in custody, upon *A.*'s promise to discharge him, seals a bond for 10*l.* to *A.*, and is thereupon immediately discharged; this bond may be avoided by duress; and so ruled, it appearing that the horse was *B.*'s own horse, and that these proceedings were only to cover the deceit.

2 Vern. 497.

per Cur.

|| 2 Ves. 634-5.

1 Ves. jun. 43.

In these cases,

though the validity of the instrument must be tried at law, yet that trial will

be in an issue

under the controul of the court of equity, in which the attention of the jury

will be called not only to the circumstances of the execution, but to the state of the party's

mind, from the effect of former acts of violence and oppression, *Peel v. ———*, 16 Ves.

157. *Lady Strathmore v. Bowes*, 2 Br. Ch. Rep. 345. 1 Ves. jun. 22.||

Also in equity, if a man by compulsion enters into a bond, though the terror and force are not sufficient to make it duress at common law, yet it may be relieved against.

Talleyrand v.

v. Boulanger,

3 Ves. 447.

A court of

law has dis-

charged a de-

fendant upon

common bail

arrested on a contract made in *France*, under which his person would not there have beenliable. *Melan v. Fitzjames*, 1 Bos. & Pull. 138. But see *contr. per Heath J. Id.* 142. and*Lord Ellenborough*, 2 East, 455.

|| Where *A.* a foreigner had arrested *B.* a foreigner upon an obligation entered into in their own country by *B.* as surety, which according to the law of that country could not affect the person; and whilst he was in custody under the arrest, had taken from him bills of exchange, upon which he afterwards arrested him again; he was restrained by injunction from proceeding in his action.||

Woodman

and Skute,

Pr. Ch. 266.

Gibb. Eq. Rep.

9. S. C.

But in this every case must depend on its own circumstances; for where *A.* being taken by the husband going to bed to his wife, gave securities for payment of 500*l.* and a bill was brought to be relieved against the securities, suggesting a plot to catch him: and that the defendant with an axe threatened to cut him in pieces; there being no proof of a plot, and it appearing that the securities were entered into at three several times, and when the plaintiff was in cool blood, and that he joined in concealing the consideration thereof, the court refused to relieve.

Also, by a rule of the court of Common Pleas, 14 & 15 C. 2. and of the court of King's Bench, P. 15 C. 2. all warrants for confessing judgments, taken by any sheriff or bailiff from any person in his custody by arrest, if not executed in the presence of some sworn attorney of either court (which attorney by a rule of the court of B. R. of 4 G. 2. and of C. B. of 14 G. 2. must be an attorney on behalf of the defendant,) and his name set or subscribed thereto as a witness, shall not be good, or of any force; and upon oath made that this was not done, the same shall be set aside, and the sheriff or officer may be punished for so doing; and if judgment be entered thereon, the same on motion will be vacated and set aside; and if the execution thereon be executed, the party will have restitution awarded him.

|| This rule extends only to cases where the defendant is in custody on mesne process; Watkins v. Hanbury, 2 Str. 1245. Fell v. Riley, Cowp. 281. Birch v. Sharland, 1 T. R. 715. Crompton v. Steward, 7 T. R. 19. and at the

suit of the party to whom the warrant to confess judgment is given. Finn v. Hutchinson, 2 Ld. Raym. 797. Churchy v. Rosse, 5 Mod. 144. Holcombe v. Wade, 3 Burr. 1792. Charlton v. Fletcher, 4 T. R. 433. Smith v. Burlington, 1 East, 241. Gilman v. Hill, Cowp. 142. Nor is the case of persons in the custody of the marshal strictly within it, as it mentions only persons in custody of the sheriff's officers. Parkinson v. Caines, 3 T. R. 616. Neither does it apply to cases where the defendant is himself a practising attorney, Walton v. Stanton, Barnes 37. nor where, being aware of the rule, he means to convert it into an instrument of fraud. Gilman v. Hill, Cowp. 142. Jeyes v. Booth, 1 Bos. & Pull. 97. The attorney present need not be an attorney of the court in which the judgment is to be entered up, Wilmot v. Barry, Barnes, 44. Bland v. Pakenham, 1 Str. 530. neither need he be the defendant's own attorney, or previously acquainted with him. Osborne v. Davis, 4 Taunt. 797. *Qu.* this case, and see what is said by Lord Hardwicke in 2 Ves. 634, 635. But he must be actually an attorney at the time. Barnes v. Ward, Barnes, 42. It seems not to be competent to the party in custody to waive the benefit of the rule by consenting to the plaintiff's attorney acting as his attorney also. Hutson v. Hutson, 7 T. R. 7. Woodin v. College, Ca. temp. Hardw. 177. Nor can the rule be dispensed with, though other persons not in custody join in the warrant. Valentine v. Gulland, 2 Taunt. 49. The rule must be complied with though the warrant be executed out of *England*. Fitzgerald v. Plunkett, 2 Str. 1247. In cases not strictly within the rule the courts will, under their general jurisdiction, relieve a party, who has been oppressed or imposed upon in consequence of such a warrant executed without the presence of any attorney on his behalf. Ruffle v. Hitchcock, 2 Bl. Rep. 1097. Waraker v. Gascoyne, *Id.* 1297. Parkinson v. Caines, 3 T. R. 616.

(B) On whom and by whom the Duress must be committed.

THE duress that will avoid a deed must be done to the party himself; therefore if *A.* and *B.* enter into an obligation, by reason of duress done to *A.*, *B.* shall not avoid this obligation, though *A.* may, because he shall not avoid it by duress to a stranger.

combe v. Standing, Cro. Ja. 187. S. P. adjudged, and that the bond may stand good as to one, and be avoided as to the other, where it is joint and several. Ro. Abr. 686. pl. 6. Duress by a stranger, by procurement of the party that shall have the benefit, is a good cause to avoid, &c. 43 E. 3. 6. Ro. Abr. 688. S. C.—But duress by a stranger, without making the obligee party thereto, is no cause to avoid, &c. Keilw. 154. a.

Montal and Woolington, Ro. Abr. 687. pl. 7. [Wayne v. Sands, Freem. 351. acc.] Hus-

But (a) a son shall avoid his deed by duress to his father; so shall (b) the father his deed, by reason of duress to his son.

(a) Ro. Abr. 687.
(b) 2 Brow.

276. [But *per Twisden J.* a man shall in no case avoid his deed by duress to another, let him be related how he will. *Freem.* 351.]

Ro. Abr. 687. Also, the husband shall avoid a deed made by duress to his
2 Brownl. 267. wife.

S. P. For the husband and wife are but one person. *Sid.* 123. cited to be adjudged.—For duress of imprisonment of the plaintiff's commoign. *Keilw.* 154.

Ro. Abr. 687. But a servant shall not avoid a deed made by duress to his
2 Brownl. 276. master, nor *vice versa*.

(C) What Contracts or Securities may be thus avoided.

Bro. tit. Dis-
seisin, 68. IF a man makes a (a) lease by duress, and the lessee enters,
(a) So, if a the lessor shall have an assise against him as a disseisor; for
man under du- the free consent of parties being essential to all contracts, where
ress makes a either of the parties is under force and violence, his free assent
letter of at- cannot be supposed, and therefore such contract is void, and
torney to give the person who enters by virtue of it is a wrong-doer.
livery, he shall
have an assise. Bro. tit. Disseisin, 63.

Bro. tit. Dis- But, if a man by duress make a feoffment and livery in per-
seisin, 63. *Vide* son, he shall have no assise against the feoffee, because such
2 Inst. 483., duress shall not be presumed, for then the power of the *pais*,
where it is said present at the solemnity, would have been supposed to have
that a feoff- come in to his rescue.
ment made by
duress is not
void, but voidable only.

Moore, 42. So, if a man acknowledges and enrolls a deed, he cannot af-
Cro. Eliz. 88. terwards plead duress.
S. C. And the
court inclined accordingly. Ro. Abr. 862. S. P. And that no averment shall be taken, that
a deed enrolled was made by duress.

Ro. Abr. 687. But a statute merchant may be avoided by *audita querela*, be-
Owen, 142. cause it was made by duress of imprisonment.
S. C. *Vide Vi-*
dian Ent. 107.

Leon. 13. The In debt for the arrears of an account, the defendant may
Earl of Nor- shew that the plaintiff, of his own wrong, imprisoned the de-
thumberland's fendant, and assigned auditors to him, being in prison, and that
case, adjudged so the account was by duress.
by all the
judges.

Dyer, 143. b. A will shall be (b) avoided by duress or menace of imprison-
(b) So, if a man ment.
makes a will
in his sickness by the over importunity of his wife, to the end he may be quiet, this shall be
said to be a will made by restraint, and shall not be good. *Styl.* 427.

If a man takes *A. S.* to wife by duress, though the marriage be solemnized *in facie ecclesie*, yet it is merely void, and they are not husband and wife, for without a free consent (a) there can be no marriage.

Keilw. 52. b.
1 N. Dyer, 13.
in margin.
Sid. 65.
(a) Though *de*
Cro. Car. 488.

jure it cannot, yet *de facto* it may, and so within the statute 3 H. 7. c. 2.

(D) *The Manner of avoiding them.*

IF a man executes a deed by duress, he cannot plead *non est factum*, for it is his deed, though he may avoid it by special pleading judgment *si actio*.

5 Co. 119. Re-
solved *per*
Cur. 2 Inst.
483. S.P. *Vide*

Keb. 516. That in pleading the special manner of the duress, *viz.* whether it was *per minas vite, minas imprisonam, &c.* must be set forth; and note, so are all the entries.

ADDENDA.

|| CARRIERS.

(B) In what Cases a Carrier is chargeable for a Failure in his Duty.

Vol. II. Page 2.

IT has appeared above that as long as the goods are in possession of the carrier, as carrier he is answerable for their destruction by an accidental fire; but when his custody as carrier has ceased, he will not be responsible for the consequences of such fire. Thus where certain parties in partnership agreed to carry goods from *London* to *Frome*, where the goods were deposited in a warehouse belonging to the partnership, where one of the partners resided (no charge being made for warehouse room), till it should be convenient to the consignees to receive them, and while in the warehouse they were destroyed by fire, it was held that the partners were not liable to the owners for the value of the goods, since they held them as warehousemen and not as carriers at the time of the fire; and one of the partners having paid the value to the owners, it was consequently held a payment in his own wrong, and that he could not recover it from his copartners.

In re Webb
and others,
8 Taunt. 445.
2 Moo. 500.

Birkett v. Wil-
lan, 2 Barn. &
A. 356.

Bodenham v.
Bennett,
4 Price, 31.
Smith v.
Horne,
8 Taunt. 144.

Batson v. Do-
novan, 4 Barn.
& Ald. 21.;
and see *Brook*
v. Pickwick, 4

Smith v.
Horne, *suprà*.
Duff v. Budd,
5 Bro. & Bing.
177. 6 Moo.
469.; and see

In case of *gross negligence* on the part of the carrier, he is answerable for the loss of goods notwithstanding the notice limiting his liability, and though the goods are above the value expressed in the notice and are not specially insured.

And whether the defendant has been guilty of gross negligence or not is a question for the jury; and gross negligence may be shewn on the common declaration in assumpsit for not safely and securely carrying.

And the leaving a coach in a wide street in the middle of the night, with a porter directed to watch it, during which time the parcel was stolen, has been held to be gross negligence.

So also the sending the parcel out in a cart for delivery with only one person; so also the delivering the parcel at the office to a person calling in the name of *Parker* stating no residence, when the parcel was directed *J. Parker, High Street, Oxford*.

Stephenson v. Hart, 4 Bing. 476. *Bradley v. Waterhouse*, 1 Moo. & Malk. 154.

So

So also if the parcel is sent by a different coach from that for which it is booked, the notice is no protection to the carrier in case of loss, for the carrier has wrongfully divested himself of the character of carrier which he undertook.

Garnett v. Willan,
5 Barn. & A. 55. Sleat v. Fagg, 5 Barn. & A. 542.

In order to fix the owner of goods with knowledge of the carrier's notice, it is not enough to prove that he took in for three years a paper in which the notice was advertised once a week.

Rowley v. Horne, 5 Bing. 2.

And a notice that the proprietor of the *coach office* where the parcel is booked will not be responsible, &c. will not avail the proprietor of a *coach* carrying the parcel from the office, unless it be shewn that he is connected with the office.

Macklin v. Waterhouse, 5 Bing. 212.

It seems that where carriers run a coach from *A.* to *B.* and back, notice to limit their responsibility on the carriage of parcels from *A.* to *B.* will extend to the journey back from *B.* to *A.*

Riley v. Horne, 5 Bing. 217.

If the principals have knowledge of the notice it is sufficient, though their agent who sends and books the parcel may not know of it, for they should inform him of it, and order him not to send parcels by that coach.

Mayhew v. Eames, 5 Barn. & Cres. 601.

The want of notice to the carrier, of the goods being above the value specified in their notice, is not waived by the carrier having before paid losses to the plaintiff, without enquiring into the particulars of the damage.

Evans v. Soule, 2 Maule & S. 1.; and see 1 Maule & S. 255.

The carrier may insist on his notice in defence, though his book-keeper was conscious or had reason to infer that the value of the goods exceeded the sum specified in the notice.

Levi v. Waterhouse, 1 Price, 280.; and see Marsh v. Horne, 5 Barn. & C. 322.

When an order is given, previous to the delivery of goods, to a carrier or other bailee, to deal with them in a certain manner when he receives them, to which he assents, and the goods are then delivered to him, a duty arises on his part to deal with them accordingly, and a promise is implied to perform that duty; so that the plaintiff may declare either on the express promise contained in the defendant's assent to the terms of the order given to him, or on the implied promise resulting from the acceptance of the goods on certain specified terms.

Streeter v. Horlock, 1 Bing. R. 34.

In an action on the case for misfeasance in carelessly and unskilfully driving a coach, whereby it was upset and the plaintiff hurt, a verdict and judgment against some of the defendants and in favour of others are good.

Bretherton v. Wood, 6 Moo. 141. 5 Bro. & B. 24.

Where the declaration stated that the defendants, for certain hire and reward, undertook to carry goods from *London* and deliver them safely at *Dover*, and the contract proved was to carry and deliver safely (*fire and robbery excepted*), the variance was held fatal.

Latham v. Ruttley, 2 Barn. & Cres. 20.

Where *A.*, the keeper of a coach office and a part owner in several coaches, made a special contract with *B.* for the carriage of parcels which he was in the habit of sending from that office to various places, it was held that this bound the owners of all the

Helsby v. Mears, 5 Barn. & C. 504.

the coaches in which *B.* was a part owner, and as well those who became partners after the making of the contract as those who were so before.

Miles v. Cattle,
6 Bing. 745.

Where the plaintiff, on setting off from *Stockton* to *London* by defendant's coach, received from *A. B.* a parcel of value, with a request to book it for *London* at defendant's office, and the plaintiff, instead of doing so, put it into his bag, intending to take it with him, and the bag was lost by the defendant on the journey, it was held that the plaintiff could not recover damages in respect of the parcel.

(D) Of the Regulations Carriers are under by Acts of Parliament, with respect to their Carriages, and the Prices they are to take, and other matters.||

Page 8.

7 & 8 Geo. 4.
c. 39.

BY the statute 7 & 8 Geo. 4. c. 39. the provisions of the 3 W. & M. c. 12. and the 21 Geo. 2. c. 28. empowering magistrates to fix rates of carriage, and impose penalties on persons taking other rates, are repealed.

3 Car. 1. c. 1.

By the 3 Car. 1. c. 1. it is enacted that no carrier with any horse or horses, nor waggonman with any waggon or waggons, nor carman with any cart or carts, nor wainman with any wain or wains, nor drovers with any cattle, shall by themselves or any others travel upon the Lord's Day upon pain of forfeiting 20s. for every such offence.

29 Car. 2. c. 7.
§ 2.

And by 29 Car. 2. c. 7. § 2. it is enacted that no drover, horse-courser, waggoner, butcher, higler, their or any of their servants, shall travel or come into his or their inn or lodging upon the Lord's Day or any part thereof, upon pain that each and every such offender shall forfeit 20s. for every such offence.

Ex parte Middleton, 5 Barn. & C. 164.

It has been decided that the driver of a van between *London* and *York* is a "carrier" within the meaning of the 3 Car. 1. c. 1., and is liable to the penalties of that statute for travelling on the Lord's Day.

Sandeman v. Breach,
7 Barn. & C. 96.

But the proprietor and driver of a stage coach is not a "carrier," within the meaning of the 3 Car. 1., nor is he, in driving his coach on a Sunday, within the 29 Car. 2. c. 7. § 1. as a person exercising his worldly labour, business, or work of his ordinary calling, on the Sabbath.

CERTIORARI.

(A) Out of what Court it issues; and therein of the discretionary Power of the Court of King's Bench in granting, denying, and filing it.

Page 9.

Rex v. Taunton, St. Mary,

UPON an indictment of a parish for not repairing a highway, the right to repair may come in question so as to entitle the

the parish to remove it by *certiorari* under the 5 W. & M. c. 11. § 6., though the parish plead only not guilty.

A *certiorari* was granted, as of course, on the application of the attorney general on behalf of a prisoner, to remove an indictment for murder from the sessions for the city of *Rochester*, on an affidavit disclosing circumstances tending to shew that an impartial trial could not be had.

It has been said, that a *habeas corpus* is the only means of removing ejectments brought in an inferior court; but it is now settled, that an ejectment may be removed by *certiorari*.

An appointment of overseers by two justices may be removed into the Court of King's Bench by *certiorari*, without appealing against it to the quarter sessions.

A plaint in replevin cannot be removed from a county court in *Wales* into the King's Bench by *certiorari*. N.B. This was before the *Welsh* judicature act, 1 W. 4.

3 Maule & S. 465.

The King v. Thomas, 4 Maule & S. 442.; and see 4 Term R. 161.

Doe v. Dring, 1 Barn. & C. 255. Patterson v. Eades,

5 Barn. & C. 550.

Rex v. Stand-ard Hill, 4 Maule & S. 578.

Edwards v. Bowen, 5 Barn. & C. 206.

(B) To what Court it lies.

Page 13.

IT has been seen (p. 13.) that a *certiorari* does not lie to the great sessions of *Wales*, without some special ground shewn. And in one case, where it had issued without such cause, and without notice given to the opposite party, the court quashed the writ, and awarded a *procedendo* and costs against the party issuing it.

Wales is abolished, and the jurisdiction of the K. B., C. P. and Exchequer is extended to *Wales*.

Jones v. Davis, 1 Barn. & C. 145. By 1 W. 4. c. 70. § 14. the jurisdiction of the Court of Great Sessions in

at *Westminster*,

(D) What the Party, who applies for it, must do before it is granted.

Page 14.

THE notice required by the 13 G. 2. c. 18. § 5. for removing an order of justices, must state on the face of it the name of the party applying for the writ.

The 5 G. 2. c. 19. § 2. is not complied with by the party and his two sureties entering into a recognizance in 25*l.* each, but it must be in the entire sum of 50*l.*

The court will not grant a *certiorari* to remove an indictment from the quarter sessions after judgment has been pronounced in that court.

On moving for a rule *nisi* for a *certiorari*, the affidavits must not be entitled in any cause.

An indictment may be removed from the sessions by *certiorari* without the six days' notice required to be given by the 13 G. 2. c. 18. § 5., for that statute does not apply to prosecutors.

By 5 G. 4. c. 106. § 23. it is provided that no writ of *certiorari* shall be issued to remove any action, bill, plaint, cause, suit, or

Rex v. Justices of Lancashire, 4 Barn. & A. 289.

Rex v. Dunn, 8 Term R. 217.

Rex v. Inhab. of Pennegoes, 1 Barn. & C. 142.

Ex parte Nohro, 1 Barn. & C. 267.

The King v. Battams, 1 East R. 298.

5 G. 4. c. 106. § 23.

other proceeding at law had in any of his majesty's courts of great session in *Wales*, unless it be duly proved upon oath that the party suing forth the same hath given seven days' notice thereof in writing to the other party; and unless the party suing for such writ shall, upon oath, shew to the court in which application shall be made, sufficient cause for issuing such writ, and so that the parties therein concerned may have an opportunity to shew cause against the issuing or granting such *certiorari*.

Edwards v.
Bowen,
2 Russell R.
153.; and see

It has been held sufficient cause for granting a writ of *certiorari* to remove proceedings in replevin from the Court of Great Sessions, that the title to the freehold is in question.

5 Barn. & C. 206. *S. C.* Pierce v. Thomas, Jacob. R. 54. By 1 W. 4. c. 70. § 14. the Court of Great Sessions is abolished.

(E) Where, by Acts of Parliament, the Court of King's Bench is restrained from granting it.

Page 20.

Rex v. Rogers,
5 Barn. & A.
773.

THE 17 G. 3. c. 56. § 22. takes away the *certiorari* only from offences for the first time created by the 22 G. 2. c. 27., and does not apply to those created by 12 G. 1. c. 34. and extended to the silk and cotton trades by 22 G. 2. c. 27.

Rex v. Hubs,
5 Term R. 542.

An indictment found at the quarter sessions on the statute 1 W. & M. c. 18. for disturbing a dissenting congregation, may be removed into the King's Bench by *certiorari* before verdict.

Rex v. Wadley,
4 Maule & S.
508.

So also an indictment found at the quarter sessions upon statute 52 G. 3. c. 155. § 12. for disturbing a religious assembly.

Rex v. Bird,
2 Barn. & A.
522.

Where the appeal is against overseers' accounts by individuals paying rates within the parish, the *certiorari* is not taken away by 50 G. 3. c. 49., that act only applying to appeals by the overseers against the disallowance of any items in their accounts by the magistrates.

Rex v. The
Justices of
St. Alban's,
3 Barn. & C.
698. See Rex

An appointment of surveyors of highways under the 13 G. 3. c. 78. cannot be removed into the Court of King's Bench by *certiorari*, since it is taken away by the eighty-first section.

Rex v. Jukes,
8 Term R. 542.
See Rex v.
Fell, 1 Barn. &
Adol. 380.

v. Justices of Somersetshire, 5 Barn. & C. 816.

A *certiorari* can only be taken away by express words; and where a statute, authorizing a summary conviction before a magistrate gives an appeal to the sessions, who are directed to hear and finally determine the matter, this does not take away the *certiorari*, even after such an appeal made and determined.

Rex v. Fin-
more, 8 Term
R. 409. Rex v.
Turner,
3 Barn. & C.
160.

If a defendant remove an indictment by *certiorari*, giving the usual recognizance under 5 & 6 W. & M. c. 11., and he be found guilty, and die before the day in bank, his bail are liable on the recognizances to pay the costs.

Rex v. Turner,
15 East, 570.

If the judgment be arrested, no costs can be taxed for the prosecutor; for the word "convicted" in the statute means *convicted by judgment*.

The

The costs of conveying the defendant to gaol, in execution of his sentence, are reasonable costs within the meaning of the act, and will be allowed. Rex v. Gilbie,
5 Maule & S.
520.

The recognizance under the statute will not be discharged till all the costs are paid, although they exceed the sum named in the recognizance. Rex v. Teal,
15 East, 4.

Prosecutors on an indictment for stopping a way which they have used before it was stopped, are parties grieved, and entitled to costs within the statute 5 & 6 W. & M. c. 11. Rex v. Wil-
liamson,
7 Term R. 52.
Rex v. Taun-
ton, 3 Maule & S. 465.

So also are prosecutors dwelling near a steam engine emitting smoke affecting their breath, eyes, furniture, and dwelling-houses. Rex v. Dews-
nap, 16 East
R. 194.

But where the prosecutor of an indictment for stopping a way had not used it before it was stopped, and whilst it was stopped declared he did not care about it, and did not apply for costs till two years after judgment given, the court held him not entitled as a party grieved. Rex v. Incle-
don, 1 Maule
& S. 268.

(H) In what Manner it is to be returned.

Page 23.

UPON a *certiorari* to remove a conviction by a justice of the peace on the deer-stealing act 16 G. 3. c. 30. a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient; for justices ought in all cases to return convictions to the sessions. Rex v. Eaton,
2 Term R. 285.

Third persons cannot object to the misdirection of a *certiorari* if the proper officer waive the objection and return the record. Daniel v. Phil-
lips, 4 Term R.
499.

A magistrate is justified in returning to a *certiorari* a conviction of the party in a more formal shape than that in which it was at first drawn up, and of which a copy had been delivered to the party by the magistrate's clerk, provided the conviction returned is warranted by the facts. Rex v. Barker,
1 East R. 186.

Where justices, to whom a *certiorari* was directed, signed the return, but did not seal it or add their description as justices, the court sent back the return to be amended. Rex v. Ken-
yon, 6 Barn. &
C. 640.

CHAMPERTY.

WHERE a creditor who had instituted proceedings at law and in equity against his debtor, enters into an agreement to abandon those proceedings, and give up his securities in consideration of a debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor, and agreeing to use his best endeavours to assist in adjusting his account with the holder of the securities, and in recovering his securities; held, that the agreement does not amount to champerty, but would have done so, if it had stipulated that creditor should have maintained

Hartley v.
Russell, 2 Sim.
& Stu. 244.

maintained such proceedings against the holder of securities, in consideration of profits to be derived by debtor from the suit.

Stone v. Yea,
1 Jac. R. 426.

Persons having a common interest may agree to unite in a defence, but the agreement must not be beyond the common object: and therefore an agreement between several owners and occupiers of land in a parish, to concur in defending any suit that may be commenced against any of them, by the present or any future rector, for the tithes of articles covered by certain specified moduses, binding themselves not to compromise or settle, and not limited to their continuance in the parish, or to any particular time, seems illegal.

Wood v. Grif-
fiths, 1 Swanst.
56.

An equitable interest, under a contract of purchase, may be the subject of sale; the sub-contract converts the original vendee into a trustee of his equitable interest for his vendee, who acquires the same rights which he had to the benefits to be derived under the primary contract. Such sub-contracts are not within the doctrine of champerty and maintenance.

Stanley v.
Jones, 7 Bing.
369.

An agreement to communicate such information as shall enable a party to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, on condition of receiving a portion of the sum recovered, is illegal.

Williams v.
Protheroe,
5 Bing. 309.

An agreement between the seller and purchaser of an estate, that the purchaser, bearing the expense of certain suits commenced by the seller against an occupier for arrear of rent, should have the rent to be so recovered, and any sum that could be recovered for dilapidations; and that the purchaser, bearing the expenses, might use the seller's name in actions he might think fit to commence against the occupier, for arrears of rent or dilapidations, is not void as savouring of champerty.

CHARITABLE USES AND MORTMAIN.

(C) What is a good Charitable Use within the
43 Eliz.

Page 36.

Attorney-
General v.
Brown,
1 Swanst. R.
265.; and see
Attorney-
General v.
Heelis, 2 Sim.
& Stu. 67.
Gort v. Attor-
ney-General,
6 Dow. 156.
Attorney-
General v.
Comber, 2 Sim. & Stu. 95.

|| **BY** an act of the 13 Geo. 3., commissioners were authorized to levy a rate on occupiers of houses in *Brighton*, for paving, watching &c. the town; and another rate on every chaldron of coals brought into the town, for repairing or building works to protect the town against the sea; on an information filed against the commissioners for a misapplication of the coal rate, the court held that the object of the act was a charitable use within the statute, and therefore the court had jurisdiction to take an account of the duty, and see how it had been applied.

A bequest to the widows and orphans of the parish of *Lindfield*, was held a good charitable bequest.

The whole series of decisions under the 43 Eliz. in favour of devices to charity, proceed on the principle that where there is ability in the grantor to grant, and the gift is for charitable purposes, the grant, though void at the time when it was made, is, by the effect of the 43 Eliz. rendered operative; but if there is inability to grant, the court has not interfered to make good a grant of a thing that the grantor had no power to grant.

See Attorney-General v. Skinners' Company, 2 Russ. 417.

(E) How Charitable Gifts and Dispositions have been construed, and how far favoured in Equity.

Page 36.

WHERE the founder of a free school directed the heirs male of the feoffees to appoint a master, and if they should fail to do so, then the election should be in the curate and churchwardens, and six chief inhabitants; the chief inhabitants at the time of the foundation, and the heir of the last surviving feoffee could not be discovered, so that the Lord Chancellor became visitor in right of the crown. He doubted the power of the visitor to elect a master, but directed a general reference of the matter to the Attorney General.

Attorney-General v. Black, 11 Ves. 191.

Equity has jurisdiction over all charities under the 52 Geo. 3. c. 101. for the purpose of administering the funds, even though the charity be created by royal charter, provided the application does not extend to regulate or alter the charity, in which case the crown can only interfere by virtue of its visitatorial power.

In re Chertsey Market, 6 Price, 261.

On an information filed by the inhabitants of *Harrow*, against the master and governors of that school, for three purposes, 1st, the removal of such governors as are not inhabitants, and unduly elected according to the founder's statute; 2d, the better administration of the revenues; 3d, an alteration in the present constitution of the school: the information as to the first part was dismissed, for the Court of Chancery has no jurisdiction to remove corporators, and eleemosynary corporators were the subject of visitatorial jurisdiction; therefore when the crown became visitor, for want of an heir of the founder, the removal of a corporator *de facto* should be sought by petition to the great seal. 2nd, As to the revenues, including the management of the estates and the application of the income, the Lord Chancellor directed an enquiry. 3d, As to the constitution of the school, with a view to reduce it to a mere parochial school, by restraining the number of boys not on the foundation, the Lord Chancellor refused to interfere: and as to the general education and discipline of the school, he said it should be left to the governors and masters; any substantial deviation from the principle and purpose of the institution was the subject of visitatorial jurisdiction.

Attorney-General v. Clarendon, 17 Ves. 491.

A bequest of residue "to the widows and children of seamen belonging to the town of *Liverpool*," was held a valid charitable bequest, and was directed to go in aid of a subsisting charity,

Powell v. Attorney-General, for

3 Meriv. 48.; for such persons of this description as should be deemed and see Attorney-General v. Comber, 2 Sim. & Stu. 95. Attorney-General v. Corporation of Exeter, 1 Russell R. 45.

Attorney-General v. Pearson, 3 Meriv. R. 409.

If land or money be properly given "for maintaining the " worship of God," in that case the court will execute the trust in favour of the established religion; but if it be clearly expressed or plainly implied, that the purpose is the maintenance of dissenting doctrines, not contrary to law, the court will execute the intention.

Mills v. Farmer, 1 Meriv. R. 55.

Where testator directed the residue of personalty to be divided for "certain charitable purposes mentioned by me, and such " other charitable purposes as I do intend to name hereafter," and he did not mention any more, the court executed the disposition in favour of charity with regard to the objects pointed out.

James v. Allen, 3 Meriv. 17.

A bequest in trust for such benevolent purposes as the trustees in their integrity and discretion might unanimously agree upon, was held void for uncertainty.

1 Sim. & Stu. 40.

Where a legacy is given for permanent charitable purposes to persons having no corporate character, the court will not, without a reference to the master, allow the fund to be paid out to those persons, even where they are intrusted by the testator with the management.

Attorney-General v. Exeter Corporation, 3 Meriv. 524.; and see Attorney-General v. Magwood, 18 Ves. 515. Attorney-General v. Brooke, *Id.* 519. Attorney-General v. Wilson, *Id.* 518.

Where an information was brought to set aside a lease of a charity estate, as being for a long term determinable on lives at a small rent on payment of a fine, the court refused to disturb it, the corporation having always let in the same manner; and Sir William Grant denied that there was any such principle as that a lease of a charity estate for lives, or for a long term determinable on lives, was *prima facie* a breach of trust. It must be proved that the mode of letting was so bad, as that no person meaning to discharge his trust fairly could resort to it.

Attorney-General v. Power, 1 Ball. & B. 145.

A bequest of money to Roman Catholic bishops and their successors is void, no such characters being known to the laws of *Ireland*, but otherwise if they are particularly named.

Attorney-General v. Le-pine, 2 Swanst. R. 181.

Where a residuary estate was bequeathed to the minister and church officers of a parish in *Scotland*, for the benefit of a charity or school there, the Lord Chancellor said, that where a charity was to be administered in *Scotland*, this court did not take the administration into its hands, but left it for the courts in *Scotland*.

In re Macclesfield School, 6 Price, 214.

Where the conduct of the trustees of a charity is not positively objectionable, the court will not interfere to regulate a voluntary charity, because some of the trustees complain of the acts of the majority, as being adverse to their intention, and to that of others of the contributors.

Ex parte Berkhamstead Charity, 1 Ves. & B. 158.

Where trustees have a leasing power, the court will controul it for the benefit of a charity.

Ex parte

The founders of a charity having named as trustees the occupiers

occupiers of certain annual offices, other trustees were appointed by the court to hold the funds, but the selection was still left to the trustees appointed by the founder.

Blackburne,
in re Taylor's
Charity, 1 Jac.
& Walk. 297.

Where in consequence of an increase of the rents of the charity, it was referred to the master to suggest a scheme for their future application, and he suggested an increase of salary to a lecturer, it was held that the master might annex the condition of residence to the increased stipend, though not required by the will of the founder.

Ex parte
Lane, 4 Madd.
479; and see
2 Ves. & B.
134

Where a testator devised a house after the death of *A.*, for the use of the master that might be appointed for a school for instruction of poor persons in *W.*, and afterwards bequeathed a sum on trust, to apply the interest to procuring a master and mistress for instructing poor children and keeping the school in repair, and to apply the residue of the interest to the poor; it was held that the bequest to the school was void, as being connected with the void devise of the house, and that the amount intended for that purpose being uncertain, the gift of the residue was also void.

Attorney-
General v.
Hinckman,
2 Jac. & Walk.
270.

Where the corporation of *Bristol* (to whom certain moneys were given for the purposes mentioned in a deed, and to the intent that they might be laid out in the purchase of lands of the clear yearly value of 120*l.* and more,) covenanted by the deed, to pay thereout annually certain sums of nearly the same amount, to certain charities in rotation, the corporation itself being one of those charities, and there being no express gift of the surplus, and the decrease and subsequent increase of the rents being in certain events provided for; it was held, that the corporation was not a mere trustee for the charities, and that the charities were not entitled to call for a distribution of the increased rents.

Attorney-
General v.
Mayor of Bris-
tol, 2 Jac. &
Walk. 294.

In distributing the increased rents of a charity estate, the Court of Chancery has authority to alter, not only the proportions in which the objects of the charity would take under the original instruments, but also the objects themselves.

Ibid.

Where a sum of stock is left to the treasurer of a charity in *Scotland*, in order that the dividends may be applied to the charity, the Court of Chancery will order the stock to be transferred to the corporation.

Emery v. Hill,
1 Russell R.
112.

And so in case of a foreign charity, the court in such cases not having the jurisdiction to administer the fund, as they do in *English* charities.

Minet v. Vul-
liamy, *Id.* 113.

Where lands are given to the use of a parish church, it is not *prima facie* a due application of the charity, to mix up the rents with the produce of parochial rates, so as to form a general fund out of which the repairs of the church and other parochial expenses are defrayed.

Attorney-
General v.
Vivian, 1 Rus-
sell R. 227.

A relator need not have any interest in the due administration of the charity.

Where a corporation, being bound to pay a certain revenue to a college out of charity lands, had, in the fourth of *James I.* conveyed to the college lands then of that annual value, in satisfac-

Attorney-
General v.
Pembroke

faction

Hall, 2 Sim.
& Stu. 441.

5 Russell, 142.

Attorney-
General v.
Corporation of
Exeter, 3 Russ.
595. 2 Russ.
45.; and see
1 Jac. 407.

faction of the annual sum, and the lands had since much increased in value, the court would not undo the arrangement.

Where a fund was given to a corporation in *England* for a charitable purpose, it was ordered to be paid to the corporation, without the settlement of a scheme.

(See page 51.) — Where lands were given in the reign of *Henry* the Seventh to the corporation of *Exeter* and their successors, for the aid and relief of the poor citizens and inhabitants of *Exeter*, “who are heavily burthened by fee-farm rents of that “city, and other impositions and talliages,” Lord *Lyndhurst* held, that the rents ought to be applied to the relief of the poor inhabitants of *Exeter* not receiving parish relief; and that it was not a due administration of them to apply them to the payment of fee-farm rents due from the city, repairing the gaol, maintaining prisoners, and other similar public purposes.

Attorney-
General v.
Haberdashers
Company,
3 Russ. 550.

(See page 51.) — In recent cases a provision for giving instruction in English, writing, and arithmetic, has been introduced into a scheme for the management of a free grammar school.

Attorney-General v. Dixie, *Id.* 554.

Attorney-
General v.
Dean, &c. of
Christ Church,
2 Russ. 524.

(Page 49.) — If there is a fair and honest intention on the part of those who have the management of a charity, it is not the habit of the court, though that intention should be founded in mistake, to hold trustees responsible for acts so done, or to call back money which they have so paid.

Attorney-
General v.
Mayor of Exe-
ter, 2 Russ.
562.

Where on an account extending over an unusually long period, a large balance was found due from a corporation to a charity, the Chancellor referred it to the attorney-general to certify whether it would be proper that the charity should accept less than the balance; and the attorney-general having certified that it would be proper to accept a sum less than one half, a decree was made accordingly.

(F) Of the Commissioners of Charitable Uses, pursuant to the Statutes 43 Eliz. and the 52 G. 3. c. 101.

Ex parte
Skinner, *in re*
Lawford Cha-
rity, 2 Meriv.
458.

A PETITION under the 52 G. 3. c. 101. must have the signature of the attorney-general, or of the solicitor-general (if there be no attorney-general), which must not be affixed without the same deliberation as in case of an information regularly filed; and if an information is filed, and afterwards a petition as to part of the same subjects, the court will not separate the two, and give relief on the petition as to what is within its limits, and dispose of the rest on the information.

Ex parte Sea-
gears, 1 Ves.
& Bea. 496.

Where a petition was presented under the 52 G. 3. c. 101. and the trustees did not appear, the court ordered that they should shew cause why the prayer should not be granted.

Ex parte Rees,
5 Ves. & B. 10.

The 52 G. 3. c. 101. is limited to questions of abuse of trust, as between the trustees and the objects of the charity, and not applicable to an adverse claim to land as having formerly belonged to the charity.

Constructive trusts are not within the act.

Ex parte
Brown, Coop. 295.

Where a trust is created for a charity, it is a breach to pull down a chapel, sell the materials, and convey the burial-ground to other uses; and the court, under 52 G. 3. c. 101., will direct a conveyance to new trustees.

Ex parte
Greenhouse,
1 Madd. R.
192.

The court has no jurisdiction under the 52 G. 3. c. 101. to direct upon petition an account of the assets of a person who has received the rents of a charity estate.

St. Wenn's
Charity, 2 Sim.
& Stu. 66.

"Whereas an act was passed in the last session of parliament, intituled *An Act for appointing commissioners to enquire concerning charities in England for the education of the poor*; and certain commissioners were appointed for the execution of the said act: and whereas an act hath passed in the present session of parliament, intituled *An Act to amend an Act of the last session of parliament for appointing commissioners to enquire concerning charities in England, for the education of the poor, and to extend the powers thereof to other charities in England and Wales*, whereby the numbers and powers of the commissioners were extended: and whereas it is expedient that additional facilities should be afforded for applications to the courts of equity regarding the management of estates or funds appropriated to charitable purposes; be it therefore enacted, that whenever, upon any examination or investigation had by or before the commissioners appointed, or to be appointed, under the authority of the before-mentioned acts, any case shall arise or happen in which it shall appear to the said commissioners that the directions or orders of a court of equity are requisite for the remedying any neglect, breach of trust, fraud, abuse, or misconduct in the management of any trust created for any charitable purposes aforesaid, or of the estates or funds thereto belonging, or for the regulating any administration of any such trusts, or of the estate or funds thereof, it shall and may be lawful for the said commissioners, or any five or more of them, if they shall think fit, to certify the particulars of such case in writing, under their hands, to his majesty's attorney-general; and thereupon it shall be lawful for his majesty's attorney-general if he shall so think fit, either by a summary application in the nature of a petition, or by information, as the nature of the case may require, to apply to or commence, in a suit in his majesty's High Court of Chancery, or to or in his majesty's Court of Exchequer sitting as a court of equity, stating and setting forth the neglect, breach of trust, fraud, abuse or misconduct, or other cause of complaint or application, and praying such relief as the nature of the case may require; and when such petition or suit is instituted in the said Court of Exchequer, it shall be lawful for that court to proceed in the hearing and deciding of the same, according to the due course of the said court; and any order or decree of the said court in such proceeding shall be final and conclusive to all intents and

59 G. 3. c. 91.
An act for giving additional facilities in applications to courts of equity regarding the management of estates or funds belonging to charities.

" purposes

“ purposes whatsoever, unless the party or parties who shall
 “ think himself or themselves aggrieved thereby shall, within
 “ one year after the time when such order or decree shall have
 “ been made and entered by the proper officer, prefer an appeal
 “ from such order or decree to the House of Lords; and when
 “ such petition or suit is presented or commenced in the said
 “ High Court of Chancery, it shall and may be lawful to and
 “ for the Lord Chancellor, Lord Keeper, or Lords Commis-
 “ sioners for the custody of the great seal, and they are hereby
 “ required, to order and direct such petition or suit to be heard
 “ and determined, either before the Master of the Rolls or Vice-
 “ Chancellor, as to the said Lord Chancellor, Lord Keeper, or
 “ Lords Commissioners shall seem meet; and thereupon the
 “ Master of the Rolls or Vice-Chancellor shall proceed to hear
 “ and re-hear, if to him it shall appear necessary, and to deter-
 “ mine the same; and all decrees, orders, and acts of the Master
 “ of the Rolls and Vice-Chancellor made and done therein shall
 “ be deemed and taken to be respectively decrees, orders, and
 “ acts of the said Court of Chancery, and be executed ac-
 “ cordingly, subject nevertheless in every case to be reversed,
 “ discharged, or altered by the Lord Chancellor, Lord Keeper,
 “ or Lords Commissioners for the custody of the great seal for
 “ the time being; and no such decree or order shall be enrolled
 “ until the same be signed by the Lord Chancellor, Lord
 “ Keeper, or Lords Commissioners of the great seal for the
 “ time being.”

59 G. 3. c. 91.
 § 2.

§ 2. “ And be it further enacted, that when any appeal shall
 “ be made to the Lord Chancellor, Lord Keeper, or Lords
 “ Commissioners of the great seal, from any order or decree of
 “ the Master of the Rolls or Vice-Chancellor made in any matter
 “ aforesaid, the decree or order which shall be made on such
 “ appeal by the Lord Chancellor, Lord Keeper, or Lords Com-
 “ missioners of the great seal, shall be final and conclusive to
 “ all intents and purposes; and no appeal from such decree
 “ or order of the Lord Chancellor, Lord Keeper, or Lords
 “ Commissioners for the custody of the great seal, to the House
 “ of Lords shall be allowed or entertained.”

59 G. 3. c. 91.
 § 3.

§ 3. “ And be it further enacted, that no petition or inform-
 “ ation, presented, filed, or prosecuted under this act, nor any
 “ answer thereto, nor any deposition, interrogatories, affidavits,
 “ or proceedings, nor any order or decree upon the same or in
 “ relation thereto, nor any copies of any such petition, inform-
 “ ation, answer, deposition, interrogatories, affidavits, orders, or
 “ decrees, nor of any other proceedings whatsoever under this
 “ act, shall be subject or liable to the payment of any stamp
 “ duty whatever.”

§ 4.

§ 4. “ And be it further enacted, that if any person, sum-
 “ moned to appear before any two or more of the said commis-
 “ sioners, shall wilfully omit or refuse to appear before such
 “ commissioners, or to bring or to produce any deed, paper, or
 “ writing, instrument or other document, in his, her, or their
 “ possession,

“ possession, custody, or power, and which he, she, or they
 “ shall be required, by the precept of such commissioners, to
 “ produce, relating wholly to the estates or funds which shall be
 “ the subject of enquiry before such commissioners, or to the
 “ receipt or application, or nonapplication or misapplication
 “ thereof, or to the state of the schools or charities which shall
 “ be the subject of enquiry before such commissioners, or the
 “ true copy of any part or parts of any deed, paper, writing, or
 “ other instrument, (and which copy any two of such commis-
 “ sioners are hereby empowered to require by such precept,)
 “ or shall refuse to be sworn, or being a quaker to affirm, or
 “ being sworn, or being a quaker having affirmed, shall refuse
 “ to answer to and before the said commissioners, or any two
 “ of them, or to answer fully any lawful question, on oath or
 “ affirmation, touching or concerning any matter or thing re-
 “ lating to such estates or funds as aforesaid, or to the state of
 “ such schools or charities as aforesaid, (except in such cases
 “ excepted by the said first-recited act,) every such person so
 “ refusing to comply with any such lawful requisitions of the
 “ said commissioners, shall be liable to the payment of such fine
 “ to his majesty as the Court of King’s Bench or the Court of
 “ Exchequer, on application made by or on the behalf of the
 “ said commissioners, or any two of them, or by his majesty’s
 “ attorney-general for the time being, shall think fit, to set and
 “ impose; which fine the Court of King’s Bench or Court of
 “ Exchequer is hereby authorized and empowered to set and
 “ impose according to their discretion respectively, and to en-
 “ force payment of the same by attachment or otherwise, in
 “ such manner as the said courts respectively may do in cases
 “ of contempt of the same courts.”

§ 5. “ And be it further enacted, that whenever it shall appear
 “ to the trustees of any free school, hospital, or other charitable
 “ institution or donation within the provisions of this act, that
 “ the statutes or regulations thereof are insufficient for the
 “ secure and due administration of the funds thereto belonging,
 “ it shall be lawful for such numbers of them as are by the said
 “ statutes or regulations empowered to do any act, by and with
 “ the consent of any five or more of the said commissioners,
 “ to present a petition to the Lord Chancellor, Lord Keeper,
 “ or Lords Commissioners of the Great Seal, or to the Court
 “ of Exchequer sitting as a court of equity, praying such relief
 “ as the nature of the case may require; and the Lord Chan-
 “ cellor, Lord Keeper, and Lords Commissioners of the Great
 “ Seal, and the said Court of Exchequer, are hereby authorized
 “ and empowered to give such directions, and to make such
 “ order, touching the matter of the said application, as to them
 “ respectively shall seem fit; which order shall be final and
 “ conclusive to all intents and purposes whatsoever, unless the
 “ party or parties who shall think himself or themselves ag-
 “ grieved thereby shall, within two years after the time when
 “ such order shall have been made and entered by the proper
 “ officer,

§ 5.

“ officer, prefer an appeal from such order to the House of
 “ Lords, to whom it is hereby enacted and declared that an
 “ appeal shall lie from such order.”

Attorney-
 General v.
 Hartley, 2 Jac.
 & Walk. 355.

The master of a free school, being appointed by the persons acting as trustees, and having acted as such for many years, the validity of his appointment is not to be questioned if he has duly executed the duties of the office.

Ibid.

Where a gift is made to trustees to support a schoolmaster generally, it is in their discretion to found a grammar school, or a school for teaching other branches of learning, subject to the control of the Court of Chancery.

(G) Of the Statute 9 G. 2. c. 36. to restrain the disposition of Lands, whereby the same become inalienable.

Page 64.

Doe dem.
 Thompson v.
 Pitcher,
 6 Taunt. 359.;
 and see
 5 Maule & S.
 107.

A GRANT of lands, in trust perpetually, to repair, and if need be to rebuild, a vault and tomb standing on the land, and permit the same to be used as a family vault for the donor and her family, is not a charitable use within the statute 9 G. 2. c. 36.

6 Taunt. 359.

If there be in a deed one limitation to an use, which is a charitable use within the statute, other limitations in the deed, not within the statute, are not thereby avoided.

Doe dem.
 Howson v.
 Waterton,
 5 Barn. & A.
 149.

Copyhold lands are within this act; and therefore a conveyance of them to charitable uses in the owner's life, must be made with the formalities required by the act; and the court, after a long undisturbed enjoyment, would not presume a bargain and sale and enrolment in Chancery. They did not decide whether it would be sufficient, in the case of copyhold, to declare the uses by a deed conformable to the statute, and to cause such deed to be enrolled in Chancery.

Doe dem.
 Welland v.
 Hawthons,
 2 Barn. & A.
 96.

Where the owner of land built a chapel used for public worship, and the congregation subscribed a sum for enlarging and improving the same; and the owner, in consideration that such money should be expended for that purpose, demised the premises by lease for twenty-three years, at a pepper-corn during his life, and 10*l.* per annum after his death; and a declaration of trust was afterwards executed by some of the trustees, declaring that they would hold the premises in trust for the congregation assembling at the chapel; and that in case the public worship would be there discontinued, then that they should assign the premises for civil purposes: it was held, that this was a conveyance void within the statute 9 G. 2. c. 36.

Attorney-
 General v.
 Stewart,
 2 Meriv. R.
 145.

The statute does not extend to the colonies, for its object was political, and intended to have only a local operation; and therefore, a real estate in *Grenada*, or money produced by its sale, may be devised to a charitable use.

Attorney-
 General v. Power, 1 Ball & Beatty, 150.

Nor does the statute extend to *Ireland*.

A *Scotchman*, by a will in the *English* form, made in *England*, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in *Scotland*, upon trust, to lay out the same in the purchase of lands or rents of inheritance in fee simple, for the intent expressed by an instrument of even date with the will; and by that instrument he directed the trustees of the will to pay the rents annually to certain other trustees, who at all times were to be persons residing within twenty miles of *Montrose*, to be by them applied to the relief of indigent ladies in *Montrose*, or within twenty miles of that town. It was held, that this bequest was void under the mortmain act.

Attorney-General v. Mill, 3 Russ. 328.

Where a testator, after giving personal estate to trustees for the perpetual endowment of two schools, proceeded to "recommend" his trustees, at a convenient time, to lay out the money, when collected, in the purchase of freehold lands, to effect the above purpose; although the gift of personalty was valid, yet it was held, the word "recommend" was imperative on the trustees, and left them no discretion; and the bequest was therefore void.

Kirkbank v. Hudson, 7 Price, 212.; and see *Malim v. Keighley*, 2 Ves. 333.

A bequest of a sum of money to erect a blue-coat school and establish a blind asylum, with a direction, that lands should not be purchased, expressing an expectation that lands would be given, is not void under the statute.

Henshaw v. Atkinson, 5 Madd. R. 306.; and see *Johnson v.*

Swann, 3 Madd. 457.

But where there was a devise of a house, for the use of the master that might be appointed to a school for the instruction of poor persons in *W.*, and a bequest of money, upon trust, to apply the interest in procuring a master and mistress for instructing poor children, and in keeping the school-house in repair, and to apply the residue of the interest to the poor; it was held, that the bequest to the school was void, as being connected with the devise of the house; and the amount intended for that purpose being uncertain, the gift of the residue was also void.

Attorney-General v. Hinxman, 2 Jac. & Walk. 270.

A grant, duly executed according to the statute, is not invalid because it is made in favour of the rector for the time being of a parish, the grantor being himself rector at the time of the grant.

Attorney-General v. Munby, 1 Meriv. 327. *Ibid.*

An assignment of a mortgage and of the money due thereon to the same college, upon the like trust, was held void as being executed within six months of the donor's death; and not capable of being set up by reference to a will made afterwards, whereby the donor gave the advowson of the living beneficially to the college.

A grant of land to a college, not beneficially, but in trust, falls not within the exception in favour of the universities.

Ibid.

A devise of land to the *British Museum* is within the statute of mortmain.

Trustees of the British Museum v. White, 2 Sim. & Stu. 594.

A bequest of a sum of money, to pay off a debt, secured by an equitable charge only on a meeting house, is void.

Waterhouse v. Holmes, 2 Sim. 167.

Attorney-
General v.
Goddard,
1 Turn. & R.
548.

Price v. Hath-
away, 6 Madd.
504.

Mellick v. The
Asylum, 1 Jac.
180.

Limbrey v.
Gurr, 6 Madd.
151.

Shaw v. Pick-
thall, Dan. 92;
and see In-
gleby v. Dob-
son, 4 Russ.
542.

Pritchard v.
Arbouin,
3 Russ. 456.

9 G. 4. c. 85.

A testator, after giving a legacy in trust for a charitable purpose, says, — “As money is of more uncertain value than land, “I do also give the trustees power to make such purchase “as they shall think best for perpetuating the gift.” It was held, that these words did not bring the legacy within the mortmain act.

F. having purchased lands, they were, by his direction, conveyed by the vendor to a trustee for charitable uses. The indenture was enrolled in the Court of Chancery within six calendar months; but *F.* died within twelve calendar months after its execution. It was held, that the conveyance was void under the 9 G. 2. c. 36.

A bequest out of real estate, to erect a monument in a church, to testator's memory, is not within the statute.

A grant of land is void under the 9 G. 2. c. 36. if there is a resulting trust for the grantor for his life, as not being “made “to take effect *in possession* for the charitable use intended,” &c. according to the statute.

Where there was a bequest of stock, to be laid out in rebuilding almshouses, and it appeared by an old inscription and an extract from a local history that the almshouses were in mortmain before the 9 G. 2. c. 36., the bequest was supported.

A bequest to lay out a sum in building a church is void; for a direction to build is held to include a direction to purchase land for the purpose of building, unless the testator distinctly refer to land already in mortmain. (p. 67.)

By 9 G. 4. c. 85. deeds conveying lands for charitable uses, where a valuable consideration is actually paid, shall be valid, although the formalities required by 9 G. 2. c. 36. have not been duly complied with.

CHURCHWARDENS.

(A) Of the Manner and Right of choosing Churchwardens.

Page 72.

Rex v. Inhab.
of Catesby,
2 Barn. & Cres.
814.; and see
12 East, 561.
1 Barn. & Ald
275.

Rex v. Wil-
liams, 8 Barn.
& C. 681.

A PARISH certificate purporting to be granted in 1761 by an only churchwarden and an only overseer of the parish, may be taken to be a good certificate; because it may be intended in favour of such an instrument, that by custom there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them died, and that the certificate was granted before the vacancy was filled up.

To a mandamus to admit *A. B.* into the office of churchwarden, reciting that he had been duly elected, a return that *A. B.* was not duly elected is good.

(B) Of

(B) Of their Interest and Power over Things belonging to the Church.

Page 75.

WHERE land belonging to a parish was occupied by *A.*, and he paid rent to the churchwardens, and they executed a lease of the same land for a term of years to *B.*, and gave a notice of the lease. In an action for use and occupation brought by *B.* against *A.*, it was held that *A.* was not estopped by having paid rent to the churchwardens from disputing *B.*'s title; and that as the churchwardens were not a corporation to take or grant lands, *B.* could not derive a valid title from them. Philips v. Pearce, 5 Barn. & C. 435.

By 59 G. 3. c. 12. § 17., all buildings, lands, and hereditaments purchased, hired, or taken on lease by churchwardens and overseers, by authority, and for the purposes of that act, shall be conveyed, demised, and assured to the churchwardens and overseers and their successors in trust for the parish; and such churchwardens and overseers shall and may accept, take, and hold in nature of a body corporate for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments belonging to the parish; and in all actions, indictments, &c. in relation to such buildings, &c., or the rents thereof, or in relation to other buildings, &c. belonging to such parish or the rents thereof; and in all actions, &c. on any bond for the faithful execution of the office of assistant overseer, it shall be sufficient to name the churchwardens and overseers for the time being, describing them as churchwardens, &c. of the parish for which they shall act, and naming such act; and no action, indictment, &c. shall abate by the death of the churchwardens, &c., or their removal, or the expiration of their office. 59 G. 3. c. 12. § 17.

A chapel warden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without consent of the perpetual curate. Jones v. Ellis, 2 Young & J. 265.

(E) Of their Accounts; and herein of Actions brought by, or against them, and the Remedies they have when their Time is expired.

Page 79.

WHERE in a parish two churchwardens were elected for a township, part of the parish, and two others for the rest of the parish, and separate rates were made for these divisions; it was held that the churchwardens of the township might sue their predecessors for money had and received, without joining in the action all the present churchwardens as plaintiffs, or all the late churchwardens as defendants. Astle v. Thomas, 2 Barn. & Cres. 271. 3 Dow. & Ry. 492.

Where twenty parishioners joined at a vestry in signing an order for the repairs of the church, and one of them, a churchwarden, Lanchester v. Frewer, 2 Bing. R. 361.

warden, paid the artificers, but the rate for reimbursing him was quashed; it was held that he could not sue for contribution the other persons who signed the order. See *ante*, (B).

(F) Of the Prohibition against their supplying Goods to the Poor.

55 G. 3. c. 137.
§ 6.

BY the 55 G. 3. c. 137. § 6., no churchwarden or overseer of the poor shall, in his own name or that of any other person, provide, furnish, or supply, for his or their own profit, any goods, materials, or provisions for the use of any workhouse or workhouses, or otherwise for the support and maintenance of the poor in any parish, township, hamlet, or place for which he is appointed, during the time of the appointment; nor shall be concerned, directly or indirectly, in furnishing the same or in any contract relating thereto, under pain of forfeiting 100*l.* with costs of suit: provided, that if it happens in any parish, township, hamlet, or place, that a person, competent and willing to undertake the supply of such articles for the workhouse or for the use of the poor there, cannot be found within a convenient distance therefrom, other than some one of the churchwardens or overseers, &c. then two or more justices may (proof thereof having been made before them on oath) by certificate under their hands and seals, permit any one or more of such churchwardens and overseers, &c. to contract and agree for supplying such articles, &c.; and such certificate shall be entered with the clerk of the peace or town clerk of the county, city, town, or district in which such person shall reside, and a copy thereof left with him; for which entry every such clerk shall receive one shilling and no more, and every person named in such certificate shall be discharged from the penalty named in the act.

Pope v. Backhouse,
8 Taunt. 259.
2 Moo. 186.

Proctor v. Mainwaring,
3 Barn. & A. 145.

Skinner v. Buckee,
3 Barn. & Cres. 6.

A farmer who furnishes the produce of his land to the poor of the parish of which he is churchwarden, at a fair market price, is within the penalties of the act.

The statute only prohibits supplying the workhouse or the poor generally, and does not extend to the case of a churchwarden or overseer who gives relief (under an order) to an individual pauper, partly in money and partly in goods from his shop.

The words "for his own profit," in the act must be construed as overriding the whole of the subsequent clause; and therefore an overseer or churchwarden who supplies coals indirectly to the use of the poor, is not within the penalty unless he does so "for his own profit."

COMMITMENT.

(A) What Kind of Offenders are to be committed.

Page 81.

A JUSTICE of the peace may commit a *feme covert* who is a material witness on a charge of felony, and who refuses to appear to give evidence at the sessions, or to find sureties for her appearance. Bennet v. Watson, 3 Maule & S. 1.

See tit. "BAIL IN CRIMINAL CASES."

(E) What ought to be the Form of the Commitment.

Page 86.

A COMMITMENT for nonpayment of a penalty on a conviction under the 10 G. 3. c. 18. (the dog-stealing act), which penalty is to be paid one half to the informer and one half to the poor of the parish, is good if it show who the informer is, and what the parish, although upon the conviction, as recited in the commitment, the informer is not named, and the justices only adjudge the penalty to be applied in such manner as the law directs. The justices need not, upon the conviction, adjudge that if the penalty be not forthwith paid the offender shall be committed, but may, after affirmance of the conviction upon appeal, commit the offender for refusing to pay the penalty. The King v. Helps, 3 Maule & S. 331.

Where two justices committed a collector of parish rates to the county gaol, upon complaint against him for refusing to account and pay over monies collected, adjudging that he should be committed to gaol, and there remain until he should have made a true account, and until such money as should appear to be remaining in his hands should be paid by him or his sureties, the commitment was held good. George Goff's case, 3 Maule & S. 203.

A justice of the peace committing for a contempt of himself in his office, cannot commit for punishment unless by warrant in writing. Mayhew v. Locke, 7 Taunt. 63. 2 Marsh, 377.; and see 7 East, 323.

Where a single woman, having been delivered of a bastard child, was committed by one justice of the peace for refusing to answer enquiries as to who was the father of the child, the commitment was held bad. *Ex parte Martin*, 6 Barn. & C. 60.

A commitment of an insane person under the '39 & 40 G. 3. c. 94. § 3. is not a commitment in execution, and is not therefore to be construed with the same strictness; and therefore a warrant stating that *A. B.* had been discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing some crime for which he would be liable to be indicted, to wit, an assault, and that the said *A. B.* being Rex v. Gourlay, 7 Barn. & C. 669.

brought before the justice he committed him, was held to be sufficient, although it did not state the name of the person whom the prisoner intended to assault, and it did not appear that the committing magistrate received any evidence on oath.

COMMON.

(A) Of the several Kinds of Common.

2. Of Common Appurtenant.

Page 95.

Cowlam v.
Slack, 15 East
R. 108. *See*
vide Clements
v. Lambert,
1 Taunt. 205.

IT is now clearly settled that common appurtenant may be claimed as well by grant as by prescription, and after a unity of possession in the lord of the land, in respect of which the right of common is claimed, with the soil and freehold of the waste, proof that the lord tenants of the farm had, for fifty years past, enjoyed the right of common, is evidence for a jury to presume a new grant of common as appurtenant, so as to support a count in an action by a tenant for surcharging it, declaring on his possession of the messuage and land with the appurtenants, and that by reason thereof he was entitled of right to the common of pasture, as *belonging and appertaining* to his messuage and land, and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture, &c.

Barwick v.
Matthews,
5 Taunt. 365.
1 Marsh. 50.

A commoner claiming a common without the manor must prescribe in a *que estate* in the name of the lord, and not in right of his own customary estate; and such common without the manor is not extinct by enfranchisement of the manor.

Sefton v.
Court, 5 Barn.
& C. 921.

The lord of a manor may, in respect of his interest in the soil of the waste commonable lands of his manor, have a right of common over common lands of another manor.

Manifold v.
Pennington,
4 Barn. & C.
161.

Where the plaintiff declared on a right of common for all commonable cattle, and the proof was that he had turned on all the cattle he kept, but that he never kept any sheep, it was held that this was evidence of a right for all commonable cattle, which ought to have been left to the jury.

(C) Of the Commoner's Interest in the Soil; and herein of the Remedies the Law gives him.

1. What Remedies he has against the Lord or Owner of the Soil.

Page 100.

Elliott v.
Hardy, 3 Bing.
61.

IN replevin an avowry was made by defendant in respect of a right of common claimed by the corporation of *Almwick*, under a grant from the *De Vesci*. The plaintiff pleaded that
the

the corporation had, from time immemorial, been accustomed to appoint a reasonable number of herds for, *among other things*, superintending the common and beasts upon it, and also to appoint, for the pains of each herd, a reasonable and proper number of stints of each such herd to be depastured on the *locus in quo*. Issue being taken on this plea, and a verdict found for the defendant, it was held sufficient after verdict. *Qu.* If good on special demurrer?

2. Against Strangers.

Page 102.

In an action for disturbance of plaintiff's common, the declaration stated that he was possessed of a messuage and land, with the appurtenants, and by reason thereof ought to have common of pasture; it was held that the allegation was divisible, and that proof that the plaintiff was possessed of land only, and of a right of common in respect of it, was sufficient.

An averment in a declaration that plaintiff was entitled to common of pasture for all his cattle *levant and couchant* upon his land, is well supported by evidence that plaintiff was a joint owner with defendant and others of a common field, upon which, after the corn was reaped and the field cleared, the custom was for the different owners to turn out in common their cattle, the number being in proportion to the extent of their respective lands within the common field, although such cattle, in fact, were not maintained on the lands during winter, and although the custom proved was to turn out in proportion to the extent, and not to the produce of the land in respect of which the right was claimed. It was held also that it was not necessary to state the right to be with exception of the plaintiff's own land.

Ricketts v. Salwey,
2 Barn. & Ald.
560.; and see
Manifold v.
Pennington,
4 Barn. & C.
161.
Cheeseman v.
Hardman,
1 Barn. & Ald.
706.

(D) Of Approvement and Inclosure.

Page 103.

WHERE allotments were made and awarded to *W. L.* in respect of several customary estates of which he was seised in fee according to the custom of the manor, under an agreement between the lord of the manor and the commoners, and an award made thereon, which were confirmed by an enclosure act, and which agreement contained a clause, saving to the lord all mines and all royalties and privileges *in tam amplo modo*, as he had enjoyed the same within the ancient customary tenements, and the award contained also a clause, saving to the lord all seignories and royalties incident to the manor, and the act saved to him the seignories, rents, services, courts, &c. as if the act had not been made, and also contained a clause, that nothing should alter or annul any settlements, &c. affecting the lands to be enclosed, but that the several allotments should be held by the several persons to whom allotted, to the same uses

Doe dem.
Lowes v. Davison, 2 Maule
& S. 175.

and for the same estates, and subject to such limitations as the lands in respect of which they were allotted were limited to; it was held, that the allotments so made were freehold, and not customary estates; and therefore were not within the custom of the manor, that customary estates are not devisable by will.

Arundell v.
Falmouth,
2 Maule & S.
440.

A lord of a manor is entitled, under an enclosure act, to an allotment in respect of his demesnes of the manor, over and above the allotment awarded to him by the act in respect of his rights as lord of the manor.

Haggerston v.
Dugmore,
1 Barn. & A.
82.

Where commissioners, by an enclosure act, were empowered to make roads, and to defray the expense by a rate on the several proprietors, and they executed their award as to the allotments before the roads were completed, or sufficient funds were raised for that purpose; it was held, that they might afterwards make a rate to defray the expense of completing the roads.

Farrer v. Bil-
ling, 2 Barn &
A. 171.

By the general enclosure act, the legal title to an allotment is not acquired until the execution and proclamation of the commissioners' award. And where a local act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors, and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and before the signing of the award, and might also, within three months before the execution of the award, sell and convey their interest in the allotments, the commissioners being thereby authorized to allot to the purchasers, and the latter, after execution of the award, to hold the allotted lands in such manner as the vendor would have done if there had been no sale, provided that where the allotments were copyhold the deed should be enrolled on the court rolls of the manor, and that the purchaser should be admitted tenant thereto at the same time as the other allottees of copyhold lands, viz. *after the execution of the award*; it was held, that this authority to enclose and to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land, and that therefore, these provisos not sufficiently countervailing those of the general enclosure act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award.

Hetherington
v. Vane,
4 Barn. & A.
428.

Where the plaintiff, being possessed of a house and land in *E.*, had, for sixty years exercised rights of common in *W.*, but it appeared that this was done near the boundary of the adjacent commons of *E.* and *W.*, and the parties exercising the right did not know the exact boundary, and the plaintiff on an enclosure of *E.* common had obtained an allotment there in respect of his estate; it was held, that the judge was right in leaving it to the jury to say whether the evidence was referable to an exercise of the right in *E.* and a mistake of the boundary, or to an exercise of the right in *W.*

Barwick v.
Matthews,

If a copyholder, in respect of his tenement in *A.*, has common in *A.* and also in *B.* for all cattle *levant* and *couchant* on the tenement,

tenement, he is entitled, on enclosure of the wastes of *A.* and of *B.*, to allotments in each, in respect of his right of common, and to the same extent in each manor as if he had no common in the other. 5 Taunt. 365.
1 Marsh. 50.
S. C.

Where a private enclosure act does not vary the terms of the eleventh section of the general enclosure act (41 G. 3. c. 109.) as to setting out and stopping up roads, if the commissioners, in their award, do not notice a road running over the enclosed lands, it is, by operation of the eleventh section, extinguished; and the proprietor of the allotment over which it runs may stop it up. White v. Reeves, 2 Moo. 25.

As to allotments in lieu of tythes, see *Cooper v. Walker*, 4 Barn. & C. 36.

The Court of Common Pleas, though empowered, will not consolidate feigned issues, brought under an inclosure act, where the questions are different. Cranmer v. Pennington, 5 Taunt. 167.

Where an enclosure act empowered the commissioners to declare in what township the several allotments should be assessed to rates and taxes, and they awarded that certain allotments, before within the district of *H.*, were within the township of *C.*; it was held, that such allotments did not thereby become rateable in *C.* Fenton v. Boyle, 1 Taunt. 320.

Where a local enclosure act gave to the party aggrieved a right of appeal for any thing done in pursuance of the act or of the general enclosure act, on giving to the commissioners, and to the parties concerned, ten days' notice in writing, and a notice of appeal against an order ascertaining the boundary of two townships, was given to the commissioners, but not to the lady of the manor, who was a party materially concerned; it was held, that the notice was insufficient. The King v. Justices of Lancashire, 1 Barn. & A. 650.

A custom for the lord to enclose the common, without limit or restraint, being inconsistent with the rights of the commoners, is bad in law; but a custom to enclose (even as against common of turbary) parcels of the waste, leaving a sufficiency of common, is good; and it lays on the lord or his grantee to show that a sufficiency of common is left. Arlett v. Ellis, 7 Barn. & C. 346.

CONDITIONS.

(A) By what Words created in a Deed.

Page 110.

BY a memorandum of agreement, in consideration of the rents and conditions thereafter mentioned, *A.* was to have, hold, and occupy, as on lease, certain premises therein specified, at a certain rent *per* acre; and it was stipulated, that no buildings should be included or leased by the agreement; and it was further agreed and stipulated, that *A.* should take, at the Doe dem. Henniker v. Watt, 8 Barn. & C. 308.; *sed vide*, 2 Bing. 13.

the rent aforesaid, certain other parcels, as the same might fall in; and lastly, it was stipulated and *conditioned* that *A.* should not assign, transfer, or underlet any part of the premises; it was held, that by the last clause a *condition* was created, for breach of which the lessor might enter.

(E) To whom the Condition may be reserved.

Page 114.

Doe v. Bateman, 2 Barn. & A. 168.

IF *A.*, being possessed of a term of years, assign over his whole interest to *B.*, subject to a proviso for re-entry, in case of the breach of a condition, *A.* may enter for the condition broken, though he have no reversion.

(I) Of Conditions precedent and subsequent.

Page 121.

Lester v. Garland, 15 Ves. 248.

WHERE a testator bequeathed his residue in trust, in case *A.* should, within six calendar months after the testator's decease, give security not to marry *B.*; then, and not otherwise, to pay to the children of *A.*, with a proviso to go over, if she should refuse or neglect to give such security, this was held a condition precedent; and Sir *William Grant*, after reviewing the cases as to computation of time, held, that the six months were exclusive of the day of the testator's death.

Long v. Ricketts, 2 Sim. & Stu. 179.; and see *Smith v. Cowdery*, *Id.* 558. *Worthington v. Evans*, 1 Sim. & Stu. 165. *Clarke v. Parker*, 19 Ves 1.

Where a testator devised his estate to trustees, to pay the rents to his son while unmarried; and in case of his marriage, with consent of the trustees, to convey to him; but in case of his marriage against their consent, then to sell the estate and divide the proceeds among other persons, and the son married without the knowledge of the trustees, and both of them disapproved when they knew it, the devise over was held to take effect, since the marriage, with consent, was a condition precedent.

As to conditions precedent, &c. in charterparties and agreements, see tit. *Agreement*, Vol. I., and *Pleas and Pleading*, Vol. VI., and 1 Will. Saund. 320. b. c. d.

(K) Of void Conditions, being against Law.

Page 127.

FOR the late cases and statutes respecting conditions to resign benefices see tit. *SIMONY*, Vol. VII.; and as to conditions against law see tit. *OBLIGATION* (E), Vol. V.; and as to illegal agreements see tit. *AGREEMENT* and *ASSUMPSIT* (A) and (E), Vol. I.

(L) Of repugnant Conditions.

Page 130.

ACCORDING to *Strickley v. Butler*, Hob. 170. a general condition against alienation in a lease to one and his assigns will be void, being repugnant to the grant; but this was denied to be law in *Dennis v. Loving*, Hard. 427.; and see tit. GRANTS (I).

And this doctrine is now exploded, for there may be assigns at law as well as by act of the party.

Weatherell v. Gearing,
12 Ves. 504.

Page 132.

Add to words "*Repugnant and void.*" See 1 W. Saunders' R. 66. note 2, and cases there collected.

And on the same principle a note in the words "I promise *not* to pay," is held to be a valid promissory note.

Bayley on Bills, (4th ed.)
6.

(O) Of the Breach of the Condition : And herein ;

1. *What shall be a breach thereof.*

Page 134.

WHERE *A.* bequeathed an annuity to *B.* with condition to fall into the residue on his signing any instrument to sell, assign or charge it, and *B.* took the benefit of the insolvent act, this being voluntary, was held a breach of the condition.

Shee v. Hall,
13 Ves. 404.;
and see *Wilk-
inson v. Wilk-
inson*, 2 Wils.
47. *Coop. R.* 259.

But if a lease be taken in execution, and sold, it is no breach of the condition not to assign without licence, unless the execution be on a fraudulent warrant of attorney.

Doe v. Carter,
8 Term R. 57.
Id. 300.

The word assigns in such provisos means *voluntary* assigns, in contradistinction to assigns by operation of law; therefore the assignment to the assignees of the tenant who has become bankrupt, is not a breach which entitles the lessor to enter.

Doe v. Bevan,
3 Maule & S.
353. *Goring v.*
Walker, 2 Eq.
Ca. Ab. 100.;

and see *Doe v Powell*, 5 Barn. & C. 308.

Unless the term is made to depend upon the personal occupation of the bankrupt.

Doe v. Clarke,
8 East, 185.

Nor does the condition bind the assignees of the bankrupt, an assignment by whom is no forfeiture.

Doe v. Bevan
ubi supra.

And as the bankrupt is, upon the assignees' acceptance of the lease, discharged from the covenants and conditions by 49 G. 3. c. 121. § 19., it has been held that where the bankrupt comes in again as assignee of his assignees, he is discharged from a covenant restraining the *lessee* from alienating.

Doe v. Smith,
5 Taunt. 795.
1 Marsh. 359.
See tit. *Bank-
rupt* (F),
Vol. I. p. 618,
619.

Where the condition not to assign without licence expressly extends to executors and administrators, a voluntary assignment by them amounts to a breach.

*Roe v. Har-
rison*, 2 Term
R. 435.; and
see *Lloyd v.*

Crispe, 5 Taunt. 249. *Qu.* Whether they are within the condition or covenant when not named. See *Anon. Moore R.* 21. *per Brown J.* 1 Ves. jun. 295. *per* *Ld. Thurlow.*

Where

Sir William Moore's Case, Cro. Eliz. 26.; assigns should not alien without the assent of the lessor, and assignment without licence by the administrator of the lessee, was held a breach, since he is an assign in law. *Bevan, ubi supra. Per* Ld. *Ellenborough*, — it seems a devise is not a breach of a condition not to assign. See *Cruso v. Bugby*, 3 *Wilson*, 234. *Fox v. Swan*, *Styles*, 485.; and *per Bayley J.* in *Doe v. Bevan, ubi supra. Sed vide Cro. Eliz.* 816. 331.

Roe v. Harrison, ubi supra. Although a condition not to assign, transfer, or set over is not broken by an underlease, yet a condition not to set, let, or assign over the premises or any part thereof, is broken by an underlease.

Doe v. Worsley, 1 *Camp.* 20. And so also where the words are "shall not assign or otherwise part with this indenture, or the premises hereby demised."

Greenaway v. Adams, 12 *Ves.* 395. And a condition or covenant not to let, set, or demise, restrains assignment.

Roe v. Sales, 1 *Maule & S.* 297.; and see *Marsh v. Curties, Moor*, 425. And where the condition was that the lessee should not demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign or set over the indenture without licence, &c., and he agreed without licence, with a person to enter into partnership with him, and that he should have the use of certain parts of the premises exclusively, and of the rest jointly with the lessee, and he accordingly let the person into possession, it was held the lessor might re-enter.

2. *What the Party must do to entitle him to the Advantage thereof; and herein of Notice, Request, Tender, and Refusal.*

Page 137.

In order to facilitate the remedy of landlords, and to obviate the difficulties attending a formal demand of rent, it is enacted by the 4 G. 2. c. 28. § 2. that where one half year's rent is in arrear, and the landlord hath right to re-enter for nonpayment thereof, such landlord may, without any formal demand or re-entry, serve a declaration in ejectment for recovery of the premises; or in case it cannot be legally served, or no tenant be in possession, may affix the same on the door of the premises, or on some notorious place of the lands, which service or affixing shall stand in place of a demand and re-entry.

Doe dem. Scholefield v. Alexander, 2 *Maule & S.* 525. See as to proceedings on this statute, *Comyn's Landlord and Tenant*, b. iv. c. 1.; *Adams on Eject.*, 162. *et seq.*; and see *tit. Rent*, Vol. VII.

Under this statute no demand is necessary, and where the proviso was for re-entry in case the rent was in arrear, *being lawfully demanded*, and there was no sufficient distress on the premises, three judges (*Lord Ellenborough diss.*) held that no demand at all was necessary.

3. *What shall be a Dispensation therewith.*

Page 140.

Brunnell v. Macpherson, A proviso not to assign without licence is extinguished by a licence to assign to a particular individual. In this case *Lord Eldon*

Eldon said "Though *Dumpor's* case always struck me as extraordinary, it is the law of the land."

14 Ves. 173.;
and see *Mason v. Corder*,
7 Taunt. 9.

In order that the consent or licence may entirely discharge the condition or proviso, it must be pursuant to the terms of the proviso; if it be required to be in writing, a parol licence will not be either a present or future dispensation of the condition.

Roe v. Harrison, 2 Term R. 455.
Macher v. Foundling Hospital, 1 Ves. & B. 191.

But if such parol licence is used as a snare and under circumstances of fraud, a court of equity will give relief.

Richardson v. Evan, 5 Madd. 218.

A covenant not to underlet or to repair is not dispensed with by waiver of a forfeiture for one breach; but the lessor may take advantage of a subsequent breach.

Doe v. Bliss,
4 Taunt. 735.

So also as to a covenant not to use premises in a certain manner.

Doe v. Woodbridge, 9 Barn. & C. 376.; and see 4 Barn. & A. 401.

CONSTABLE.

(A) How chosen and appointed.

Page 165.

BY 1 G. 4. c. 37. where it appears to any two or more justices acting for any county, &c. by the information on oath of five respectable householders, that any tumult, riot, or felony has taken place or is likely to take place, such justices may call upon and appoint by precept in writing any householders or others (not legally exempt from serving the office of constable), residing within their divisions or the neighbourhood thereof, to act as special constables for such time and in such manner as such justices shall think necessary for the preservation of the public peace, and may administer to them the usual oaths; and every person so called on (not being exempt), who shall neglect to act, shall be liable to such fines as persons neglecting to take the office of constable are by law subject to; and by § 3, reasonable allowances are to be made for their expenses.

1 G. 4. c. 37.

Where in an application for a *quo warranto* against a constable, the affidavits in support of the rule stated, that for fifty years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial, they were held insufficient.

The King v. Lane, 5 Barn. & A. 438.

(B) Who are obliged to serve.

Page 169.

A PERSON is not liable to serve the office of constable unless he be resident in the parish; and therefore a person occupying a house and paying all parish rates in respect of it, and carrying on the trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night

The King v. J. Adlard,
4 Barn. & C. 772.

night at work, but not sleeping in the house, is not liable to serve the office of constable in the parish where the house is situate.

Rex v. Chap-
ple, 3 Camp.
91.

A member of the Barbers' Company in *London* is not exempted from serving the office of constable; the exemption in the statute 32 H. 8. c. 42. only applying to persons lawfully admitted and approved according to the statutes to occupy surgery.

The statute 6 & 7 W. 3. c. 4., exempting apothecaries from serving as constables, is made perpetual by 9 G. 1. c. 8.; and see 55 G. 3. c. 194., 6 G. 4. c. 133.

Licensed victuallers, alehouse-keepers, &c. are disqualified from serving by the 3 G. 4. c. 77. § 19. Roman Catholic priests, complying with the 31 G. 3. c. 32., are exempted.

No serjeant, corporal, drummer, or private of the militia shall be compelled to serve, 42 G. 3. c. 90. § 174.; nor any effective member of any yeomanry corps, 57 G. 3. c. 44. § 3.

(C) Of their Power and Duty in acting without any Warrant from a Justice of the Peace.

Page 171.

Williams v.
Glenister,
2 Barn. & C.
699.

WHERE a parish clerk having refused to read a notice tendered to him in church, and the party delivering it read it himself while the minister was walking to the communion table, and no part of the service was going on, and thereupon the defendant a constable took him from church and detained him for an hour after the service was finished, and then let him go on promising to attend before a magistrate; it was held, that though he was justified in removing him, yet the detention after the service was over was illegal, as there was no malicious disturbance of the church, amounting to an offence against the statutes.

Rex v. Taun-
ton, 3 Maule
& S. 465.; but

It is the duty of a constable to present a highway within his district for non-repair.

not since the 7 & 8 G. 4. c. 38.

Isaacs v.
Brand,
2 Stark. Ca.
167.

Where a party is arrested by a constable on suspicion, in an action brought against the constable it is a question for the jury, whether there was reasonable ground for the suspicion or not; and where the defendant a constable arrested the plaintiff on suspicion of receiving stolen goods, on the mere assertion of one of the thieves, the jury found for the plaintiff.

Beckwith
v. Philby,
6 Barn. & C.
635. See tit.
Trespass (D), Vol. VII. p. 663. *notd.*

Where there is reasonable ground of suspicion, the constable is justified in arresting, though it turns out that no felony has in fact been committed.

Wright v.
Court, 4 Barn.
& C. 596.
As to the pow-
ers and duties
of the con-

A constable taking a party on suspicion of felony must carry him before a justice as soon as he reasonably can, and cannot justify detaining him three days till witnesses can be collected and brought forward against him; nor can he justify handcuffing him, unless necessary to prevent his escape.

stables of the night in *London*, see 1 & 2 G. 4. c. 118.; and as to assisting officers of excise, see 6 G. 4. c. 80. § 39., and assisting officers of customs, 6 G. 4. c. 108. § 40.; and as to their duties

duties in levying the county rate, see 55 G. 3. c. 51., 1 & 2 G. 4. c. 85.; as to their duties, in serving notices of sessions, see 15 G. 3. c. 78. § 62. 5 Barn. & C. 243. 6 Barn. & C. 111. 4 Barn. & C. 702.; and respecting militia, 52 G. 3. c. 38., 43 G. 3. c. 50. § 5., 42 G. 3. c. 90. § 25. By 7 & 8 G. 4. c. 38. they are relieved from making various presentments of offences. See 1 & 2 G. 4. c. 88. as to assaulting constables to rescue offenders or prevent their apprehension.

To trespass and false imprisonment, a plea by *A.* and *B.* that a horse of *A.* having been taken out of *A.*'s possession and found in plaintiff's stable, and *A.* having ground to believe that the horse was stolen by plaintiff, gave charge of plaintiff to *B.* a constable, and requested him to take plaintiff to be examined before a justice, whereupon they took plaintiff to a police office, was held ill; for it clearly was bad for *A.*, and though *B.* might have justified as constable separately, yet, having joined, the plea was bad for him also.

Hedges v. Chapman, 2 Bing. R. 523.

(D) Of their Power and Duty in executing Warrants of Justices of the Peace.

Page 172.

WHERE a constable having a warrant of distress for a church rate under the 53 G. 3. c. 127. broke the doors of the plaintiff's house and entered; though he clearly exceeded his authority, yet it was held no action could be commenced against him after the expiration of the three calendar months limited by the statute, for he was acting "in pursuance of the statute" within the meaning of the clause.

Theobald v. Crichmore, 1 Barn. & A. 227.

A constable authorized by warrant to seize the goods of *A.*, and seizing the goods of *B.* by mistake, is within the protection of 24 G. 2. c. 44. § 8., and must be sued within six calendar months.

Parton v. Williams, 5 Barn. & A. 330.

And so also if the constable having a warrant to seize stolen black cloth, and finding none, seizes cloth of another colour and takes it before a magistrate.

Smith v. Wiltshire, 2 Bro. & B. 619. 5 Moo. 322. S. C.; and see Price v. Messenger, 2 Bos. & Pull. 158.

And so also a constable detaining a person whom he has taken into custody in execution of his office.

Macloughan v. Clayton, Holt. Ca. 478.; and see Bell v. Oakley, 2 Maule & S. 259.

A constable is not necessarily a trespasser if he seizes goods other than those mentioned in the warrant; but, unless such goods are likely to be useful in substantiating the stealing of the goods mentioned in the warrant, the seizure is a trespass.

Crozier v. Cundy, 6 Barn. & C. 232. See Kay v. Grover, 7 Bing. 312.

If a warrant was directed to the constables of *W.*, (their names not being inserted,) the constables of *W.* could not execute it out of the district of *W.*; but now by 5 G. 4. c. 18. § 6. they may execute it at any place within the jurisdiction of the justice granting or endorsing it as if their names had been mentioned.

Rex v. Weir, 1 Barn. & C. 288.

Where a constable is acting as a mere assistant, as in case where a warrant is directed to overseers, and they employ the constable to assist them, if after a demand of the warrant he inform the plaintiff of the character in which he acted, and refer him to the overseers,

Clarke v. Davey, 4 Moo. R. 465.

overseers, an action cannot be maintained against the constable, for the party should apply to the overseers.

(E) Of their Expenses.

18 G. 3. c. 19.
§ 4.

BY the 18 G. 3. c. 19. § 4. reciting that constables, &c. are or may be at great charge in doing the business of their parish, township, &c.; it is enacted that every constable, headborough, &c. shall, every three months, and within fourteen days after he shall go out of office, deliver to the overseers of the poor a just account in writing, fairly entered in a book to be kept, &c. of all sums expended on account of the parish, township, &c. in all cases not theretofore provided for; and also of all sums received on account of the said parish, &c.; and the said overseers shall lay the same before the inhabitants of the parish, &c.; and in case the accounts be approved of by the majority of the inhabitants, the overseers of the poor are authorized to pay out of the poor rates the sums due on such accounts, but in case they shall be disallowed, then the overseer shall deliver back to the constable, &c. such book of accounts; and it shall be lawful for the constable, &c. to produce the book before any justice of the peace for the county, riding, &c. where such parish, &c. is situate, giving notice thereof to the overseers, which justice shall settle the sum due on such accounts, and enter the same and sign his name thereto; and the said overseers are required to pay such sum out of the poor rate.

Rex v. Seville,
5 Barn. & A.
180.

Expenses incurred by a constable in prosecuting a man whom he arrested for a misdemeanor in a place of worship, are not monies expended by him in doing the business of his township within this act, and cannot therefore be allowed in his accounts, since the township was under no obligation to prosecute the misdemeanor.

Rex v. Bird,
2 Barn. & A.
532.

Nor are a constable's expenses incurred in prosecuting for an assault committed on him in execution of his duty within the act.

41 G. 3. c. 78.
§ 1.; and see
1 G. 4. c. 37.
§ 3, 4.

By the 41 G. 3. c. 78. § 1. two justices of the peace, when any person has been appointed special constable to execute any warrants for felony, may order such allowances to be made to him for his expenses as shall seem necessary, which orders shall be submitted on oath of the special constable to the quarter sessions, which shall allow or disallow the same, and order the treasurer of the county to pay what sum they think necessary, which shall be paid and allowed in his accounts; and by § 2. any two justices may order reasonable allowances to be made to any high constable for extraordinary expenses incurred in his duty in case of tumult, riot, or felony which shall be submitted to the quarter sessions, &c. as above.

COPARCENERS.

(A) The Nature and Reason of such Inheritance.

Page 175.

WHERE *J. S.* devised estates to trustees, their heirs, &c. upon trust to sell and pay debts, &c. and then to apply the rents, &c. to *A.* for life, and after his decease to the heir or heirs at law of *B.* and the heirs, executors, &c. of such heir or heirs, to whom the trustees were directed to convey and assign accordingly; it was held that the co-heiresses of *B.*, who were also the co-heiresses of the deviser, took not as coparceners by descent, but as joint-tenants by purchase, and therefore subject to right of survivorship.

Swaine v. Burton, 15 Ves. 365.

COPYHOLD.

(A) Of the Nature of the Tenure, and what shall be deemed Copyhold.

Page 189.

THE freehold of an estate, parcel of a manor and demisable only by licence of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary tenement, *habendum* to her and her heirs, *tenendum* of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs and other services, is in the *lord* and not in the *tenant*, though not holden *ad voluntatem domini*; but such an estate, whether strictly copyhold or not to all purposes, may clearly pass under a description of *copyhold* in a will, the intention to pass it under that description being apparent.

Doe v. Danvers, 7 East, 299. See Wil-
lan v. Lancaster, 5 Russ. 108.

One person may have the *prima tonsura* of land as copyhold, and another the soil, and beneficial enjoyment of it as freehold.

Stammers v. Dixon, 7 East, 200.

(B) In what Respect Copyholds partake of the Nature of Freehold Lands.

Page 190.

AS there can be no general occupancy of copyholds, and no special occupancy except by custom, an estate to *A.* for her life and that of *B.*, terminates on the death of *A.*, in the absence of any custom that it should go to her heir or devisee, or the other *cestui que vie*.

Doe v. Scott, 4 Barn. & C. 706.

(C) What Acts of Parliament extend to Copyholds.

Page 192.

COPYHOLDS are now excepted out of the section of the bankrupt act, directing the commissioners to convey the real estate to the assignees (6 G. 4. c. 16. § 64), and the 68th & 69th sections provide generally for their sale for the benefit of the creditors.

(E) Of particular Customs that are good, and peculiar only to some Copyholds.

Page 198.

Badger v.
Ford, 3 Barn.
& A. 153.

A CUSTOM for the lord to grant leases of the waste of the manor without restriction, is bad in point of law.

Doe v. Jenney,
5 East R. 522.

Where a copyholder in fee who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over, on which surrender and re-admittance no new fine was paid, and by the custom a remainder-man, coming into possession on the death of the tenant for life, must be admitted and pay a fine; it was held that such a custom was good, and that on the death of the tenant for life, the next in remainder not coming in to be admitted, and pay her fine, after proclamations made and presentment by the jury, the lord might seize *quousque*, and maintain ejectment to recover possession in the mean time, and the proclamations were good though in general terms, without *naming* the person next in remainder.

Doe v. God-
dard, 1 Barn.
& C. 522.;
and see Right
v. Bawden,
3 East, 260.

A custom that where a copyhold is granted to a tenant during the life of other persons, and the life of the longest liver of them successively, and the grantee dies during the life of one or more of the *cestui que vies*, such *cestui que vies* shall themselves be entitled to the tenement for their lives, to take *successively* according to the order in which they are named in the grant, but if the grantee devises the tenement, then the devisee to hold during the life of the *cestui que vies*, is good.

Doe dem. Mil-
ner, v. Bright-
wen, 10 East
R. 583.

A husband was held entitled to the copyhold as tenant by the curtesy to his late wife, (a child having been born,) although the wife had never been admitted in her life, the wife's title being as heir, and therefore not requiring admittance to perfect it; and this, although the only evidence of the custom of tenancy by the curtesy on the rolls was three entries of admittance of husbands whose wives had all been admitted; and the husband having such good title as tenant by the curtesy, his possession must be referred to this and not to any adverse title, notwithstanding he was admitted after his wife's death, *to hold pursuant to a settlement*, by which the estate of the wife was limited to the survivor in fee; nor can any release from the heir at law of the wife living during the curtesy, be presumed during that period, since the husband's possession was lawful during that time, nor

from the present heir at law since the curtesy (there being only 14 years), especially since he might be called on by proceedings in equity to discover it.

Concurrent customs in a manor to bar entails by recovery and by surrender are not inconsistent, and slight evidence suffices to prove the latter.

Doe v. Dauncey, 7 Taunt. 674. Roe v. Jeffery, 2 Maule & S. 92.

Qu. Whether a custom to present a surrender at any subsequent court be good.

A custom that if a tenant for life of a copyhold obtains a grant in reversion in the name of a third person, such person is entitled beneficially unless a trust is expressed on the rolls of the manor, is good.

6 Barn. C. 493. Edwards v. Fidal, 5 Madd. 237.

(F) Of granting Copyhold Lands.

2. *What Acts shall destroy the Lord's Power of making Grants.*

Page 204.

WHERE a copyhold tenement, to which a right of common was annexed, vested in the lord by forfeiture, and he regranted it as a copyhold with the appurtenances; it was held, that having always continued demisable while in the lord's hands, it was a customary tenement, and still entitled to a right of common.

Badger v. Ford, 5 Barn. & A. 153.

3. *What Things may be granted as Copyhold.*

Page 205.

Tonsura prima or the forecrop of the land may be granted as copyhold.

Stammers v. Dixon, 7 East, 200.

A grant of parcel of the waste of the manor to hold to *B.* and his heirs, by way of increase to his copyhold, by such services as the copyhold was subject to, for which *B.* paid a fine of 10s., was held not to enure as copyhold, there being no custom to warrant such grant, nor as an estate in fee.

Rex v. Inhab. of Wilby, 2 Maule & S. 504.; and see Rex v. Inhab. of Hornchurch, 2 Barn. & A. 189.

But if there be a custom within the manor for the lord to grant parcels of the waste by copy of court roll, the premises granted in the above mode are well described as copyhold, though the date of the grant be modern.

Ld. Northwick v. Stanway, 5 Bos. & Pull. 546.; and see Boulcott v.

Winmill, 2 Camp. 259. Watk. on Copy., p. 34.

(G) Of Surrenders, Presentments, and Admittances :
And herein,

1. *Of the Necessity of a Surrender, and where the Copyholder shall be said to be in before Admittance.*

Page 208.

Roe v. Loveless, 2 Barn. & A. 453.

AN admittance applies only to those cases where a surrender is first necessary, and therefore where a copyholder takes by grant from the lord, an admittance is not necessary.

Doe v. Belamy, 2 Maule & S. 87.

A person claiming to be admitted as heir to a copyhold, need not tender himself to be admitted at the lord's court, if the steward on application out of court has refused to admit him.

Vawser v. Jeffery, 16 Ves. 526.

An existing surrender to the use of a will, will support a devise of copyhold, notwithstanding an intervening surrender to other uses under which there had never been any admittance.

Wilson v. Allen, 1 Jac. & Walk. 611.

It is clear that the heir of a copyholder may accept enfranchisement before admittance. *Quære* as to a surrenderee or devisee.

Doe v. Vernon, 7 East, 8.

The devisee of a copyhold surrendered to the use of the will, not having been admitted, cannot devise the same; whether the heir of the surrenderor would be a trustee for the second devisee a court of equity only could decide, nor can the heir devise before admittance.

Wainwright v. Elwell, 1 Madd. 627.

Smith v. Triggs, 1 Stra. 487.

2. *Where the Want of a Surrender will be supplied in Equity.*

Page 210.

Rogers v. Marshall, 17 Ves. 294.; and see Brodie v. Barry, 2 Ves. & B. 130. (a) Mr.

The want of a surrender will be supplied in case of a deed as well as of a will, on the same principle, and for and against the same persons; not for a child against a grandchild unprovided for. (a)

Watkins says properly that what the heir may be earning by his industry ought not to be considered as a provision, vol. i. 135.

Milbourne v. Milbourne, 1 Cox. 247. 2 Bro. C. C. 64.

Where there were freehold estates to answer the words of the devise, the court refused to supply a surrender of the copyhold estates included in it.

Gale v. Gale, 2 Cox. 136.; and see Stansfield v. Haerbergham, 10 Ves. 282.

A dormant surrender of a copyhold, (*i. e.* a surrender to A. on condition to perform the will of the surrenderor) will vest an estate in the dormant surrenderee sufficient to support the contingent remainders in the will without trustees for that purpose.

Church v. Mundy, 12 Ves. 426. Kensington v. Mansell, 13 Ves. 136.

An admittance of the particular tenant of copyholds is an admittance of the remainder-man, and a devise of the remainder or reversion requires a surrender to the use of the will.

Doe dem. Nethersole v.

The statute 55 G. 3. c. 192. does not render valid the will of a feme covert without surrender, (the custom requiring a sur-

render by husband and wife of the lands, and a separate examination of the wife and consent of the husband,) for the statute only intended to supply formal surrenders, and not one of substance like that in case of a feme covert.

Bartle, 5 Barn. & A. 492.

Page 213.

Since the above statute, a copyhold will pass under a general devise of real estate, though there be no surrender to the use of the will.

Doe v. Ludlam, 7 Bing. 275.; see 2 Sim. & Stu. 229. 6 Madd. 523.

8. *Of the Time of making the Surrender, Presentment, and Admittance, and where they shall be effectual, though any of the Parties die before they are completed.*

Page 218.

Where a surrender was duly made and presented by the homage, but no entry of it was made on the court rolls; it was held that such surrender and presentment might be proved by a draft entry from the muniments of the manor, and the parol testimony of the foreman of the jury presenting it.

Doe v. Callo-way, 6 Barn. & C. 484.

(H) Of the Operation of the Surrender in passing the Estate: And herein,

1. *Of the Persons to take, and what shall be sufficient Certainty in the Description of them.*

Page 219.

IF copyholds are surrendered to such uses as the owner shall appoint, the appointment may be by will, and no surrender to the use of the will is necessary.

Cuthbert v. Lempriere, 3 Maule & S. 158.

John Lealand surrendered a copyhold in his occupation to the use of *Joseph Lealand* and *John Lealand* his son, for their lives and the life of the survivor, remainder to the heirs of the body of the said *John Lealand* son of *Joseph Lealand*, remainder to the right heirs of the said *John Lealand*; the ultimate remainder is to the right heirs of the surrenderor.

Roe dem. Hucknall v. Foster, 9 East, 405.

3. *What Estate or Interest passes by the Surrender.*

Page 220.

A. a copyholder for life, remainder to his infant son *B.*, surrenders his own and *B.*'s estate, (over which he had no controul, and thereby let in *B.*'s remainder,) and takes a new copy for the lives of himself, his daughters *C.* and *B.* successively; and on *A.*'s death after twenty years had run against *B.*, *B.* enters on the possession then vacant; held that, as against his sister *C.*, who had no title and no possession, he might successfully rest on his legal title and possession, although the twenty years' possession by *A.* might have barred *B.*'s recovery against him, and might have prevented *B.* recovering in ejectment if out of possession;

Doe dem. Burrough v. Reade, 8 East R. 355.

had the twenty years' possession been C's, it would seem to be otherwise.

Goodright v.
Peers, 11 East,
58.

A copyholder surrenders "his copyhold cottage with a croft adjoining," and a common right, &c. belonging to the same, *all which premises* (as the surrender described) *were then in his own occupation*, and on the same day devises "all his copyhold cottage and premises then in his own possession;" the croft was held to pass although in fact in the occupation of a tenant.

Boddington v.
Abernethy,
6 Barn. & C.
776.

Uses limited on a surrender of copyhold are revocable pursuant to a power, and the new uses shall take effect although they defeat vested estates.

4. *Of the Power and Authority of the Lord and Steward, and therein of the Difference of their Acts.*

Page 221.

Widdowson v.
Earl of Har-
rington, 1 Jac.
& Walk. 552.

On a bill in chancery against the lord to be admitted to a copyhold to try the right to it, the court will not interfere where the plaintiff is barred by the statute of limitations, or where he does not shew a *prima facie* title with a reasonable prospect of success.

(I) Of Fines payable by Copyholders: And herein,

1. *Where a fine shall be said to be due, and by whom, and to whom payable.*

Page 222.

IN pursuance of Lord *Hardwicke's* suggestion in *Drury v. Mann*, 1 Atk. 95. the new bankrupt act 6 G. 4. c. 16. § 64. excepts copy and customary hold estates out of the real estate to be conveyed by the commissioners to the assignees, therefore a fine will not now be due from the assignees.

Holloway v.
Berkeley,
6 Barn. & C. 2.
Garland v.
Jekyll, 2 Bing.
273. over-
ruling Attrce
v. Scott,
6 East, 476.
3 Ridg. P. C. 426.

If a copyhold tenement, subject to a customary heriot, becomes vested in several as tenants in common, the lord is entitled to a heriot from each tenant; but if the undivided shares afterwards are united in one tenant, one heriot only is payable. *Qu:* Whether it would be the same in case the tenement were divided into several portions, and these were afterwards united.

Whether a heriot can be distrained for after the expiration of the term, see

Rex v. Lord of
the Manor of
Bonsall, 5 Barn. & C. 175.
Everest v.
Glyn, 6 Taunt.
R. 425.

It seems that coparceners are entitled to be admitted as one heir, on payment of one set of fees.

The steward has no general right to full fees where a party is admitted to several distinct tenements; unless there is a custom, he must stand on his *quantum meruit*.

3. *Of the Certainty and Reasonableness of the Fine.*

Page 224.

Lord Verulam

In settling the value of a copyhold fine, the tenant is not concluded

cluded by the amount of rent he may have reserved on the premises, but may shew their value to be less. v. Howard, 7 Bing. 327.

(K) Of the Extinguishment of the Copyhold.

1. *Where the whole Copyhold shall be extinguished or suspended.*

Page 227.

WHERE a man having married a woman owner of a customary estate in fee, took a grant of the freehold from the lord, upon which livery of seisin was afterwards given, it seems that the grant operated as an enfranchisement before the livery, and that the course of the descent of the customary estate was not thereby altered. Doe dem. Newby v. Jackson, 1 Barn. & C. 448.

The enfranchisement of a copyhold may on proper evidence be presumed even against the crown; as to evidence on which the presumption may be founded, see the case in margin. Roe dem. Johnson v. Ireland, 11 East R. 280.

If a lord seised of a manor in fee, subject to a mortgage in fee, purchase copyholds of the manor, and the surrender is taken to the use of the mortgagor and his heirs, it shall still enure to the benefit of the mortgagee, having become parcel of the manor; and so if a lord, tenant for life with remainders over, purchase a copyhold, it shall be subject to the limitations in remainder; and a copyhold so purchased by the lord, will pass under a previous devise of the manor. Doe v. Potts, Dougl. 710. St. Paul v. Dudley & Ward, 15 Ves. 167. King v. Moody, 2 Sim. & Stu. 579. Roe v. Wegg, 6 Term R. 708.

(L) Of Forfeiture.

3. *Forfeiture in the Copyholder taking upon him to dispose of the Copyhold, and to grant Leases.*

Page 231.

See Doe dem. Nunn v. Luffkin, 4 East, 221. 1 New R. 163. S. C.

4. *Of Forfeiture in committing Waste; and herein of the Lord's and Tenant's Interest in the Trees.*

Page 232.

A copyholder for lives who cannot compel a renewal, cannot cut timber: *secus*, if he has a power of nominating his successor. Mardiner v. Elliott, 2 Term R. 746.

The lord cannot bring ejectment against a copyholder for life for cutting trees, where such copyholder claims under the will of a copyholder of inheritance, who according to the custom was authorized to cut timber; the injury, if any, in such case, is to the remainder man under the will, and not to the lord. Denn v. Johnson, 10 East R. 266. *Sed vide* Doe v. Clements, 2 Maule & S. 68.

(See Doe v. Morris, 2 Taunt. 52.)

Richards v. Noble, 5 Meriv. R. 673. If copyholder commit waste, the lord may have an injunction and account. which overrules Dench v. Bampton, 4 Ves. 700. *antè*, p. 238.

Whitechurch v. Holworthy, 19 Ves. 215. Without a custom the lord has not such an interest in the trees, that he can enter the copyhold and cut them.

6. Of Forfeiture for Treason and Felony.

Page 233.

Rex v. Willes, 5 Barn & A. 510. A copyhold of inheritance is not forfeited by a conviction for felony without attainder, unless there is a special custom in the manor.

Doe v. Evans, 5 Barn. & C. 584. A pardon restores a copyholder who has committed felony to his competency to hold lands, and unless the lord has seized the copyhold, the copyholder may recover it on his pardon from a person who has ousted him.

CORONERS.

(C) Of his Authority and Duty in taking Inquisitions.

Page 243.

Rex v. Ferrand, 3 Barn. & A. 260. A CORONER'S duty is judicial, and he can only take an inquest *super visum corporis*, and an inquest in which the jury were not sworn by the coroner himself, and *super visum corporis*, is absolutely void; the court will not therefore, after an adjournment by the coroner of such an inquest, grant any *mandamus* to proceed with it.

7 G. 4. c. 64. § 4. By 7 G. 4. c. 64. § 4., which repeals the 1 & 2 P. & M. c. 13., it is enacted, that every coroner upon any inquisition taken before him, whereby any person shall be indicted for manslaughter, or murder, or as accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognizance all such persons as shall know or declare any thing material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court.

§ 5. And by § 5, if any justice or coroner shall offend in any thing contrary to the true intent and meaning of these provisions, the court to whose officer any such examination, information, evidence, bailment, recognizance or inquisition ought to have been delivered, shall on examination and proof of the offence, in a *summary manner*, set such fine upon every such justice or coroner, as the court shall think meet.

By § 6. these provisions apply to justices and coroners, not only of counties, but of all other jurisdictions.

(D) Of traversing and quashing such Inquisitions.

Page 246.

A CORONER'S inquest was quashed for omitting to state the place where the death happened, or where the body was found, and for omitting the names of the jurors in the body, and because they had subscribed with the initials only of their Christian names.

Rex v. Evett,
6 Barn. & C.
247.

(G) Of Fees that he may lawfully take.

Page 249.

THE court refused a mandamus to the sessions, to allow the coroner's costs of an inquisition, the justices having been of opinion, that there was no ground in the manner of death for the inquisition, and the court seeing no reason for a different judgment.

Rex v. Justices
of Kent,
11 East R. 229.

The coroners of franchises not contributing to the county rate, are not entitled to the fees under the 25 G. 2. c. 29., or to any fees from the county.

Rex v. Justices
of Yorkshire,
7 Term R. 52.

A coroner under the 25 G. 2. c. 29. § 1. is not entitled to compensation for the miles travelled in returning *from* the inquisition.

Rex v. Justices
of Oxon,
2 Barn. & A.
203.

And if he holds two or more inquisitions at the same place, on the same day, he is only entitled to one sum of 9*d.* per mile for travelling expenses.

Rex v. Justices
of Warwick,
5 Barn. & C.
430.

(H) Of discharging him, and for what Misdemeanors punished.

Page 250.

NO action lies against a judge of a court of record, for an act done in his judicial capacity, and therefore trespass cannot be maintained against a coroner, for turning a person out of a room where he is about to take an inquisition.

Garnett v. Fer-
rand, 6 Barn.
& C. 611.

CORPORATIONS.

(B) By whom and in what Manner created.

Page 253.

A CHARTER granted by the crown cannot be *partially* accepted, whether it be a charter of creation, or granted to a pre-existing corporation.

Rex v. West-
wood, 4 Barn.
& C. 781.

A charter

Rex v. Hughes,
7 Barn. & C.
708.

A charter may be accepted by a written declaration of assent signed by the corporators, or by their acting under it (in the election of an officer). *Quære*. Whether it is necessary that a charter should be accepted by a majority of burgesses?

The King v.
Downes,
5 Barn. & C.
182.

Where a charter incorporated the men free burgesses of *C.*, and declared that for ever after there should be within the borough, to be chosen out of the free burgesses, eighteen common councilmen, and then nominated eighteen persons to be first common councilmen; it was held, that the charter virtually made them free burgesses also.

Master, War-
dens, &c. of
'Tobacco Pipe
Makers' Co. v.
Woodroffe,
7 Barn. & C.
838.

By charter, the king incorporated the tobacco pipe makers in *London, Westminster, England, and Wales*, and provided for transaction of corporate business at meetings in a hall in *London*, or within three miles thereof, and authorized the master, wardens, &c. to make by-laws for the government of the society, and every member thereof, and every person using the art or mystery of making tobacco pipes in *London and Westminster*, and any other places in *England or Wales*, it was held, that though the charter was inadequate to bind all the tobacco pipe makers in the kingdom, it was competent to bind such of them as became members of the company; and also that the charter, by fixing the meetings to *London and Westminster*, sufficiently established local limits.

Conservators
of the River
Tone v. Ash,
10 Barn. & C.
549.

A corporation may be created by implication, without express words of creation. By an act for making the river *Tone* navigable, thirty persons and their successors were to be conservators of the river, with power to cleanse, &c. and keep it navigable, and also to make a new channel, making recompense to land-owners. And if the owners and conservators could not agree, or if the title were in an infant, &c., then the sheriff was to summon a jury, whose determination was to bind all parties, and to vest an estate in *fee-simple in the conservators and their successors*. The conservators were also enabled, by name of "The Conservators of the River *Tone*," to take gifts or grants of money or lands; and it was made lawful for any person to convey an estate to the *conservators and their successors* without licence to alien in mortmain. And the conservators were authorized to make contracts in writing under their hands and seals, and to sue and be sued by the name of "The Conservators of the River *Tone*." It was held that, as it manifestly appeared that the conservators were to take lands by succession, and not by inheritance, they were a corporation by implication, though not created so by express words.

(C) Of the Names of Corporations.

How far the Name may be varied from in Grants by or to a Corporation.

Page 256.

A MISDESCRIPTION of a corporation in a conveyance of part of their estates for the redemption of the land tax, was held immaterial.

The mayor, jurats, and commonalty, of the ancient town of *Rye*, were held to take lands by a devise to the right worshipful the mayor, jurats, and town council, &c.

Croydon Hospital v. Farley,
2 Marsh. 174.
6 Taunt. 467.
Attorney-General v.
Mayor of Rye,
7 Taunt. 546.

3. *How far it may be varied from in pleading and judicial Proceedings.*

Page 258.

If a corporation bring an action by a wrong name, the defendant can only take advantage of it by a plea in abatement.

Stafford Corporation v.
Bolton, 1 Bos. & Pull. 40.

(E) How Corporations differ from natural Persons.

2. *How they are to sue and be sued.*

Page 263.

THE mayor of a corporation signing an agreement of sale on behalf of himself and the rest of the burgesses and commonalty, the vendors mutually agreeing to fulfil the conditions of sale, cannot sue, in his own name, the purchaser for non-fulfilment of the contract.

Bowen v.
Morris,
2 Taunt. 574.;
and see Spittle
v. Lavender,
2 Bro. & B. 452.

An ejectment cannot be maintained against the existing bailiffs of a corporation, by proving payment of rent of the premises by the annual predecessors of the defendants in the same office, for several years before; and service of a notice to quit on the existing bailiffs, the defendants, since the payment of such rent, shows a tenancy in the corporation. The tenancy may be determined by a notice to the corporation to quit, served on its officers; after which the lessor may distrain the cattle on the land, or bring an action against the corporation, or an ejectment against any person in actual possession of them.

Doe v. Woodman, 8 East R. 225.; and see 11 East, 334.
Wood v. Tate,
2 New R. 247.

The master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens to the use of the master, wardens, and company.

Feltmakers' Master, &c. of
— v. Davis,
1 Bos. & Pull. 98.

3. *What they may do without Deed.*

Page 265.

A corporation not established for trading purposes, cannot be acceptors of a bill of exchange, payable at less than six months after

Broughton v.
Manchester

and Salford
Water-works,
5 Barn. & A. 1.

after date, as this would be a contravention of the bank acts.
Quære. Whether any, except a trading corporation, can bind themselves as parties to a bill of exchange?

Murray v.
East India Co.
5 Barn. & A. 204.

Assumpsit will lie against a trading corporation whose power of drawing and accepting bills is recognized by statute.

6. *Of the Qualifications requisite for Members or Officers of Corporations.*

Page 268.

Rex v. Mar-
shall, 2 Term
R. 2.

Where by the constitution apprentices serving seven years to freemen *residing* in the town, were entitled to freedom, and by a by-law the indentures were required to be enrolled, an apprentice bound to a freeman *resident only occasionally*, is not entitled to have his indentures enrolled; and the court will not grant a *mandamus* to the town clerk.

Rex v. Powell,
8 Term R. 659.

Where a charter ordained that no person should be admitted a burgess, except he had for three years been seised of an estate of freehold for his life, or for some greater estate of a certain yearly value, with an exception of such as should be seised of such estate of such yearly value come to him by descent or marriage; it was held, that a party seised of an estate in right of his wife *for her life*, was not within the exception.

Rex v. Wil-
liams, 2 Maule
& S. 141.

Where a charter required the mayor to be *resiant*, on pain of forfeiting a sum not exceeding 100*l.*; it was held, that *resiancy* was not required as a qualification for holding the office, but only under a penalty.

Rex v. Mayor
of Doncaster,
7 Barn. & C.
650.

Where by the custom, all persons having served an apprenticeship to a free burgess carrying on trade, were entitled to be free burgesses; it was held, that a clerk, having served under articles to an attorney, was not within the custom.

7. *Of the Concurrence required in Corporate Acts.*

Page 269.

Cooke v.
Loveland,
2 Bos. & Pull.
51.

Where the crown by letters patent granted to the master and wardens (four) of the corporation of bakers, by themselves and their deputy, full power to overlook and correct the trade of baking, it was held that the master and one warden could not justify entering a house to overlook bread, for they were not a majority of the persons authorized, and if they acted as deputy they should have shewn that they were appointed by the majority.

The King v.
Richard
Bower, 1 Barn.
& C. 492.; and
see Rex v.
Thornton,
4 East, 294.

Where an election of a mayor is to be made by the mayor, aldermen, bailiffs, principal burgesses and other burgesses, and inhabitants of the borough for the time being, (they being for that purpose congregated,) or the greater part of them as should be so congregated, it was held that a majority of each definite body must be present, in order to make a valid election. And a majority of the twenty-four principal burgesses not being present, the election was void.

Rex v. Devon-
shire, 1 Barn.

The doctrine of *The King v. Bellringer*, that where an act is to be done by the majority of a definite body of the corporation,
a majority

a majority of the *complete* definite body must concur, is not to be narrowed. And it was held to apply to a case where the definite number of capital burgesses, were by the charter to be renewed in case of vacancy by the other capital burgesses, *at that time surviving and remaining, or the greater part of the same*; it was held that a majority of the complete, and not merely the existing, number must concur to make the election valid.

the body at large could elect without a majority of the definite body, See *Rex v. Grant*, 8 Barn. & C. 565.

& C. 609. See *Rex v. Headley*, 7 Barn. & C. 496., where, according to the words of the charter, it was held, that a majority of

8. *Of the Regularity of their Proceedings.*

Page 270.

Where a power of creating freemen has once been vested in the body at large of a prescriptive corporation, the exercise of it cannot afterwards be sustained in a select part of the same corporation, continued by charters under other names of incorporation, there being no express grant of such a power to the select body by charter, nor even any by-law to that effect; and this although the charters contain a confirmation of all former privileges, &c., and although the power have been exercised by the select body, since the granting of the charters.

Rex v. Holland, 2 East R. 70.

Though there is a prescriptive right in the eldest sons of burgesses born in the town, and the younger sons born in the town, and who have served a seven years' apprenticeship, and in every person having served a seven years' apprenticeship to a burgess, to be admitted burgesses, this does not necessarily exclude the incidental power, arising by implication, for the corporation to secure their perpetual succession by voluntary elections. Whether such power of voluntary election be incidental to the corporation or exist by prescription, they may delegate it to a select part of themselves but not to a stranger, and the recorder of the town must be taken to be a stranger, if not a burgess.

Rex v. Bird, 13 East, 367.

Though the affixing the corporate seal passes the estate without a formal delivery, if done with that intent, it is otherwise if the order for affixing the seal be accompanied by a direction to the clerk to retain the deed in his hands, till accounts are adjusted with the purchaser.

Derby Canal Co. v. Wilmot, 9 East, 560.

9. *Of Election and Amotion of their Members.*

Page 274.

Where the charter authorized the election of a mayor on the charter day, with power to hold over, and on the mayor's death within a year after his election, and in the mean time the alderman next in order to officiate as mayor, this provision did not extend to the case of the mayor dying *more* than a year from the election, which was *casus omissus* in the charter.

Rex v. Smith, 2 Maule & S. 583.

Where the charter directed that if it should happen that any of the capital burgesses should die or dwell out of the borough, or for some cause be removed, the remainder might elect others in the place of those happening to die or be removed, these words

Rex v. Mayor of Truro, 3 Barn. & A. 590.

words were held not so unambiguous as to warrant the court in granting a *mandamus* to admit two persons in the room of the two non-resident burgesses, the corporation not having previously removed them for this cause from their office.

The case of *Rex v. Amery*, 2 Term R. 568. (p. 281.) was reversed in the House of Lords (4 Term R. 122.), but the grounds do not appear.

Rex v. Pate-
2 Term
R. 777.
The offices of town clerk and alderman are not necessarily incompatible, unless the town clerk's accounts are allowed by the aldermen, or unless he acts ministerially under them.

Rex v. Smith,
2 Maule & S.
583.
Where the charter ordained that the mayor, &c. should be chosen justices within the borough, and that the justices should not permit any person to retail ale or beer within the borough without a licence from two justices, a dealer in spirits, though disqualified by the 26 G. 2. c. 13. from granting licences, is not therefore disqualified from being mayor, since the objection is removed by 39 G. 3. c. 86., which enables the county magistrates to grant licences in case of disqualification of the corporate justices.

Rex v. Player,
2 Barn. & A.
707.
If in the election of honorary freemen, the vote is taken collectively on a list of names instead of individually, the election is void.

Rex v. Wil-
liams, 2 Maule
& S. 141.
The presiding officer who forms an integral part of an elective assembly, must be present up to the time when the election is completed.

Rex v. Os-
borne, 4 East,
327.
Where the charter directed that on a vacancy in the aldermen, *the rest of the aldermen* might nominate two burgesses for the choosing of one of them an alderman by *the commonalty*, the word commonalty was held to mean the whole corporation, the aldermen as well as the burgesses at large.

Rex v. Mayor
of Fowey,
2 Barn. & C.
584.; and see
Rex v. Hub-
ball, 6 Barn.
& C. 159.
Where by the charter nine of the free burgesses were to be elected aldermen, and the mayor, recorder, and aldermen were empowered at their discretion to nominate free burgesses, and the corporation was reduced to six aldermen and four free burgesses, and one of the aldermen was incapacitated by age, the Court of King's Bench refused to grant a *mandamus* to compel the mayor and aldermen to proceed to the election of free burgesses, since the court never grant a *mandamus* to compel an election of members of an indefinite body.

Rex v. Harper
5 East R. 208.
Where a charter granted to the mayor, bailiffs and burgesses, or greater part of them, to choose *one of themselves* to be mayor, but appointed the first mayor to continue for a year, until some *other burgess* should be elected and sworn, and also directed the new mayor to be sworn in before the last mayor, his predecessor, and the bailiffs for the time being, and burgesses present, and the new bailiffs to be sworn in like manner; the latter provisions were held to explain the first, and shew that the mayor must be chosen out of the burgesses at large, and not out of the bailiffs.

Rex v. Bridge,
1 Maule & S.
76.
On the nomination of two aldermen that one might be elected mayor, votes given in favour of one of them, *previous* to notice being given of his ineligibility in consequence of not having taken

taken the sacrament, are not thrown away, so as to authorize the returning officer to return another candidate, who is in a minority.

On the charter days for election of the lord mayor of *London*, the business of the election is to have precedence of all other matters.

The annual indemnity act is prospective as well as retrospective, and applies to all those who may be in default after its passing, and before the day to which it extends.

A corporate office does not become *ipso facto* void by the non-residence of the corporator; and where a charter does not require residence in the members of a corporation, the court will not grant a *mandamus* commanding a corporation to meet and consider of the propriety of removing non-resident corporators, unless their absence has been productive of serious inconvenience.

A corporator voting at an election of officers cannot impeach the title of persons there elected, on account of an objection to the title of the presiding officer, unless he shews that he was ignorant of the objection at the time of the election.

The title of a corporator having an inchoate title cannot be impeached because he was sworn in before officers who were so *de facto*, though not *de jure*.

Where a party had been sworn in and exercised his corporate office more than six years, the court in their discretion, without deciding whether he was protected by 32 G. 3. c. 58., refused to grant a *quo warranto* information against him, on the ground of his not having been sworn in before the proper officer.

Where the election of burgesses is fixed either by charter or custom to take place on any specific day, then it is the duty of every person entitled to vote, to take notice that there is to be an election on that day. But when no specific day is fixed, and the election may take place at a meeting holden at any time, it is essential that notice of the meeting and of the business to be transacted there, should be given to all persons resident within the limits of the borough, who are entitled to vote, and that should be a reasonable notice, and at a reasonable time before the election actually takes place. Notice of meeting by ringing a bell within the borough, without shewing how long it ought to ring, is clearly not a reasonable or legal notice.

In a subsequent case the court noticing the above *dictum*, forbore giving any opinion as to the necessity of stating the object of meeting in a notice given of it, where the election is in the body at large; but they held, that where the election was to be made by the select body appointed by the charter to be aiding the mayor, the mayor was not bound to give the select body specific notice of a meeting to be held for the election, but that a reasonable and usual notice, requiring them to attend a meeting of the corporation without stating the object, was sufficient.

To a *mandamus* to the lord mayor and aldermen of *London* to admit

Rex v. Parkinson, 3 Barn. & A. 668.

In re Stevenson, 2 Barn. & C. 34.

Rex v. Heaver, 2 Term R. 772.
Rex v. Mayor of Portsmouth, 3 Barn. & C. 152.

The King v. Slythe, 6 Barn. & C. 240.

Rex v. Robert Brooks, 8 Barn. & C. 321.

Per Bayley J.
Rex v. Hill, 4 Barn. & C. 441.; and see
Rex v. Chetwynd, 7 Barn. & C. 695.

Rex v. Pulsford, 8 Barn. & C. 350.

The King v. admit

Mayor of London, 9 Barn. & C. 1.

admit and swear in *A. B.* to the office of alderman, they returned certain proceedings towards an election at a wardmote court when *A. B.* was declared to be elected, and a return thereof made to the court of lord mayor and aldermen, and that the court had from time immemorial cognizance and jurisdiction to enquire into and adjudicate upon all elections at wardmote courts to city offices, upon the petition of any party interested; that petitions, by several parties interested, were presented against the return of *A. B.*; that the merits were enquired into, and the election declared null and void by the said court of lord mayor and aldermen; and that *A. B.* was not duly elected, wherefore, &c. Traverse of the allegation that *A. B.* was not duly elected. At the trial of the issue, it appeared, that at first the lord mayor appointed three clerks to take the poll, but on the second day he dismissed two of them. After the number of votes was declared, a scrutiny was demanded and granted, and then the lord mayor dismissed the suitors at the wardmote, "to meet again upon a fresh summons." After this, the lord mayor went out of office, and his successor issued a fresh summons for holding a wardmote, and there took the scrutiny, and declared *A. B.* duly elected, which was returned to the court of lord mayor and aldermen, who, upon petitions being presented, declared the election void as in the return. Upon a special case stating these facts, it was held, first, that the return was good in form; secondly, that the custom set out for the lord mayor and aldermen to enquire into and adjudicate upon elections did not oust the jurisdiction of this court; thirdly, that the election was not invalid on account of the dismissal of two of the poll clerks, or the change of the presiding officer; lastly, that the wardmote court was not dissolved, but only adjourned, by the dismissal of the suitors to meet again upon a fresh summons.

The King v. Salway, 9 Barn. & C. 424.

A usage not inconsistent with a charter may continue, notwithstanding the acceptance of a charter; but a usage repugnant to the charter, cannot. By a charter of Queen *Elizabeth* it was provided, that vacancies in the common council of the borough of *L.* should be filled up by election out of the "burgesses and inhabitants." The charter was accepted, but the corporation afterwards elected burgesses, not being inhabitants, to the office of common-councilmen, as they had done before. This charter, and all other franchises, were surrendered to *Charles* the Second, and *William* and *Mary* by a charter of restoration, granted that the corporation should enjoy all franchises, elections, rights of election, &c. that they had previously enjoyed *by virtue or pretence of any charter, or by any other lawful manner, right, or title.* It was held, that under the charter of *Elizabeth* burgesses could not be elected to be common-councilmen unless they were inhabitants, and that an usage to elect burgesses, not inhabitants, was repugnant to the charter, and could not be pleaded in explanation of it. It was held, also, that the charter of *William* and *Mary* only restored such rights as had been *lawfully* exercised under or by pretence of former charters, and therefore did

did not enable the corporation to elect burgesses, not being inhabitants, to the office of common-councilmen.

By charter, the capital burgesses and common-council of a borough were authorized every year, on *Monday* next before *Michaelmas*, to elect and nominate one of the capital burgesses to be mayor for one whole year thence next ensuing; and he, before he were admitted to execute that office, or in any way to intermeddle in the same office, was, on *Friday* next after the feast of *Saint Michael* next ensuing such nomination and election, not only to take his corporal oath well and faithfully to execute the office, but also all the oaths appointed by a mayor to be taken; and after such oath so taken, he might execute the office of a mayor of the borough for one whole year then next ensuing. It was then provided, that none who should once have borne the office of mayor, should again be elected and preferred to be mayor, within the space of three years next ensuing the end and determination of his office of mayoralty; held, that the words "three years," mentioned in the prohibitory clause, imported years of office, and not calendar years; and, therefore, a person who had once served the office of mayor, might be again promoted to the same office as soon as three mayoralties had intervened. Held, also, that a party became mayor, not when he was elected, but when he was sworn in; and it was sufficient, if three mayoralties intervened between the time when he ceased to be mayor, and the time when he was sworn into office a second time.

By several charters, the sheriffs of *Norwich* were to be chosen by the citizens and commonalty "from themselves;" a subsequent charter confirming former privileges, and regulating the time and mode of electing sheriffs, omitted the words "from themselves." The usage, both before and since, had been to elect from among the freemen: held, that the last charter was not meant to vary the qualification; that the restrictions in the former charters could not be dispensed with; and that the election of a person not free was irregular.

By an act 8 G. 4. it was enacted, "That the mayor, sheriffs, citizens, and commonalty of the city of *Norwich*, at an assembly to be held within three calendar months before the 4th of *May* in each succeeding year, should elect twenty persons to be guardians of the poor of the said city; and that on the *Monday* in *Easter* week in every succeeding year, there should be elected for each parish, hamlet, &c. of the said city and county, an additional number of persons to be guardians of the poor, amounting in the whole to forty-eight, and that the several persons so elected should enter upon the office of guardian on the 4th day of *May* next ensuing their election." There was then a proviso, "that in case default should be made in the election of a guardian or guardians, the other guardians might proceed in the execution of the act as fully and effectually as if the elections of all the guardians had actually

The King v. Swyer,
10 Barn. & C.
486.

The King v. Grout, 1 Barn. & Adol. 104.

The King v. The Mayor of Norwich,
1 Barn. & Adol. 510.

“ taken place : ” held, that the clause fixing the time of election was directory ; and the mayor, sheriffs, citizens, and commonalty having neglected to elect twenty persons to be guardians within three calendar months next before the 4th day of *May* 1830., the court granted a *mandamus* to compel them so to do.

(G) Of the Dissolution of Corporations.

Page 285.

Rex v. Morris,
3 East, 213.

THE major part of an integral part of a corporation whose attendance is required at the election of corporate officers being gone, it operates as a dissolution of the whole corporation.

COSTS.

(B) In what Cases the Plaintiff shall have no more Costs than Damages : And herein,

1. *Of Actions of Trespass where the Right of Frechold or Inheritance may come in Question, or where the Trespass is wilful and malicious.*

Page 289.

Irwine v. Reddish, 5 Barn. & A. 796.
1 Dow. & Ry. 413. S. C.

A JUDGE'S certificate, under the 43 Eliz. is sufficient to deprive a plaintiff of costs, notwithstanding the action be on the 11 G. 2. c. 19. § 19., by which, in case plaintiff obtain a verdict, he is entitled to full costs.

Wright v. Nuttall,
10 Barn. & C. 492.

In an action against an attorney, where there is a verdict for less than 40s. damages, the judge may certify under the 43 Eliz. c. 6., although the defendant could only be sued in the superior courts.

Seaton v. Benedict, 5 Bing. 187.

And where a plaintiff furnished the defendant's wife with articles of dress, which were rendered unnecessary by the defendant's having amply supplied her, and in an action for the price the jury found for the plaintiff, with 10s. damages, the judge certified to deprive him of costs.

9 Price, 314.;
and see
Wright v. Piggin, 2 Younge, & J. 544.

If it appears on the record that the freehold must necessarily have come in question, the judge's certificate cannot deprive the plaintiff of costs.

Flint v. Hill,
11 East, 184.

The plaintiff recovering less than 40s. is not entitled to costs, because a view of the *locus* was granted on application of defendant.

Johnson v. Stanton,
2 Barn. & C. 621.

A judge's certificate under 22 Car. 2. c. 9. may be granted within a reasonable time after the trial.

And

And so also a certificate that the trespass was wilful and malicious, under 8 & 9 W. 3. c. 11.

Woolley v. Whitby,
2 Barn. & C. 580.

The certificate may be indorsed on the *postea* after costs have been taxed.

Foxall v. Banks, 5 Barn. & A. 556.

In trespass *quare clausum fregit*, if the defendant plead not guilty, and justify under a right of way, and the plaintiff admit the way, and new assign *extra viam*, and the plaintiff has a verdict for 1s. damages on the new assignment, he is entitled to full costs.

Taylor v. Nicholls, 3 Barn. & A. 445.

In trespass for cutting down trees, the defendant pleaded 1st, not guilty; 2d, a justification, because the trees obstructed a highway. Plaintiff joined issue on the not guilty, traversed the highway and new assigned *extra viam*. Defendant suffered judgment by default on the new assignment. The jury having found a verdict for the defendant on the special plea, and assessed damages on the new assignment, the plaintiff was held entitled to full costs, except on the issue on the special plea, and the defendant was held not entitled to costs even on that issue.

Longden v. Bourne,
1 Barn. & C. 278. *Sed vide* 1 Bro. & B. 465, 4 Moo. 110.; and see Holroyd v. Breare, 4 Barn. & A. 700.
Trotman v. Rand, 9 Price,

Holder, 1 Bro. & B. 222. Littlewood v. Wilkinson, 9 Price, 514. Harber v. 336.

2. Of Costs in Actions of Slander.

Page 297.

By 58 G. 3. c. 30. § 2. in all actions or suits for slanderous words to be sued or prosecuted in any court whatsoever, which hath not jurisdiction to hold plea to the amount of 40s., in such actions or suits, if the jury upon the trial of the issue in such actions or suits, or the jury that shall enquire of the damages, do find or assess the damages under 30s., then the plaintiff in such action or suit shall have and recover only so much costs as the damages amount to, without any further increase.

58 G. 3. c. 30. § 2.

3. Of Costs in Actions of Assault and Battery.

Page 298.

If a plea justify assaulting and ill-treating by a *molliter manus imposuit*, it in substance admits a battery, and entitles the plaintiff to full costs, though the damages are under 40s. and the judge do not certify.

Johnson v. Netherwood,
7 Taunt. 689.
See Reece v. Lee, 7 Moo. 269.

(C) Where the Costs shall be doubled or trebled.

Page 300.

TO entitle defendant, an officer, to double costs, under the statute 7 Jac. 1. c. 5. there must be a certificate of the judge that he is an officer, and was sued for something done as such.

Harperv. Carr,
7 Term R. 448.

The 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12. § 3., giving double costs

Atkins v. Ban-

well, 5 East, 92.; and see *Blanchard v Bramble*, 5 Maule & S. 151.

to parish officers, do not extend to an action of *assumpsit* against them for a *nonfeasance*.

Bale v. Hodgetts, 1 Bing. 182.

If a jury omit to find costs, the court may, where the plaintiff is entitled to them, make such an entry on the *postea* as is usual to authorize the allowance of costs.

Johnson v. Lawson, 2 Bing. 541.; and see 7 Term R. 500.

Defendants in replevin who avowed generally under 11 G. 2. c. 19. for rent due on a demise under which the plaintiff held as their tenant, are entitled to double costs in their favour, although they plead other avowries on which it seems they distrain, in order to try a title.

Gurney v. Bul-ler, 1 Barn. & A. 670.

Aliter if the cause be referred before issue, and the arbitrator award a verdict to defendant.

The avowant on a distress for poor rates is only entitled to single costs under 43 Eliz. c. 2. § 19.

Deacon v. Morris, 2 Barn. & A. 395.; and see 2 *Id.* 662 n. and 7 Term R. 267.

In an action on 29 Eliz. c. 4. against the sheriff, the plaintiff is entitled to treble costs as well as treble damages.

Kemp v. Richardson, 2 Moo. R. 238.

If some counts of the declaration are on a statute giving treble costs, and some of them at common law, the plaintiff cannot have treble costs on the whole of the counts.

4 Barn. & C. 889. 7 Dow. & Ry. 484. S. C.

When a statute gives double costs, the true mode of estimating them is, first, to allow the defendant single costs, including the expenses of witnesses, counsels' fees, &c., and then to allow him one half the amount of single costs, without making any deduction on account of these expenses.

4 Barn. & C. 154. 6 Dow. & Ry. 1.

If treble costs are given, they are calculated thus; 1st, the common costs; 2d, half of these; 3d, one half of the latter.

Double costs are also expressly given to defendants in actions against officers of customs by 6 G. 4. c. 108. § 97., and 7 & 8 G. 4. c. 53. § 115.; against persons acting under the mutiny and marine acts, 11 G. 4. c. 7. § 7.—c. 8. § 58.; and see 7 & 8 G. 4. c. 4. § 155., 9 G. 4. c. 4. § 155., 10 G. 4. c. 6. § 72.; against persons holding public employments, and having power to commit to safe custody by 42 G. 3. c. 85. § 6.; against any person for any thing done in pursuance of the act for consolidating the acts relating to duties under the management of the commissioners of taxes 43 G. 3. c. 99. § 70., or of the bankrupt act 6 G. 4. c. 16. § 44. (see tit. "BANKRUPT"), or the jury consolidation act 6 G. 4. c. 50. § 58.; in replevin, on a distress for rates by commissioners on plaintiff's lands, under 50 G. 3. c. 47, (a); in actions for non-residence on 57 G. 3. c. 99. § 45., under the *Birmingham* paving act 52 G. 3. c. 113., and also by the coal act (b), 47 G. 3. sess. 2. c. 68., and by 1 G. 4. c. 87. § 6.: in all cases wherein the landlord shall elect to proceed in ejectment under the provisions of that act, and the tenant shall have found bail as ordered by the court, if the landlord, on the trial of the cause, shall be nonsuited, or a verdict pass against him on the merits

(a) See 6 Maule & S. 128.

(b) See 1 Crompton & Jer. 54.

merits of the case, there shall be judgment against him, with double costs.

A certificate that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under the 7 G. 1. c. 5., need not be granted immediately after the trial of the cause.

Norman v. Danger,
5 Younge & J.
203.

And where the plaintiff is nonsuited, the judge before whom the cause was tried may, after an interval of four years, on an affidavit that the defendant was within the provisions of the statute, grant him a certificate to entitle him to double costs.

Ibid.

(D) Of awarding the Defendant his Costs.

Page 302.

WHERE, on setting aside a verdict, the costs are to abide the event, and the plaintiff discontinues, the defendant is not entitled to costs of the trial; for if the defendant had had a verdict, he would not have had the costs of the first trial.

Howarth v. Samuel,
1 Barn. & A.
566.

Where defendant is arrested on a bond for the whole penalty, though less is due, he is not entitled to costs under the 43 G. 3. c. 46.; for the penalty is the debt in law.

Talbot v Hodson,
2 Marsh.
527.

It is now settled, that the statute 43 G. 3. c. 46. does not apply to cases where the defendant pays into court a lesser sum than that for which he was arrested, and the plaintiff takes it out.

Butler v. Brown, 1 Bro. & Bing. 66.
Davey v. Renton,
2 Barn. & see 6 Price, 126.

C. 711. overruling *Laidlaw v. Cockburn*, 2 New R. 76. 5 Moo. 590.; and Nor to cases where an arbitrator awards a less sum, unless the defendant can show the arrest vexatious or malicious.

1 Moo. 92. *Payne v. Acton*, 1 Bro. & Bing. 278.; and see *Keene v. Deeble*, 3

Silversides v. Bowley,
Barn. & C. 491.
Dronefield v. Archer,
5 Barn. & A.
515.

Where there is an account between plaintiff and defendant, and items on both sides, it is an arrest without reasonable or probable cause within the 43 G. 3. c. 46., if the plaintiff arrests the defendant for the items on one side, without giving credit for those on the other.

If an attorney arrest his client for a larger sum than is found due on taxation, this is a case within the statute 43 G. 3. The defendant, under 43 G. 3., cannot levy the costs of an execution for costs of an action.

Robinson v. Elsam, 5 Barn. & A. 661.
7 Taunt. 179.

Trespass against two defendants, one suffered judgment by default, and a writ of enquiry was executed against him. The plaintiff entered a *nolle prosequi* against the other; and after a lapse of two years, he was held entitled to costs under the 8 Eliz. c. 2. § 2.

Jackson v. Chambers,
8 Taunt. 603.

In order to recover the costs of a nonsuit on merits in ejectment, the lessor of plaintiff must be served with a copy of the consent rule and *allocatur*, and attached if he does not pay.

Doe v. Salter,
5 Taunt. 485.

The costs of a judgment, as in case of nonsuit entered against plaintiff after he has become bankrupt, cannot be set off against the costs of an action against the defendant by the assignees of the bankrupt.

West v. Price,
2 Bing. 455.

Sandby v. Miller, 5 East R. 194.

A suit by a vicar in *London*, for tythes, in which he recovers less than 5*l.*, is a case within the 39 & 40 G. 3. c. 104.; and the defendant may enter a suggestion to deprive him of costs; for it is not within the exception of the eleventh section as properly belonging to the Ecclesiastical Court.

Jordan v. Strong, 5 Maule & S. 196.

The defendant's pleading a tender does not preclude him from entering a suggestion under the 39 & 40 G. 3. c. 104.

Gray v. Cook, 8 East R. 336.

A market gardener renting a stand with a shed over it in *Fleet Market*, at an annual rent, and occupying it three times a week, and only till ten in the morning, after which it is occupied by others, does not "keep a stand" within the meaning of the 39 & 40 G. 3. c. 104.

Stephens v. Derry, 16 East, 147.; and see 13 East, 161.

Nor is a husband within the act, who is domiciled in *Middlesex*, where his wife carries on business, although he is a clerk to solicitors in *London*; for he does not seek the *whole* of his livelihood in *London*.

Croft v. Pitman, 5 Taunt. 648. 1 Marsh. 269.; and see 2 Taunt. 196.

But a person renting a counting-house in *London*, jointly with another, and receiving orders for business there, is within the act, though he sleeps in *Southwark*.

Holden v. Newman, 15 East, 161.

An action of *assumpsit* for board and lodging, (in which an arbitrator awards something for *rent* of the lodgings,) falls within the exception in the *London* act 39 & 40 G. 3. c. 104., excepting actions for rent from the jurisdiction of the *London* courts of request.

Drew v. Fletcher, 1 Barn. & C. 283.

So also, an action for money had and received, brought against the receiver of an estate for money received by him for rent, for the purpose of trying the title to an estate; and the plaintiff, though he recover less than 5*l.*, is entitled to full costs.

Fomen v. Os-
well, 1 Maule
& S. 393.
14 East, 344.;
and see
5 Term R. 529.

Where the plaintiff failed on a special count, but recovered less than 5*l.* on the common counts, on the balance of an account, it was held within the 39 & 40 G. 3. c. 104., the defendant residing in *London*.

Tucker v. Crosby, 2 Taunt. 169.

The defendant is entitled to a suggestion under the *London* Court of Request Act, though it appears that if the plaintiff had delayed his action for a short time, the debt would have amounted to more than 5*l.*

Younger v. Kilsby, 6 Taunt. 452.

And so also, though the plaintiff believed that he had a good cause of action for more than 5*l.*

Ward v. Abrahams, 1 Barn. & A. 367.

The statute 39 & 40 G. 3. c. 104. extends to assignees of a bankrupt.

Board v. Parker, 7 East, 46.; and see 7 East, 50. 2 Bro. & Bing. 698.

Attorneys, plaintiffs, are not, within the 39 & 40 G. 3. c. 104., compellable to sue in the *London* Courts of Conscience.

Lawson v. Moggridge, 1 Taunt. 396.

An action on the case for negligence is not a demand within the *Southwark* Act.

In order to proceed under the *Southwark Act*, 22 G. 2. c. 47., both plaintiff and defendant must be *resiant* within the jurisdiction.

A suggestion cannot be entered under the *Middlesex County Court Act* 23 G. 2. c. 33. after a judgment by default, but only after a trial.

ception of debts on balance of accounts in the *Rochester Act*, 48 G. 3. c. 51., Larkin, 3 Bro. & Bing. 257. 7 Moo. 68.

Dillamore v. Capon, 1 Bing. 388.; and see 15 East R. 647.
Harris v. Lloyd, 4 Maule & S. 171. As to *ex-see* Harsant v.

(E) What Persons are entitled to or exempted from paying Costs: And herein,

1. Of Executors and Administrators.

Page 314.

IF money, when recovered, would be assets, the executor suing for it shall not pay costs.

Thomson v. Stent, 1 Taunt. 322.

Where plaintiffs sued upon an account stated, *after* the testator's death, with them as executors of monies due to them as executors, and a promise to pay them as executors; it was held, that they might have sued in their own right, and therefore were liable to pay costs.

Jones v. Jones, 1 Bing. R. 249.; and see 9 Barn. & C. 666.

Where plaintiffs sued as executors, and it appeared that the balance claimed in fact arose out of accounts between the plaintiffs, as surviving partners of the testator, and the defendant, they were nonsuited. Held, that the court had no power to order the defendant to have his costs as costs in the cause.

Barnard v. Higson, 3 Barn. & A. 215.; and see Zachariah v. Page, 1 Barn. & A. 586.

If an executor pleads — 1st, *Non assumpsit*; 2d, *Ne unques* executor; 3d, *Plene administravit*, and the issue on the two first pleas is for the plaintiff, and on the last for the defendant, the executor is entitled to the general costs of the trial, the last plea being a complete answer to the action.

Edwards v. Bethel, 1 Barn. & A. 254.; and see 8 Taunt. 129.

Where a plaintiff surreptitiously obtained probate of a first will, which had been revoked, and, as executor, sued the executor of the last will before the surreptitious probate was revoked, he was held liable to the costs of the cause.

Shaw v. Mansfield, 7 Price, 709.

In covenant against executors, they pleaded *plene administravit* and a retainer, at the trial they put in a plea *puis darrein continuance*, to which the plaintiff put in a bad replication, and the defendants had judgment on demurrer: it was held, that the plaintiff was liable to the costs subsequent to the plea *puis darrein continuance*, but not before, (under the stat. 8 & 9 W. 3. c. 11. § 2.) since the action at first was well founded.

Lyttleton v. Cross, 4 Barn. & C. 117.

Where the lessor of the plaintiff, having entered into the common rule to pay costs, dies between the commission day and the trial, his executor is not liable to pay them.

Doe dem. Pain v. Grundy, 1 B. & C. 284.

3. *Of Costs for and against Informers, and where the Prosecution may be said to be carried on at Suit of the King.*

Rex v. Com-
merall, 4 M.
& S. 203.

The sessions before whom a parish is acquitted upon the trial of an indictment for not repairing a highway, may, by their order, award *C.* and *E.* to pay the costs to the parish, although they are not on the back of the indictment, which originated in a presentment of the constables, whose names are on it. And the order may be for payment of costs to the parish solicitor.

Rex v. Wallis,
5 Term R. 375.

The prosecutor of a *quo warranto* against a constable of *Birmingham*, is not entitled to costs under 9 Ann. c. 20.

Rex v. John-
son, 4 Maule
& S. 515.

The costs of a prosecution for felony at *Liverpool*, tried in the borough court, may be ordered by the court to be paid by the treasurer out of the county rate for the county of *Lancaster*.

Rex v. Raw-
son, 2 Barn. &
C. 598.

Where the defendants, in an indictment for misdemeanor, submitted to a verdict of guilty, on an understanding that no judgment should be prayed against them, the prosecutors were held not entitled to costs, as they had not stipulated for them.

By the 7 G. 4. c. 64. § 22., the court before which any person is tried for felony, is authorized to order payment to the prosecutor of expenses incurred in preferring the indictment, and also payment to the prosecutor and witnesses, of such sums as to the court shall seem reasonable for expenses in attending the magistrate and grand jury, and in otherwise carrying on the prosecution; and also for trouble and loss of time: and by § 23. a similar provision is made for payment of expenses on prosecutions for the following misdemeanors, — assault with intent to commit a felony, attempt to commit felony, riot, misdemeanor in receiving stolen property, assault upon a peace officer in discharge of his duty, or on any person acting in aid of such officer, of neglect or breach of duty as peace officer, assault committed in pursuance of conspiracy to raise wages, of knowingly obtaining property by false pretences, indecent exposure of the person, wilful perjury, or subornation of perjury.

Rex v. Boyle,
1 Price, 454.;
and see
3 Price, 40.

Costs are not recoverable on an extent in aid under 53 G. 3., although sued to secure stamp duties on policies of insurance, and founded on a bond to the crown for payment of those duties, and although an immediate extent might have issued.

(G) *Of Costs in a Writ of Error.*

Gildart v.
Gladstone,
12 East R. 668.

JUDGMENT having been given in the Common Pleas for the plaintiff in a special verdict in *assumpsit*, which was reversed on writ of error in the King's Bench, the defendant is entitled there not only to judgment for his acquittal, but also for his costs of his defence in the Common Pleas, being the same judgment which the court below ought to have given, the defendant in such case being entitled to his costs by 23 H. 8. c. 15.

If the House of Lords affirm a judgment without awarding costs, and remit it to the King's Bench, in order that such proceedings may be had as if no writ of error had been brought, the court will not refer it to the master to tax the plaintiff his costs in parliament. Beale v. Thompson, 2 Maule & S. 249.

The Common Pleas will not compel security for costs in error on the ground of the plaintiff in error being a lunatic. Steel v. Allan 2 Bos. & Pull. 437.

(K) Of Costs in the several Steps and Proceedings in a Cause.

Page 328.

ON moving for a rule for security for costs, the defendant must state in what stage proceedings are; and the court will not grant the rule unless application has been made to plaintiff for security. 1 Marsh. 376.
3 M. & S. 283.
1 Barn. & A. 331. 6 Taunt. 20.

And the Common Pleas will not on the motion for security, enter into the merits of the case; and the security is not required if the plaintiff resides in this country; nor where plaintiff is abroad, if the defendant has taken any step in the cause subsequently to his being acquainted with the fact of the plaintiff being abroad. 5 Barn. & A. 702.

A plaintiff resident in *Ireland*, is bound to give security, though he sometimes come over and sojourn in this country. 4 Moo. 356.

In answer to the application, the plaintiff should distinctly swear that he resides and intends to continue to reside in *England*. 5 Barn. & A. 908.

Plaintiffs suing as executors may be compelled to give the security. 1 Bro. & Bing. 277.

So also a defendant in replevin. 1 Bro. & Bing. 505.

Security cannot be required of a person quitting this country for a mere temporary residence abroad, nor from a foreign ambassador in this country. 7 Moo. 613.
5 Maule & S. 503.

Nor from a foreigner during his absence on board his own ship, if he reside here part of the year. 8 Taunt. 711.

Security will be required of an uncertificated bankrupt. 7 Term R. 296.
Sed vide

And also of an insolvent or his assignee. 2 Taunt. 61.
1 Marsh. 447.

6 Taunt. 123. 2 Barn. & C. 579. *Sed vide* 7 Moo. 344.

So also of a plaintiff convicted of felony after issue joined. 1 Barn. & A. 159.

But not where one plaintiff is resident in this country, though the other be resident abroad. 1 East, 431.
7 Taunt. 307.

A plaintiff in error residing out of the jurisdiction, will be compelled to give security; but not an infant plaintiff. 5 Barn. & A. 265.
1 Marsh. 4.

(L) Costs, how assessed or taxed.

Page 332.

2 Bing. 387.

COSTS are allowed on an interlocutory proceeding in a writ of entry.

16 East, 129.

Where a *nolle prosequi* is entered as to some counts, there is no rule for allowing any costs of those counts.

(As to costs on petitions, as to returns of members to parliament, see 7 Term R. 507. 11 East, 194. 4 Maule & S. 234.)

Prothero v.
Thomas,
8 Taunt. 670.

The court will not compel the attendance of a witness before the prothonotary, to enable him to tax a bill of costs arising in the court, referred to him for that purpose by a master in chancery.

Lopez v. De
Tastet, 3 Bro.
& Bing. 292

A plaintiff is entitled to the allowance of a sum sworn to have been paid for postage of foreign letters, as being solely applicable to the cause; but he is entitled to the expenses of the production and translation of such letters only as are applicable to such parts of the counts as relate to the verdict.

Severn v.
Olive, 3 Bro.
& Bing. 72.
6 Moo. 235.

Where plaintiff brought four actions against two insurance companies for loss by fire, and a verdict was found for the former against each company in two of the causes only, it was held that the costs were to be apportioned equally, although three causes only were set down for trial at the same sittings, there being a demurrer pending in the other.

Holmes v.
Holmes,
2 Bing. 75.

In an action for disturbance of a watercourse, the expenses of plans used at the trial were allowed.

Gray v. Wain-
man, 7 Moo.
467.

Where defendant married a party to a chancery suit, and received a part of the property in right of his wife, he was held liable to the solicitor for a proportion of costs, although the bill had only been delivered to a co-defendant.

Stephens v.
Crichton,
2 East R. 259.;
and see 8 East
R. 393.

The party succeeding is not entitled to costs of examining witnesses on interrogatories, or taking office copies of depositions, but each party applying, pays his own expense, unless otherwise expressed in the rule.

Rushworth v.
Wilson,
1 Barn. & C.
267.

Where there is reasonable ground for supposing that a witness will be admissible, the master may allow his expenses on taxation of costs against the other party.

Berry v. Pratt,
1 Barn. & C.
276.; and see
1 Marsh. 563.
6 Taunt. 88.

And where a seafaring man remained in this country, in order to give evidence in a cause, the master was held justified in allowing him a subsistence from the service of the writ to the trial.

Laing v.
Bowes,
5 Maule & S. 89. *Sed vide* 2 Bing. 341.

Expenses of a person sent to enquire after the witnesses to a bond, were not allowed on taxation of costs.

Severn v.
Olive, 3 Bro.
& B. 72.

Nor the expenses of experiments necessarily made for the purpose of affording evidence on a point in dispute new to scientific men.

5 Bro. & B.
292.

No costs are allowed for a witness who has not been paid before the claim is made.

The

The rule established by the cases as to taxing costs in part for the plaintiff and in part for the defendant, seems to amount to this; that where the plaintiff's demand *is altogether denied by the defendant's pleas*, and at the trial the plaintiff obtains a verdict for part of his demand, and the defendant for other part, the plaintiff is entitled to the costs of the issues found for him, including the general costs of the trial, but not including costs of the issues found for the defendant; but that the defendant is not entitled on these last to any costs from the plaintiff; but where the defendant suffers judgment by default as to part of the plaintiff's demands, and pleads only as to other part, and plaintiff takes issue on the pleas, and at the trial *all* the issues are found for the defendant, then the defendant is entitled to the costs of the issues found for him, and the plaintiff is only entitled to the costs of the judgment by default.

As to costs on new trials, see Tidd's Prac. (8th edit.) 946.; and as to staying proceedings in second action for the costs of a former, see Tidd, 583.; and as to costs on bringing money into court, see Tidd, 666, 672.

Longden v. Bourne,
1 Barn. & C.
278. Home v. The Commissioners of the Thames,
5 Bro. & B.
117. 6 Moo.
324.; and see
15 East, 191.
9 Price, 356.
4 Barn. & A.
700.
1 Brod. & Bing, 222.
Tidd's Prac.
1009. (8th ed.)

COVENANT.

(B) Covenants created by Implication of Law.

Page 341.

WHERE the lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, and the owners of the other two thirds, for pulling down an old smelting mill, and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain a covenant to build it; held that such covenant was to be implied, and that the lessor of the one third might sue upon it in respect of his interest.

By indenture between *S. F.* senior, of the first part, *S. F.* junior, of the second part, and *J. H. H.* of the third part, it was agreed that *S. F.* senior should retire from business, and *S. F.* junior and *J. H. H.* become partners; that the capital employed should be 36,000*l.*, 24,000*l.* of which *S. F.* senior, should advance for *S. F.* junior, and 12,000*l.* was to be advanced by *J. H. H.* The deed then proceeded, "And whereas an account of all the debts of *S. F.* senior, in his business of merchant, has been this day taken, and the balance in his favour amounts to 38,033*l.*; and whereas it has been agreed by and between *S. F.* senior, *S. F.* junior, and *J. H. H.*, that the whole of the debts and credits of *S. F.* senior, shall be received and paid by *S. F.* junior, and *J. H. H.*, and that the balance of 38,033*l.* shall be accounted for and paid by them in manner herein-after mentioned; and *S. F.* senior, by indenture, hath assigned the debts and credits

Sampson v. Easterby,
9 Barn. & C.
505.

Saltoun v. Houstoun,
1 Bing. 433.

"to

“ to them; this indenture further witnesseth, that it is agreed
 “ that in consideration of 12,000*l.* paid *S. F.* senior, by *J. H. H.*,
 “ and for raising 24,000*l.* as *S. F.* junior’s share of the capital,
 “ the sum of 36,000*l.*, part of 38,033*l.*, is to be retained by
 “ *S. F.* junior and *J. H. H.*, and the remaining 2,033*l.* paid to
 “ *S. F.* senior, by instalments, at six, twelve, and eighteen
 “ months; and if any of the debts shall prove bad, the loss shall
 “ be borne by *S. F.* junior, and *J. H. H.* ;” held, that this deed
 amounted to a covenant by *S. F.* junior, and *J. H. H.*, to pay
 the debts due from *S. F.* senior in his business, at the date of
 the indenture.

(D) Where there are several Parties: And herein of
 joint Covenants.

Page 345.

James v.
 Emery,
 8 Taunt. 245.
 2 Moo. 195.
 5 Price, 529.

IF the interest of covenantees be several, they may maintain
 several actions, though the language of the covenant be that of a
 joint covenant.

Withers v.
 Bircham,
 5 Barn. & C.
 254.; and see
 Petrie v. Bury,
Id. 353.

Where two distinct annuities were granted to *A.* and *B.*
 during the life of the grantors, and the survivor and *C.* cove-
 nanted with *A.* and *B.* and their executors to pay the annuities,
 or either of them, in default of the grantors; *A.* having died, it
 was held that his executors might sue *C.* for arrears, for the in-
 terest in the annuities being several, the covenant also was
 several.

Petrie v. Bury,
 3 Barn. & C.
 353.

All joint covenantees who may sue on a covenant, *must* sue,
 unless (as it seems) any of them have refused assent to the
 deed.

Berkeley v.
 Hardy, 5 Barn.
 & C. 255.

Where an indenture was made between *A.* for and on behalf
 of *B.* on the one part, and *C.* on the other part, *A.* being autho-
 rized by writing under *B.*’s hand, but not under seal, and *A.*
 executed the deed in his own name, it was held that *B.* could
 not maintain covenant on the deed, although the covenants were
 expressed to be made by *C.* to and with *B.*

Ld. South-
 ampton v.
 Brown, 6 Barn.
 & C. 718.

If the rent in an indenture is reserved to a stranger, and the
 lessee’s covenants are made with the demising parties jointly
 with such stranger, the demising parties can alone sue on them,
 and the stranger must not join.

Servante v.
 James,
 10 Barn. & C.
 410.

Covenant by the master of a vessel with the several part
 owners, and their several and respective executors, adminis-
 trators, and assigns, to pay certain monies to them, and to their
 and every of their several and respective executors, adminis-
 trators and assigns, at a certain bankers, and in such parts and
 proportions as were set against their several and respective
 names; held, a several covenant, upon which each covenantee
 must sue severally in respect of his several interest, and that
 they could not maintain a joint action.

(E) Cove-

(E) Covenants Real and Personal: And herein to whom they shall extend.

1. *Covenants which shall extend to the Heir or Executor, so as to bind them, though not expressly named.*

Page 347.

AN action of covenant does not lie on the stat. of 3 W. & M. c. 14. § 3. against the devisee of lands, to recover damages for a breach of covenants made by the devisor. That statute only applies to cases where *debt* lies. 1 Will. 4. c. 47. and by this act the devisee is liable on the covenants of the bind the heir. See tit. *Heir and Ancestor* (F), Vol. IV. Addenda.

Wilson v. Knubley, 7 East R. 127. But the statute is repealed by

2. *Covenants which the Heir or Executor may take Advantage of.*

Page 348.

The case of *King v. Jones* in the Common Pleas, was affirmed in the King's Bench.

The devisee of lands in fee may sue on a covenant made with the testator by the defendant, that he was seised in fee, and had good right to convey, for though, if the defendant was not seised at the time of the covenant, there is a breach in the time of the testator, yet it is a continuing breach in the time of the devisee, and it is sufficient to allege that thereby the lands are of less value to the devisee.

4 Maule & S. 188.

Kingdom v. Nottle, 4 Maule & S. 53.

In such case the executor cannot sue.

Id. 355. S. C.

3. *Where the Assignee shall be bound by the Covenant of the Assignor.*

Page 349.

Nor are the assignees of a bankrupt liable to all the covenants of a lease to the bankrupt, if they merely advertise the lease for sale, and no bidders offering, never take possession of the premises.

Turner v. Richardson, 7 East, 335.

But a party taking an assignment of a lease by way of mortgage, is liable on the covenants as assignee, though held otherwise in *Eaton v. Jacques*, Doug. 455.

Williams v. Bosanquet, 1 Bro. & B. 258.

A grant by lessees for lives of all their estate and interest in the premises, to a person and his executors for ninety-nine years, if the lives should so long exist, is no assignment of the freehold, and does not render the grantee liable as assignee on the covenants, &c.

Derby v. Taylor, 1 East R. 502.

Unless the interest passing to the assignee is of a *real* nature, he is not liable to covenants made by the grantee or lessee in respect of it.

Portmore v. Bunn, 1 Barn. & C. 694.

Where an estate was conveyed to such uses as *A.* should appoint, remainder to himself in fee, yielding a fee-farm rent, which he covenanted to pay, and afterwards *A.*, by virtue of the power, conveyed the estate to a purchaser; held, that such purchaser was not subject to the covenant for payment of the rent, for

Roach v. Wadham, 6 East R. 289.

for though the covenant ran with the land originally, yet it ceased to do so in the hands of a purchaser, as he did not take the interest of the original covenantor, but took it under the covenantor's appointment as if the original conveyance had been made to himself.

Paule v.
Nurse, 8 Barn.
& C. 486.

The assignee is not liable for breaches of covenant, arising after he has assigned his interest; and this, although the lessee may covenant for himself and assigns not to assign. Therefore in covenant against the assignee of the lessee for nonpayment of rent, where the defendant pleaded that before the rent became due, he assigned over all his estate; and the plaintiff replied, that by the indenture the lessee covenanted not to assign without the lessor's consent, and no consent was given; the replication was held bad, since the covenant by the lessee not to assign did not estop the assignee from setting up the assignment, and the action being founded on privity of estate, the liability of the defendant ceased as soon as privity of estate was destroyed.

4. *Where the Assignor continues still liable.*

Page 352.

6 G. 4. c. 16.
§ 75.; and see
tit. *Bankrupt*,
Vol. I.

The law at page 353. as to bankruptcy being no bar to an action for rent afterwards accrued, is now altered; and by the new bankrupt act, 6 G. 4. c. 16. § 75., the bankrupt is discharged in respect of the rent and covenants, in case the assignees accept the lease, and also in case they decline it, if the bankrupt deliver up the lease to the assignees within fourteen days after he has notice of their declining it.

5. *Where an Assignee shall take Advantage of a Covenant.*

Page 353.

Twinam v.
Pickard,
2 Barn. & A.
105.

Covenant will lie by the assignee of the reversion of part of the demised premises against the lessee, for not repairing.

Jourdain v.
Wilson,
4 Barn. & A.
266.

A covenant by a lessor to supply the demised premises with a sufficient quantity of good water at a certain rate, runs with the land, and the assignee of the lessee may sue the reversioner upon it.

Vernon v.
Smith, 5 Barn.
& A. 1.

So also a covenant to insure premises within the bills of mortality against fire. See 14 G. 3. c. 78.

Milnes v.
Branch,
5 Maule & S.
411.

The lessee of a rent issuing out of an estate conveyed by the lessor to the defendant, to the use that the lessor should take the rent, and subject thereto to the defendant, cannot sue the defendant on his covenant made with the lessor, his heirs and assigns, to pay the rent, and also to build certain messuages on the land; for there is no privity of estate, the covenant being merely in gross and personal to the lessor.

Canham v.
Rust, 8 Taunt.
227. 2 Moo.
164.

A mere legatee of money due on a mortgage, cannot sue on the covenant for payment of the mortgage money made with the mortgagee; for the covenant is personal, and the executors of the

the mortgagee alone can sue; and it makes no difference that the legatee is *one* of the executors, and that the other has assented to the legacy.

The assignee of the reversion of demised land may sue on the implied covenant resulting from a *reddendum* of suit and service to a mill by grinding corn there; the ownership of the mill, and the reversion of the demised premises, being vested in the same person.

Vyryan v. Arthur, 1 Barn. & C. 410.

The assignee of a chattel interest may sue on a covenant for title, as well as the assignee of the inheritance. Thus, where *A.* being possessed of a term, assigned it over to *B.*, and covenanted for quiet enjoyment, and *B.* assigned it over to *C.*; it was held, that *C.* having been evicted by the superior lessor of *A.* for a breach of covenant by *A.*, might, as assignee, sue *A.* on his covenant for quiet enjoyment.

Campbell v. Lewis, 3 Barn. & A. 592. affirming Judgment of C. P. 3 Moo. 35.

A covenant to build a new smelting mill in a lease of mines and minerals, opened or to be opened under certain moors, &c. tends to the support of the thing demised, and the assignee of the reversion may therefore sue on it.

Sampson v. Easterby, 9 Barn. & C. 505.

(F) How Covenants are to be construed.

Page 356.

A COVENANT by a party in a settlement (after settling part of his estates), that he will, by will or otherwise, give and devise all other his real estates, and also his personal estates, to the children of his first and second marriages, applies only to such real and personal estate of which the covenantor dies seised or possessed, and does not prevent him from disposing freely of his unsettled or his after-acquired estates.

Needham v. Kirkman, 3 Barn. & A. 551.; and see Lewis v. Madocks, 17 Ves. 48.

But he cannot defeat the covenant by a disposition in effect testamentary.

Fortescue v. Hannah, 19 Ves. 67.

A clause in an agreement to let, that in case the lessor, his heirs, executors, and assigns should want any part of the said land to build, then the lessee, his heirs, executors, &c. should give up that part on request by lessor, he making an abatement of rent, and also to pay so much of the fence, at a valuation, as he should have occasion to take away, by giving six months' notice, was held to be a covenant, and not a condition defeating the estate, there being no proviso for re-entry on breach of covenant.

Doe v. Phillips, 2 Bing. 15.; *sed vide* Doe v. Abel, 2 Maule & S. 541., where a similar clause was held a condition, there being a proviso for re-entry.

A covenant by lessee to supply lessor and his tenants, at all seasons of burning lime, with lime at a certain price, contains an implied covenant to burn lime at all such seasons.

Shrewsbury v. Gould, 2 Barn. & A. 487.

A proviso that it should be lawful for either lessor or lessee, his executors or administrators, to determine a lease in seven or ten years, on twelve months' notice to the other, his heirs, executors, or administrators, extends by reasonable intendment to the devisee of the lessor, who was entitled to the rent and reversion.

Roe v. Hayley, 12 East, 464.

If

St. Cross v.
Howard de
Walden,
6 Term R. 338.

If a *reddendum* in a hospital renewed lease be so many “quarters of corn,” it will be understood legal quarters, reckoning the bushel at eight gallons, although the old leases before the statute 22 & 23 Car. 2. c. 12. contain the same *reddendum*, and till lately the lessees paid by composition, reckoning the bushel at nine gallons.

Attersoll v.
Stevens,
1 Taunt. 183.
and see Flint
v. Brandon,
1 New R. 73.
Bowler v.
Woolley,
15 East R. 444.

Where lessor demised land to lessee at a certain rent, with liberty to dig half an acre of brick earth annually, and the lessee covenanted not to dig more, or to pay to the lessor an increased rent of 375*l.* per half acre, being after the same rate that the whole brick earth was sold for, and a stranger dug and carried away brick earth, and the lessee recovered in trespass the full value, it was held that he was entitled to retain the whole damages.

Love v. Pares,
13 East R. 80.;
and see
16 East R. 87.

A covenant in a lease for 21 years not to cut down, during the term, any of the coppice of less than ten years' growth, or at any unseasonable part of the year, but that at the end of the term the landlord should pay to the tenant the value of all such growth of coppice as should be then standing and growing, was held, according to its grammatical construction, to bind the landlord to pay the value of all the coppice of less than ten years' growth left on the premises at the end of the term.

Wyndham v.
Way, 4 Taunt.
316.

By an exception of all “trees, woods, coppice-wood grounds, of what kind or growth soever,” apple-trees are not excepted.

Beaty v. Gibbons,
16 East,
116.

Where the outgone tenant had covenanted with his landlord to leave all manure on the farm, and to sell it to the incoming tenant, at a valuation, by certain persons, the effect of this covenant is to give the outgone tenant a right of onstand for the manure on the farm, on which he may maintain trespass, if the incoming tenant removes and uses it before a valuation.

Pownall v.
Moore,
5 Barn. & A.
416.

A covenant by lessee that he will sufficiently muck and manure the land with sufficient sets of muck within six years of the last years of the term, the last set of muck to be laid on the premises within three years of the expiration of the term, is satisfied by the tenant laying on two sets of muck within the three last years of the term.

Luxmore v.
Robson,
1 Barn. & A.
584.

On a covenant to repair and keep in repair during the continuance of the term, an action may be maintained for breaches committed before the term has expired.

Wood v. Day,
7 Taunt. 646.
1 Moo. 389.;
and see
7 Taunt. 385.
411. 2 Barn.
& C. 273.

If a lessee covenant to leave the premises in repair at the expiration of the term, and also that the lessors might direct the lessees to complete the repairs, by giving six months' notice in writing, there are two distinct covenants, the former of which is not qualified by the latter, and the lessor may sue for leaving the premises out of repair, without proving six months' notice.

Thresher v.
E. London
Water-works,
2 Barn. & C.
608.

Where a lessee erected trade fixtures on the demised premises, and then took a new lease from the expiration of the old one, the latter containing a covenant to repair, he was held bound to repair the fixtures, unless strong circumstances existed to show that they were not intended to pass under the second demise.

Where

Where a lessee, with covenant to repair, underlets with a similar covenant, if the lessee is sued by the lessor for want of repairs occasioned by the under-lessee, he may recover the damages and costs in the action at the suit of his lessor, and also the costs of defence, by an action against the under-lessee on his covenant.

An action lies on the covenant for quiet enjoyment for disturbance of a way of necessity.

If a lease contain a covenant for quiet enjoyment against the lessor and those who claim under him, the lessee cannot, on an eviction by a paramount title, resort to the implied covenant for general title in the word *demise*.

Covenant for quiet enjoyment during a term, "without the lawful let, suit, interruption, &c. of *J. M.*, his executors, administrators, or assigns, or any of them, or any other person or persons having or claiming any estate or right in the premises, and that free and clear and freely and clearly discharged or otherwise by *J. M.*, his heirs, executors, or administrators, defended, kept harmless, and indemnified from all former gifts, grants, bargains, sales, leases, mortgages, assignments, rents, arrears of rent, statutes, judgments, recognizances, &c., made or suffered by *J. M.*, or by their or either of their acts, means, default, procurement, consent, or privity," preceded by a covenant that the lease was a good lease, notwithstanding any act of *J. M.*, and followed by a covenant for further assurance by *J. M.*, his executors, administrators, and all persons claiming, during the residue of the term, any estate in the premises under him or them. Held by three judges against *Park J.*, that the covenant for quiet enjoyment extended only against the acts of the covenantor and those claiming under him, and not against the acts of the whole world.

The assignor of a term covenanted that he had not at any time done any act whereby the premises assigned could be encumbered, and that, notwithstanding any such act, the lease was a good and subsisting lease, and that the defendant, at the time of executing the assignment, had in himself good right to assign the premises *in manner aforesaid*. Held, that the covenant that the assignor had good right to assign, was qualified and restrained to his own acts only.

Where the lessor covenanted that the lessee should hold the premises without any lawful let, &c., or eviction by the lessor, or through his acts, means, or default, and the lessor held under a lease, with a proviso for re-entry by the original lessor, in case the premises should be used as a shop; the under-lessee, being ignorant of this proviso, underlet to a tenant who incurred a forfeiture by keeping a shop, and the original lessor evicted him; this was held not an eviction *by means* of the lessor within the meaning of the covenant in the under-lease.

Where the under-lessee of a lease renewable under an archbishop, covenanted with the lessee that he would pay to the lessee

Neale v. Wyllie,
5 Barn. & C.
535.

Morris v. Edgington,
3 Taunt. 24.

Merrell v. Frame,
4 Taunt. 329.

Nind v. Marshall,
1 Bro. & Bing.
319.

Foord v. Wilson,
8 Taunt. 545.
2 Moo. 592.

Spencer v. Marriott,
1 Barn. & C.
457.

Charlton v. Driver, 2 Bro.

& King. 345.
5 Moo. 59.

lessee such part of the fine and fees which, on the renewal of the lease, should be paid by the lessee in respect of the premises underlet, and the lessee renewed for a term exceeding the term of the under-lease, it was held that the under-lessee was only liable to pay a proportion of the fine and fees commensurate with the interest he acquired in the premises.

Styles v.
Wardle,
4 Barn. & C.
908.; and see
Hall v.
Cazenove,
4 East R. 477.

Where a covenant stipulates to do a certain act within twenty-four months next after the date of the indenture, and the indenture is not executed and delivered till after the date written on it, the time is to be computed from the date marked on the indenture, and not from the actual day of the delivery.

Watson v.
Home, 7 Barn.
& C. 285.

Where a lessor by lease demised for a term of years a piece of ground at a fixed annual rent, and the tenant covenanted not to build on the land without the licence of the lessor, and the lessor covenanted to pay all taxes already charged or to be charged upon or in respect of the demised piece of ground, during the continuance of the term; and at the time when the lease was executed the lessor gave a licence to the lessee to build on the land demised. The lessee did build, and thereby increased the annual value of the premises. It was held, that the landlord was liable on his covenant to pay the taxes in proportion to the rent reserved, and not to the improved value.

Bennett v.
Womack,
7 Barn. & C.
627.; and see
Henderson v.
Hay, 3 Bro.
C. Ca. 632.,
and cases in
note by Eden,
and Church v. Brown, 1 Ves. 258 as to usual covenants.

A party contracted for an assignment of a lease of a public house, holden at a net rent, upon usual and common covenants. A covenant by the tenant to pay land-tax, sewer's rate, and all other taxes, was held usual, as being a common covenant in leases at a net rent. A proviso for re-entry, in case of any business but that of a victualler being carried on in the house, was also considered as usual and common.

Leigh v. Hind,
9 Barn. & C.
774.

Where the lessee of a public house, on assigning it, covenanted that he would not keep a public house within the distance of half a mile from the premises assigned, it was held that the half-mile mentioned in the covenant meant half a mile measured by the nearest way of access between the premises assigned and any public-house afterwards kept by the covenantor.

Hancock v.
Hodgson,
4 Bing. 269.

By a deed which recited that defendants, the directors of a mine company, had purchased a mine for 4,500*l.*, to be paid within a twelvemonth, out of the monies to be raised by the company, with a proviso that the directors should be allowed six months' further time, in case the bankers of the company should not, within the twelvemonth, have received sufficient deposits from the subscribers to enable the directors to pay thereout; the directors covenanted, that out of the payments so to be made by the subscribers, they would pay the purchase-money at the time specified, subject to the aforesaid proviso: held, that the directors were personally responsible at the expiration of the eighteen months.

Carpenter v.
Cresswell,

T. C., in consideration of covenants by *H. R. C.*, covenanted not to interfere in a certain branch of the *Scotch* fish business, and

and to assign to *H. R. C.* a certain *Scotch* fishery: *H. R. C.*, in consideration of the assignment and of *T. C.*'s covenant to pay *T. C.* an annuity: held, that the covenant not to interfere in the business, was only part of the consideration for the annuity; and was, therefore, not a condition precedent, or dependent covenant. 4 Bing. 411.

A covenant with a lessor of premises in a parish, to indemnify the parish against any paupers which the covenantor may cause to be settled in it, is valid. Walsh v. Fussell, 6 Bing. 165.

Tenant for life, remainder over, by indenture demises to lessee, his executors, &c., for fifteen years, without any express covenant for quiet enjoyment, lessee is evicted by remainderman after death of tenant for life, and before the expiration of fifteen years: held, that lessee cannot maintain covenant against executor of tenant for life. Adams v. Gibney, 6 Bing. 656.

Lessee covenanted that he, his executors, or assigns, would insure the demised premises, and keep them insured during the term, and deposit the policy with the lessor: held, that the true construction of this covenant was, not that the lessee should effect one policy, and keep that policy on foot, but that he, his executors, administrators, or assigns, should always keep the premises insured by some policy or another; and that it was a breach if they were uninsured at any one time, and a continuing breach for any portion of the time they were uninsured. The lease contained a proviso for re-entry on breach of any of the covenants. The lessee assigned, and the premises were never insured, either by him or his assignee. The lessor distrained on the 30th of *September* for rent then due, and afterwards brought an ejectment on a demise of the 24th of *October*: held, that though the distress was an acknowledgment of tenancy to the 30th of *September*, and a waiver of any forfeiture to that time, yet the lessor was entitled to recover in ejectment, for the forfeiture incurred by the breach of covenant between the 30th of *September* and the 24th of *October*. Doe dem. Fowler v. Peck, 1 Barn. & Adol. 428.

Defendants chartered a ship to *New Zealand*, where they were to load her; or, by an agent there, to give plaintiff, the owner, notice that they abandoned the adventure; in which case they were to pay him 500*l.* The ship went to *New Zealand*, but found neither agent nor cargo there, and the captain made a circuitous voyage home, by way of *Batavia*. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original adventure to *New Zealand* would have been. Plaintiff having sued defendant on the charterparty for breach of covenant; held, that he could not recover the 500*l.* penalty, in addition to the profit of the homeward voyage. Staniforth v. Lyall, 7 Bing. 169.

(H) What shall be deemed a Breach or construed a good Performance.

Page 366.

Griffiths v.
Broome,
6 Term R. 66.

IF a lessor reserve in his lease a right to enter and cut timber, making satisfaction to the lessee for any damage occasioned, covenant does not lie by the lessee against the lessor for any wrongful act of cutting by a stranger without the lessor's consent, though the lessor countenance it afterwards.

Collison v.
Lettsom,
6 Taunt. 224.
2 Marsh. 1.

If *A.*, in granting a lease to *B.*, covenants that if he has an offer during the term, to purchase certain adjoining land, he will first offer it to *B.* at five per cent. less than is bid for it, it is no breach of the covenant if *A.* disposes of the whole estate, including the demised land and the adjoining premises, without making any offer to *B.*, the covenant only applying to the case of an offer to purchase the adjoining land separately.

Doe v. Spry,
1 Barn. & A.
617.

Selling of raw meat by retail is a breach of covenant not to exercise the trade of a butcher, although no beasts are slaughtered on the premises.

Jones v.
Thorne,
1 Barn. & C.
715.

Where a lessee covenanted not to do any act on the premises which might grow or be to the damage, annoyance, or disturbance of the lessor or neighbourhood, and the proviso for re-entry was, that the lessee should not permit any person to inhabit the premises who should carry on certain specified trades, (a licensed victualler not being one,) or any other business that might grow or be offensive to the lessor's tenants: held, that the opening of a public house was not a breach.

Doe v. Keeling,
1 Maule
& S. 95.

Where a lessee covenanted not to exercise or permit to be exercised, on the premises, any business whatsoever, without license of the lessor, the assignment by lessee to a schoolmaster carrying on his business on the premises, was held a breach, entitling the lessor to enter under a proviso for re-entry.

Hobson v.
Middleton,
6 Barn. & C.
295.

Covenant that defendant had not done, nor permitted nor suffered to be done, any act whereby an estate was encumbered; it was held, that assenting to an act which the covenantor could not prevent, was no breach.

Hughes v.
Humphreys,
6 Term R. 680.

To covenant by the father of an apprentice for not teaching him, it is a good plea that up to a certain time the defendant did teach, &c., and that then the apprentice, without leave, quitted the defendant's service, and never returned.

(I) Where the Breach shall be said to be well assigned.

Page 368.

Hodgson v.
East India
Company,
8 Term R.
278.; and see
1 Term R. 671.

IN an action on a covenant for quiet enjoyment, it is sufficient to allege that *A. B.* lawfully claiming title under the defendant, entered on the plaintiff without setting forth any particulars of *A. B.*'s title.

4 Term R. 617.

In covenant by sheriff against a surety for an officer who had not arrested a person under a warrant, it is necessary to aver that the warrant was delivered to such officer, and it seems that the warrant should be directed to him.

Desanges v. Priestley,
3 Moo. 247.

Where *A.* covenanted that he would from time to time, at the request of *B.*, confirm all actions which *B.* might bring on a bond of which *A.* was obligee, without releasing the same; and the declaration averred that *B.* commenced an action in name of *A.*, against the obligor of the bond, and that *A.* did not avow and justify the action (although often requested), but on the contrary executed a release to the obligor of all actions, bonds, &c., by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs and other expenses: upon special demurrer to the breach, it was held first that the averment of request was unnecessary, and therefore required no venue, since defendant had by executing the release disabled himself from bringing any action: 2d, it was no ground of demurrer to the whole breach that the plaintiff was not entitled to the special damage.

Amory v. Brodrick, 5 Barn. & A. 712.

Where defendant purchased an estate charged with an annuity to *M. S.*, and as part of the bargain covenanted to pay the annuity, and to indemnify the vendor against any charge in respect of it, the breach assigned in the declaration was the nonpayment of the annuity, without adding that the vendor had thereby been damnified, and it was held sufficient on demurrer.

Saward v. Anstey, 2 Bing. R. 519.

Where one of five tenants in common, brought covenant on a lease for rent payable on the four most usual days of payment in the year, and the breach was that on the 24th day of *June* 1824, a large sum of money, to wit the sum of 21*l.* 15*s.* one fifth part of rent for three quarters of a year of the term then elapsed, became due from the defendant to the plaintiff, and still was in arrear; held good on special demurrer.

Henniker v. Turner,
4 Barn. & C. 157.

Covenant to save harmless certain premises against all actions, suits, claims and demands whatsoever, both in law and equity, which might be made, commenced or prosecuted by *H. W. P.* or *T. B. W. P.*; breaches 1st, that *H. W. P.* on &c. at &c. who then and there made a claim and demand, and claimed to have right and title to the premises, entered and cut trees, &c. and procured the occupier to attorn to him; 2dly, that certain title-deeds relating to the premises were withheld by one *A. W.*, at the instance and through the claim and demand of *T. B. W. P.*: plea to 1st breach that *H. W. P.* had no lawful claim or title to the premises, to 2d breach a similar plea as to *T. B. W. P.*: on demurrer held that *H. W. P.* and *T. B. W. P.* being named in the covenant, the indemnity extended to all claims made by them, whether on lawful title or otherwise; and 2dly, that the acts on which the breaches were assigned were *claims in law* within the meaning of the covenant: *Quere*, Whether the breaches would have been good if specially demurred to.

Fowle v. Welsh, 1 Barn. & C. 29.

(L) What may be pleaded in Bar to the Action.

Page 379.

Thompson v.
Charnock,
8 Term R. 139.

TO an action on a covenant in a deed (made for performance of several matters), the defendant cannot plead in bar, that in the deed there is a covenant that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by arbitrators, and that defendant offered to refer but that plaintiff refused, for such an agreement cannot oust the jurisdiction of a court of law or equity.

Carvick v.
Blagrove,
1 Bro. & Bing.
531. 4 Moo.
303.

In covenant where the assignee of the lessor alleges that the lessor was possessed for the remainder of a term of twenty-two years, commencing, &c. the defendant, the lessee, may traverse this allegation.

Orgill v.
Kemshead,
4 Taunt. R. 642.

A lessee cannot plead to an action of covenant for rent an assignment and tender by the assignee.

Weaver v.
Sessions,
6 Taunt. 154.
1 Marsh. 505.

To an action of covenant for using malt not bought of the plaintiff contrary to covenant, it is not a good plea that plaintiff had delivered bad malt to defendant, who thereupon bought malt of others, although the defendant by the deed was authorized to buy malt of others if the plaintiff delivered bad malt: for as one failure by the plaintiff could not operate as a total suspension of the covenant, the defendant should have alleged a request to send him good malt, and that he had purchased malt of others on the plaintiff's failure to do so.

Corporation of
Arundel v.
Bowman,
8 Taunt. 190.
2 Moo. 91.

Where the plaintiff suing on a covenant not to stock a field otherwise than with sheep, averred under a *viz.* that defendant stocked it with other cattle, on the 1st *October* 1816, and on nineteen other days, between that day and 28th *September* 1817: if defendant plead that he did not stock it otherwise than with sheep *on the several days in the declaration mentioned*, the plea is bad on special demurrer, the issue on the specific days being immaterial.

Cordwent v.
Hunt,
3 Taunt. 596.

To covenant for not erecting a mill according to covenant with the plaintiff, the defendant pleaded that within a reasonable time he began to provide materials for erecting it, and whilst he was so doing the plaintiff requested him to refrain until plaintiff should request: 2d, that he committed the supposed breach of covenant by the leave and licence of the plaintiff; both pleas held bad, for the covenant under seal could not be dispensed with by parol.

Marsh v. Bul-
teel, 5 Barn.
& A. 507.

Where plaintiff declares on a covenant to abide by an award, and alleges a breach in nonpayment of money pursuant to it, it is good plea that before the award, the defendant by deed revoked the authority of the arbitrators, although such revocation be in itself a breach of the covenant.

Merceron v.
Dowson,
5 Barn. & C.
479.

To covenant against the assignee of lessee, declaring that all the right &c. of the lessee vested in the defendant, and that afterwards the premises were out of repair, it is not a good plea that

that for one period defendant was possessed of one sixth of the premises as tenant in common with *A. B.* and *C.*, and for another period of one third as tenant in common with *B.* and *C.*, and that no greater interest ever came to him by assignment; as the defendant should have pleaded in abatement, and shown how the other persons became tenants in common with him.

COURTS.

(E) What is incidental to all Courts in general.

Page 399.

A COURT of general gaol delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine.

The King v. Clement, 4 Barn. & A. 218.

And if an offending party being summoned to attend the court to answer for such contempt by an order issued for that purpose, do not appear, the court has jurisdiction to impose a fine on him in his absence.

In re Clement, 11 Price R. 68.

A judge at *nisi prius* has the power of fining a defendant for a contempt committed by him in the course of addressing the jury.

Rex v. Davison, 4 Barn. & A. 529.

COURT OF PARLIAMENT.

(A) Of the Original and Antiquity of Parliaments.

Page 401.

MUCH light will be thrown on the origin of parliaments by the truly valuable publication of parliamentary writs and records now in progress, under the direction of his majesty's record commission, and executed with diligence and accurate knowledge by *Francis Palgrave*, esquire, barrister. *Dugdale's* collection of writs is imperfect, and contains none of the returns to parliament, which are highly important. *Prymme's* Parliamentary Writs are imperfect and ill-arranged, and the Rolls of Parliament published under the Record Commission of 1800 having been printed from transcripts in *Lincoln's Inn* Library instead of from the originals, are full of inaccuracies and clerical errors; it was therefore determined to reprint them. The first volume of this great publication appeared in 1827, and embraces the writs of summons, writs for elections to parliament and returns, and writs of expenses; also the writs of military summons and other valuable records during the reign of *Edward* the First. The work is rendered useful and easy of reference by an Abstract, Alphabetical Digest, and Calendar; the writs are printed in the body in *fac simile* with the abbreviations of the original. The body of the work is prefaced by a "Chronological Abstract," accurately stating

Parliamentary Writs, vol. 1. published by his Majesty's command, edited by Francis Palgrave, Esq.

stating the date and the particular description of each instrument in chronological order, and referring to the page in the body where it is to be found. Then follows a "Calendar of Writs" and Returns" arranged according to the alphabetical order of the counties and boroughs sending members, shewing the date and place of the parliament, and the names of the members. There is also an accurate Alphabetical Digest of the names of every individual named in the collection of records, stating succinctly in what capacity and at what date he appears on the records, and referring to the page in the body where the record naming him is to be found; and an index to this digest makes it easy of reference. When this elaborate work is complete, it will compose a body of valuable materials for historical and antiquarian deductions, arranged with great perspicuity and unwearied labour.

(D) Of Elections : And herein,

1. *Of the Electors, and their Qualification.*

Page 423.

AS to the disqualification of almsmen and persons receiving parish relief, it seems clear that they are disabled from voting where the franchise is in potwallers or persons paying scot and lot. In these cases, the receipt of alms or parish relief negatives the possession of the franchise required. In some cases also where the right of voting is in freemen, the receipt of relief has been held to disqualify; and though similar decisions have taken place in county elections, yet, according to the last case, it seems that the receipt of parish relief does not prevent a party from voting if he is *in possession* of his forty-shilling freehold. *Quære*, Whether the objection applies in principle to any cases except where the receiving relief goes to negative the specific qualification required, as in case of potwallers and scot and lot men?

Whether outlaws can vote does not appear settled, but persons excommunicated do not now incur any civil penalty or disability whatsoever by 53 G. 3. c. 127. § 2.

According to the decision of the *Middlesex* Committee in 1804, (2 Peck. Ca. 89.) a master in chancery, a six clerk in chancery, a sixty clerk in that court, a clerk of the peace for *Middlesex*, sub-register of the Court of Chancery, clerk of the petty bag, king's coroner and attorney, and various other offices for life, including parish clerks, organists, sextons, are not entitled to vote unless they derive forty-shillings per annum *from land* in right of their offices.

A voter is not disqualified from voting by the mere fact of his having bribed other voters, nor even by a resolution of a committee declaring him guilty of bribery; but only after judgment obtained against him in an action for the penalty of bribery under the 2 G. 2. c. 24. § 7., or on being otherwise lawfully convicted.

Quære, Whether votes procured by a bribed agent, but which are not themselves given for a bribe, are good votes.

2. *Of*

Great Grimsby, 1 Peckwell Ca. 59. Male on Elect. p. 166. Okehampton, 1 Peckwell, 573. Bedfordshire, 2 Luder's Ca. 564. Dodd's Doubtful Questions in the Law of Elections, 1—24. where the cases are stated.

Dodd's Doubtful Questions, &c. 32.

See observations, *Id.* 40. 50.

Id. 51.

Dodd's Doubtful Questions, &c. 56.

2. *Of the Elected, and their Qualifications.*

Page 427.

In the case of Sir *Francis Goodwin* in 1604, the House of Commons held, that outlawry in a civil suit did not render a candidate ineligible; this was however antecedent to the act of 9 Ann. c. 5. requiring freehold landed estate as a qualification; and as the outlawry, after inquisition found, would vest the rents and profits in the crown till reversal, it would appear to defeat the landed qualification required by the statute. Id. 38.

3. *Of the Duty of Returning Officers, and the Remedies against them: And herein, of the Mode of proceeding upon Complaint of undue Elections.*

(See 9 G. 4. c. 22., consolidating and amending the laws relating to the trial of controverted elections, and 9 G. 4. c. 59., regulating the mode of taking the poll at elections for cities, boroughs, &c.)

COURT OF KING'S BENCH.

(A) Of the Jurisdiction of the Court of King's Bench.

Page 456.

AN act for the more effectual administration of justice in 1 W. 4. c. 70.
England and Wales. — “Whereas the appointment of an § 1.
 “additional puisne judge to each of his majesty's superior courts
 “of common law would cause much greater facility and despatch
 “of business therein: and whereas it is expedient to put an end
 “to the separate jurisdiction of the county palatine of *Chester*
 “and the principality of *Wales*, and to make more effectual
 “provision for the administration of justice in *England* and
 “*Wales*; be it therefore enacted, that whenever his majesty
 “shall be pleased to appoint an additional puisne judge to either
 “of his Courts of King's Bench, the Common Pleas, and the
 “Exchequer, the puisne judges of such court shall sit by rotation
 “in each Term, or otherwise, as they shall agree amongst them-
 “selves, so that no greater number than three of them shall sit
 “at the same time in banc for the transaction of business in
 “term, unless in the absence of the Lord Chief Justice or Lord
 “Chief Baron; and that it shall and may be lawful for any one
 “of the judges of either of the said courts, when occasion shall
 “so require, while the other judges of the same court are sitting
 “in banc, to sit apart from them for the business of adding and
 “justifying special bail, discharging insolvent debtors, adminis-
 “tering oaths, receiving declarations required by statute, hearing
 “and deciding matters upon motion, and making rules and
 “orders in causes and business depending in the court to which
 “such judge shall belong, in the same manner and with the same
 “force and validity as may be done by the court sitting in banc.
 “§ 2. And be it further enacted, that from and after the
 “appoint-

“ appointment of any such additional judge, there shall be issued
 “ and paid and payable out of, and charged upon the consoli-
 “ dated fund of the United Kingdom of *Great Britain* and
 “ *Ireland*, (after paying or reserving sufficient to pay all such
 “ sums as have been directed by any former act of parliament
 “ to be paid out of the same, but with preference to all other
 “ payments which shall hereafter be charged upon the same,) the
 “ sum of 5000*l.* to such additional judge as shall be so
 “ appointed, as and for a yearly salary, to be paid from time
 “ to time quarterly, free and clear from all taxes and deductions
 “ whatsoever, on the fifth day of *January*, the fifth day of *April*,
 “ the fifth day of *July*, and the tenth day of *October* by equal
 “ portions, the first payment to be made on the first of such
 “ days respectively as shall occur after the appointment of the
 “ judge entitled to receive the same; and that if any person
 “ hereafter appointed to such office shall die, or resign the
 “ same, the executor or administrator of the person so dying,
 “ or person so resigning, shall be entitled to receive such pro-
 “ portionable part of the salary aforesaid as shall have accrued
 “ during the time that such person shall have executed such
 “ office since the last payment, and that the successor of any
 “ such person so dying or resigning shall be entitled to receive
 “ such portion of the salary as shall be accruing or shall accrue
 “ from the day of such death or resignation: provided always,
 “ that the removal of a puisne judge from one court to another,
 “ shall not be deemed a new appointment under this act.

§ 3.

“ § 3. And be it further enacted, that upon the resignation
 “ of any such additional judge, it shall be lawful for his majesty,
 “ by his letters patent under the Great Seal of *Great Britain*,
 “ to give and grant to the person so resigning (under and sub-
 “ ject to the same conditions, limitations, and restrictions as any
 “ annuity on resignation can now by law be granted to any other
 “ judge of the same court), an annuity during his life not ex-
 “ ceeding the sum of 3,500*l.* yearly, or such other sum as shall
 “ by any act hereafter to be made, provided for judges resigning
 “ their offices, to be paid and payable out of and charged upon
 “ the consolidated fund aforesaid, free and clear of all taxes and
 “ deduction whatsoever, by even quarterly payments to be made
 “ respectively on the day aforesaid in each year.

§ 4.

“ § 4. And be it further enacted, that every judge of the said
 “ courts, to whatever court he may belong, shall be, and he is
 “ hereby accordingly authorized to sit in *London* and *Middlesex*
 “ for the trial of issues arising in any of the said courts, and to
 “ transact such business at chambers or elsewhere, depending
 “ in any of the said courts, as relates to matters over which the
 “ said courts have a common jurisdiction, and as may, according
 “ to the course and practice of the said court, be transacted by
 “ a single judge.

§ 5.

“ § 5. And be it further enacted, that a certain act passed in
 “ the third year of the reign of his late majesty King *George* the
 “ Fourth, intituled *An Act to repeal an act of the first and second*
 “ *years of his present majesty, for facilitating the despatch of*
 “ *business*

“ *business in the Court of King's Bench, and to make further provision in lieu thereof*, shall be, and the same is hereby repealed, except so far as it repeals the said former act, and except so far as relates to the last warrant issued by his said late majesty under the said act.

“ § 6. And be it further enacted, that in the year of our Lord 1831, and afterwards, *Hilary* term shall begin on the 11th and end on the 31st day of *January*; *Easter* term shall begin on the 15th day of *April* and end on the 8th Day of *May*; *Trinity* term shall begin on the 22d day of *May* and end on the 12th day of *June*; and *Michaelmas* term shall begin on the 2d and end on the 25th day of *November*; and that the essoign and general return days of each term shall, until further provision be made by parliament, be as follows, that is to say, the first essoign or general return day for every term, shall be the fourth day before the commencement of the term, both days being included in the computation; the second essoign day shall be the fifth day of the term; the third shall be the fifteenth day of the term, and the fourth and last shall be the nineteenth day of the term, the first day of the term being already included in the computation, with the same relation to the commencement of each term as they now bear, and shall be distinguished by the day of the term on which they respectively fall, the *Monday* being in all cases substituted for the *Sunday*, when it shall happen that the day would fall on *Sunday*, except always that in *Easter* term there shall be but four returns instead of five, the last being omitted; provided that if the whole or any number of the days intervening between the *Thursday* before and the *Wednesday* next after *Easter* day shall fall within *Easter* term, there shall be no sittings in banc on any such intervening days, but the term shall in such case be prolonged and continue for such number of days of business as shall be equal to the number of the intervening days before mentioned, exclusive of *Easter* day, and the commencement of the ensuing *Trinity* term shall in such case be postponed, and its continuance prolonged for an equal number of days of business.

“ § 7. And be it further enacted, that when the alteration of the terms herein-before mentioned shall take effect, not more than twenty-four days, exclusive of *Sundays*, after any *Hilary*, *Trinity*, and *Michaelmas* term, nor more than six days, exclusive of *Sundays*, after any *Easter* term, to be reckoned consecutively immediately after such terms, shall be appropriated to sittings in *London* and *Middlesex* for the trial of issues of fact arising in any of the said courts; provided that if any trial at bar shall be directed by any of the said courts, it shall be competent to the judges of such court to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall for the purpose of such trial be deemed and taken to be a part of the preceding term; provided also, that a day or days may be specially appointed, at any time not being within such twenty-four days, for the

“ trial

“ trial of any cause at *nisi prius*, with the consent of the parties thereto, their counsel or attorneys.

§ 10.

“ § 10. And be it further enacted, that all persons admitted or admissible to practise as attorneys in the Courts of King’s Bench or Common Pleas, shall be admissible in like manner as attorneys of the Court of Exchequer, and be admitted and allowed to practise there as such, upon application to the barons of that court, without being obliged to employ any clerk in court in the capacity of attorney of the Court of Exchequer, any law or usage to the contrary notwithstanding; and that it shall be lawful for the barons of the said court, and they are hereby required to distinguish by their rules and orders, the fees which shall continue to be taken by the sworn and side clerks of the court for duties performed as officers of the court, similar to the duties of the officers of the other superior courts, from such fees and charges as shall be allowed to be taken by the attorneys so admitted to practise, so that the amount of such fees and charges, upon the whole, do not exceed the amount and rate of such fees and charges as are now allowed upon the taxation of costs.

§ 11.

“ § 11. And be it enacted, that in all cases relating to the practice of any of the Courts of King’s Bench, Common Pleas, or Exchequer in matters over which the said courts have a common jurisdiction, or of or relating to the practice of the Court of Error before mentioned, it shall be lawful for the judges of the said courts jointly, or any eight or more of them, including the chiefs of each court, to make general rules and orders for regulating the proceedings of all the said courts, which said rules and orders so made shall be observed in all the said courts; and no general rule or order respecting such matters shall be made in any manner except as aforesaid.”

COURT OF EXCHEQUER.

(B) In what Cases it has Jurisdiction.

Page 463.

(See the 1 W. 4. c. 70., *antè*, p. 847. *et seq.*)

Ex parte
Williams,
8 Price R. 5.

THE court has jurisdiction over recognizances entered into under the 28 G. 3. c. 52. (for appearing before an election committee of the House of Commons and prosecuting petitions), on their being certified according to the statute by the Speaker into the Exchequer, on the report of the select committee; and in a case of sufficient merits, the court will interfere to discharge such recognizances on a summary application.

The highly important case of the bankers in the Court of Exchequer, which is shortly referred to as reported in Freeman, 331. (*antè*, page 465.), is also reported in 5 Modern Reports, and in Skinner’s Reports, 601. But the fullest report is in 11 State Trials, 138. where Lord Keeper Somers’s learned

Case of the
Bankers,
11 Sta. Tri.
156. Bankers’
Case, by
Turnour, (2d
edit.)

and elaborate argument is fully given. The summary of the case was this: — After the restoration, it was the practice of the bankers or goldsmiths in *London* to advance sums to government, on the security of tallies, or orders for payment of principal and interest out of the funds in the Exchequer. In 1671, when the debt to the bankers was above a million, the king resorted to the shameful expedient of shutting the Exchequer, and postponing the payment of the orders before issued; which involved the bankers and their customers in great distress. In 1677, in order to relieve them, the king granted annuities to them out of the hereditary excise, equal to 6*l.* per cent. interest, but redeemable on payment of the principal. The interest was paid till 1683, but then became in arrear, and continued so till the revolution. In the 1st *William* and *Mary*, the bankers and parties to whom they had assigned the annuities, petitioned the Court of Exchequer, setting forth the letters patent of *Charles II.*, and praying for payment of the arrears of the annuities. To this petition the attorney-general demurred. Two points were made, first, whether the letters patent were good to bind the successor of *Charles the Second*; and, second, whether a petition to the Exchequer was the proper remedy. On the first point, the whole court agreed that in general the king could alienate the revenues of the crown, but *Lechmere* Baron thought the excise an exception. But all agreed that a petition was the proper remedy, and judgment was accordingly given for the petition, directing payment at the receipt of the Exchequer. A writ of error was then brought by the attorney-general in the Exchequer Chamber. All the judges who argued held the grant good, and a majority of them, including Lord Chief Justice *Holt*, held the remedy by petition proper. But Lord Chief Justice *Treby* held, that the barons of the Exchequer were not authorized to make order for payments on the receipt of the Exchequer, and, therefore, that the petition was improper: and Lord *Somers* concurred in this opinion in a most learned and luminous judgment. A question then arose, whether the Lord Chancellor and Lord Treasurer were bound to decide according to the opinion of the majority of the judges, and seven judges (against three) being of opinion that they were not, Lord *Somers* concurred in this opinion, and there being no Lord Treasurer, he, on his own opinion, reversed the judgment of the Court of Exchequer. (a) This judgment was, however, reversed by the lords, and the judgment of the Exchequer affirmed. Notwithstanding this decision in their favour, it appears the bankers only got one half of their demand; see 12 & 13 W. 3. c. 12. § 13.

It is now settled, that the Court of Exchequer have the same controlling authority over the commissioners for auditing the public accounts which they formerly had over the auditors of the Prest, the statute 25 G. 3. c. 52., which constituted them a board, not having erected them into an independent judicial body, so as to exclude the authority of the barons of the exchequer sitting as a court of judicature over all matters of revenue

(a) One of the grounds of impeachment against him was for reversing this judgment without calling the barons before him according to 51 E. 3. c. 12.

Colebrook v. Attorney-General, 7 Price, 146. *Ex parte* Colebrook, *Id.* 87.; and see *Crawford v. Attorney-*

General, *Id.* 1. revenue accounts. But the court will not interfere in a summary way on motion and petition against the commissioners for auditing public accounts, but the party complaining must file his bill.
 Attorney-General v. Hoseason,
 6 Price, 512.; and see the abstract of the acts as to auditing public accounts. Manning's Ex. Prac. 276. (2d edit.) 25 G. 3. c. 52. 46 G. 3. c. 141. 1 & 2 G. 4. c. 121.

Attorney-General v. Lindegren,
 6 Price, 287.
 The mere passing of the accounts of a public officer by the auditors of the department under which he has been employed, does not preclude the court (in a fit case) from decreeing an account, in respect to allowances, contrary to justice and equity, and not brought to the notice of the board when his accounts were passed.

See the form of this writ,
 15 Price R. 303.
 In addition to the powers given to the Court of Exchequer, as to discharging debts and recognizances by 33 H. 8. c. 39. § 57. and 4 G. 3. c. 10., a writ of privy seal is issued to the commissioners, the chancellor, and the barons, at the commencement of every reign, giving them full powers to relieve against penalties and forfeitures, according to equity and conscience, on the case of the party being fully demonstrated.

Rex v. Peto,
 1 Younge & J. 169.
 An action was brought, at the instance of the crown, against a contractor for the building of certain public works, on a bond for the performance of his contract; the action was defended, and verdict and judgment obtained by the crown. The defendant applied to the court to stay proceedings on the judgment for a short period, that he might file a bill on the equity side of the court, alleging that he had mistaken his course in defending the action at law, and being advised that he had good grounds for equitable relief, he was about to file a bill against the law officers of the crown. The court rejected the application on the grounds that, taking the application as made in the suit at law, the *postea* could not be stayed; that treating it as an application in equity, there was no suit depending, and that defendant had not shown sufficient ground for equitable relief; and *semble* that his grounds of equity might have been urged by him at law.

(C) Of the Manner of its Proceedings.

Page 467.

57 G. 3. c. 18. BY the 57 G. 3. c. 18. it is enacted, that the Lord Chief Baron shall have power to hear and determine all causes, matters, and things depending in the court as a court of equity; and in case of sickness or other unavoidable cause, his majesty may by warrant appoint any other baron to hear and determine such causes, matters, and things; the said chief baron or baron to sit at such times as he shall appoint, whether the rest of the barons are sitting or not; and the decrees and orders of such chief baron or baron to be deemed decrees and orders of the Court of Exchequer, subject only to be reversed by the House of Lords.

COURT OF THE CONSTABLE AND EARL MARSHAL.

(B) In what Cases it has Jurisdiction.

Page 470.

THOUGH it is said the court cannot proceed against persons for bare scandalous words, reflecting on the honour and gentility of families, yet in the time of *Charles* the First it is represented as giving more damages for words not actionable in two days, than all the juries at *Westminster* during the term and the sittings after.

Clarendon's
Life.

Though the statute 13 R. 2. c. 2. (p. 470.) defined the jurisdiction of the court, and provided that if any complained of being impleaded there for matter triable at common law, he should have a privy seal to the constable to surcease till it were discussed by the king's council, the abuses of its jurisdiction were not immediately prevented. In the case of *Bennett Wilman*, in the 5 H. 4., on petition, the lord the king, by the advice and assent of the lords in parliament, granted that the said *Bennett* should be treated according to the statutes and common law of *England*, notwithstanding any commission to the contrary or accusation against him, made before the constable and marshal; and a writ was sent to the justices of the King's Bench, with a copy of this article from the roll of parliament, directing them to proceed as they should see fit, according to the laws and customs of *England*.

Rot. Parl.
vol. 3. 530.
Hallam, Hist.
Mid. Ag. 3.
224.

Hume (Hist. c. 22.) adduces the patent of high constable, granted to Earl *Rivers* by *Edward* the Fourth, to prove the arbitrary nature of the office; but Lord *Coke* pronounces this to be a most irregular precedent (4 Inst. 127.), and not to be drawn into example; though after all, its terms do not seem so subversive of constitutional trial as *Hume* supposes, jurisdiction being given over causes *quæ in curiâ constabularii Angliæ ab antiquo, viz. domini Gulielmi Conquestoris progenitoris regis, seu aliquo tempore citra, tractari, audiri, examinari, et decidi consueverunt, seu de jure debuerunt sive debent, et diversa alia perperam*. These are expressed, though not very perspicuously, in the statute 13 R. 2. c. 2.

Hume's Hist.
c. 22. 4 Inst.
127. Hallam, 3.
225. Brodie's
Intro. 227.
Amos's For-
tescue, p. 115.
notâ. See fur-
ther as to this
court, *Reeves'*
Hist. Edw. 3.
Rich. 2. Run-
nington's
Hale's Com.
Law, 39, 40.

Madd. Excheq. p. 27. *Spelman's* Gloss. Voc. *Constabularies*. *Cotton's* Posthum. 64. *Harg.* Sta. Tri. 11. p. 124. There is no record of cases in the Court of Chivalry: *Rushworth*, who had kept an account of them, lost his notes by lending them to a person who never returned them. *Amos's* Fort. p. 116.

OF THE COURT OF THE JUSTICES OF ASSISE AND *NISI PRIUS*.

Page 475.

3 G. 4. c. 10.

BY a late act of parliament, whenever it shall happen that the commissions, under which the judges sit upon their circuits, shall not be opened and read in the presence of one of the *quorum* commissioners, at any place specified for holding the assizes, on the very day appointed for such purpose, it shall and may be lawful to open and read the same, in the presence of one of the *quorum* commissioners therein named, on the following day; or if such following day shall be a *Sunday* or any other day of public rest, then on the succeeding day: and such opening and reading thereof shall be as effectual, to all intents and purposes, as if the same had been opened and read in the presence of one of the *quorum* commissioners, on the very day appointed for that purpose, and shall be deemed and taken to be an opening and reading thereof on the day for that purpose appointed; and all records and other proceedings, under or relating to any commission, which may be opened and read by virtue of that act, shall and may be drawn up, entered, and made out, under the same date and in the same form, in all respects, as if such commission had been opened and read on the day originally appointed for that purpose, provided that the judges and *quorum* commissioners are directed and required to have such commissions opened and read on the very days appointed for that purpose, unless the same shall be prevented by the pressure of business elsewhere, or by some unforeseen cause or accident.

ECCLESIASTICAL COURTS.

(D) In what Cases these Courts have Jurisdiction.

Page 489.

Gilbert v.
Buzzard,
2 Hagg. Cons.
R. 533.
5 Phill. R. 535.

A PARISHIONER exhibited articles against the churchwardens of *St. Andrew's, Holborn*, for refusing to bury his wife in an iron coffin, and the churchwardens insisted that, from the smallness of the burying ground, and the populousness of the parish, it would occasion great expense and inconvenience if all parishioners insisted on being buried in such coffins. Sir *William Scott*, after full argument, in a learned and luminous judgment, decided that such coffins could only be admitted on payment of an increased rate of fees to the parish.

Watson v.
Thorp, 1 Phill.
R. 269.
Stone's Case,
1 Adams R.
521. n.

The Consistory Court, by its chancellor, has power to suspend an incumbent, *ab officio et beneficio*, from performing the functions of his office, and receiving the profits of his living, for immoral conduct; and may deprive for doctrines contrary to the articles of the church, the bishop passing sentence.

The

The court may temporarily suspend him also for altering or omitting parts of the church service. Newbery v. Goodwin, 1 Phill. R. 282.

And may suspend a parishioner *ab ingressu ecclesiæ*, for brawling in the chancel of the church. 2 Phill. R. 295.

The ecclesiastical courts have jurisdiction to try questions of simony. Dobie v. Masters, 5 Phill. R. 171., and cases there cited.

A minister of the Church of *England* cannot by law refuse to bury the child of a dissenter, and if he do, it is a subject for a proceeding against him in the Ecclesiastical Court. Kemp v. Wickes, 3 Phill. R. 264.

The Ecclesiastical Court has no jurisdiction over a royal will of a deceased sovereign of *England*, in which *no executors are named*, and where the reigning sovereign has succeeded in right of his crown to all the goods of the deceased, and a proceeding by a legatee against the king's proctor to obtain probate is not sustainable. In the goods of King George III., 1 Addams R. 255.

(See the 10 G. 4. c. 53. regulating the duties, salaries, and emoluments of the officers, clerks, &c. of the Ecclesiastical Courts.)

OF THE COURT OF ADMIRALTY.

(A) To what Cases the Jurisdiction of the Admiralty is confined.

Page 496.

A PIECE of land grown up by accretion of soil from the sea belongs to the lord of the soil as a gradual and imperceptible increment, and not to the king as derelict, if the increment has been so slow as to be imperceptible in its daily progress, though clearly perceptible after a lapse of years. The King v. Lord Yarborough, 3 Barn. & C. 91.

(As to the boundary between the *corpus comitatus* and the high seas, see tit. "PIRACY," Vol. VI.)

(E) By what Law it proceeds, and the Form of such Proceedings.

Page 505.

WHEN two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other upon the high seas: whatever is the property of the enemy may be acquired by capture at sea, but the property of a friend cannot be taken, provided he observes his neutrality. Report of the Judge of the Prerogative Court, of the Advocate-General and Attorney and

Solicitor-General, in answer to the *Prussian* memorial and *Exposition des Motifs*, &c. in 1752, concerning neutral ships. Collect. Jurid. 135. This admirable paper was principally the work of Mr. Merray the Solicitor-General, and has always been held in high estimation, as correctly laying down the principles of the law of nations as to capture of neutral ships. Vattel calls it an excellent piece on the law of nations. Vattel, *Droit de Gens*, l. 2. c. 7. § 84.; and Montesquieu says it was a *réponse sans réplique*. Letters, 5 March 1753.

Hence the law of nations has established, that the goods of

an enemy on board the ship of a friend may be taken; that the lawful goods of a friend on board the ship of an enemy ought to be restored; that contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war, is a departure from neutrality. By the maritime law of nations, universally and immemorially received, there is an established method of determination whether the capture be, or be not, lawful prize.

Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize in a Court of Admiralty, judging by the law of nations and treaties.

The proper and regular court for these condemnations, is the court of that state to whom the captor belongs. The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, *viz.* the papers on board, and the examination on oath of the master and other principal officers; for which purpose there are officers of admiralty in all the considerable sea-ports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. (a) If there do not appear from thence ground to condemn as enemies' property, or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence the property shall appear so doubtful, that it is reasonable to go into the further proof thereof. A claim of ships or goods must be supported by the oath of somebody, at least as to belief. The law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master, at least, should be privy to the truth of the transaction. To enforce these rules, if there be false or colourable papers, if any papers be thrown overboard, if the master and officers examined *in præparatorio* grossly prevaricate, if proper ship's papers be not on board, or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages, for which purpose all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated, by many treaties. (b)

Though from the ship's papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect; if he will not shew the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy.

When

(a) See the standing interrogatories to be exhibited on behalf of the king to commanders, officers, &c. of ships seized as prizes. 1 Rob. Ad. R. 381.

(b) Treaty between England and Holland 17th Feb. 1668, art. 13.; between England and France, 24th Feb. 1677; treaty at Ryswick between France and Holland, 1697, art. 30.

When the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

If the sentence of the Court of Admiralty is thought erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this superior court judges by the same rule which governs the Court of Admiralty, *viz.* the law of nations, and the treaties subsisting with that neutral power whose subject is a party before them.

If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive. This manner of trial and adjudication is supported, alluded to, and enforced by many treaties. (a) In this method all captures at sea were tried during the last war by *Great Britain, France, and Spain*, and submitted to by neutral powers. In this method, by courts of admiralty acting according to the law of nations and particular treaties, all captures at sea have immemorially been judged of in every country in *Europe*. Any other method of trial would be manifestly unjust, absurd, and impracticable.

Though the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied or departed from; and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty; and the law of nations only governs so far as it is not derogated from by the treaty. Thus, by the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy; but particular treaties have enjoined a less degree of search, on the faith of producing solemn passports and formal evidences of property duly attested. Particular treaties too have inverted the rule of the law of nations, and by agreement declared the goods of a friend on board the ship of an enemy to be prize, and the goods of an enemy on board the ship of a friend to be free, as appears from the treaties already mentioned, and many others. So, likewise, by particular treaties, some goods reputed contraband by the law of nations, are declared free. If a subject of the King of *Prussia* is injured by, or has a demand upon any person here, he ought to apply to his majesty's courts of justice, which are equally open and indifferent to foreigner or native. So, *vice versâ*, if a subject here is wronged by a person living in the dominions of his *Prussian* majesty, he ought to apply for redress in the king of *Prussia's* courts of justice. If the matter of complaint be a capture at sea during the war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

The law of nations, founded upon justice, equity, convenience,
3 K 2 and

(a) See the treaties referred to, Collect. Jurid. 157.

and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the state, and justice absolutely denied *in re minime dubiâ* by all the tribunals, and afterwards by the prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions, different men think and judge differently, and all a friend can desire is, that justice shall be impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried.

Case of Flad
Oyen, 1 Adm.
R. 115. Have-
lock v. Rock-
wood, 8 Term
R. 270.

A court of prize must, according to the law and usage of nations, sit in the belligerent country; and a court established by one of the belligerents in a neutral state, is not to be recognized as a legal court, or its sentences respected.

Vigilantia,
1 Rob. R. 1.
The Emden,
Id. 16.

An enemy's vessel, only ostensibly transferred, and remaining in the enemy's trade, is liable to seizure and condemnation. If there is nothing special or particular in the conduct of the vessel, her national character is determined by the residence of the owner; but the traffic in which the ship is engaged, and the mode and circumstances of it, may stamp on her another character.

Endraught,
Id. 19. 22.
The Magnus,
1 Rob. R. 51.

Switzerland and other interior countries are allowed, from necessity, to export and import through an enemy's ports; but *strict* proof of property is required; and in doubtful cases, orders and payment for the property must be proved.

The Santa
Cruz, 1 Rob.
R. 50.

The law of *England*, as to confiscating or restoring the property of allies recaptured, is founded on reciprocity; it adopts the rule of the country to which the claimant belongs. Our maritime law having adopted the liberal principle of restitution, on salvage, of recaptured property of its own subjects, gives its allies the benefit of this rule, till it appears that the ally acts otherwise towards *British* property.

Frederic,
Id. 85.

A ship coming out of a blockaded port is *primâ facie* liable to seizure; and to obtain release, the claimant must satisfactorily prove the innocency of his intention.

Vrow Judith,
Id. 150.

Persons entering a port under a blockade *de facto* not publicly proclaimed, are entitled to some kind of warning; *aliter* if coming out, for then the existence of the blockade *de facto* must be known.

Spes and Irene,
5 Rob. R. 77.

A vessel is not allowed to come to the mouth of a blockaded port to make enquiry whether the blockade has ceased or not.

Shepherdess,
Id. 262.

In general, the clearing out for a blockaded port is a breach of blockade; but in regard to the convenience of commerce, and the great distance, the court has allowed *American* vessels to clear out, conditionally, for a blockaded port, subject to enquiries as to the continuance of the blockade; but such enquiries should be made in the *blockading*, not in the *blockaded* country.

If a master, after warning of the blockade, obstinately persevere in the course to the port, the court cannot receive an excuse of intoxication.

A com-

A commander of an expedition may impose a valid blockade, though without orders from his government; and though the notification of it ought properly to be made to neutral states, yet where this was not practicable, a notification to the hostile governor of the blockaded port was held valid. The Rolla,
6 Rob. R. 364.

The raising of a blockade by a superior force is a total defeasance of its operations, and notification of its renewal is necessary. The Hoffnung,
Id. 112.

A vessel having violated a blockade inwards is liable to capture on her return voyage.

And a vessel, blockaded in a port, coming out with permission to go to a neutral port, and which violates the permission, and unloads in an enemy's port, is liable to capture on coming out; but the fraudulent evasion only affects the next immediate voyage. Christians-
berg Id. 376.

A neutral vessel cannot enter a hostile port in ballast. Comet,
Edwards's Ad. R. 32. See Collect. Marit. part i. p. 66.

It is no breach of blockade fairly to put into an enemy's port under real stress of weather; the coming out of such port with a cargo undelivered, is not conclusive as to *bona fides* in going into it. Charlotta,
Edwards R.
252.

It is no excuse that the ship goes into the blockaded port to procure a pilot for another port. Arthur, Id.
202.

In 1665, orders were made in council, declaring the rights of the Lord High Admiral, under grants of the crown, to certain captured vessels which now form a part of the droits of admiralty. These orders declare, that all ships and goods of enemies coming to any port, creek, or road of *England* or *Ireland* by stress of weather, or accident, or mistake of port, or ignorance, not knowing of the war, belong to the Lord High Admiral; but such as shall voluntarily come in, either men of war or merchantmen, upon revolt from the enemy, and such as shall be driven in and forced in port by the king's men of war, and also ships seized in ports, creeks, or roads of this kingdom or of *Ireland*, before declaration of war, or reprisals, belong to his majesty. 2d, That all enemies' ships and goods casually met at sea, and seized by any vessel not commissioned, do belong to the admiral. 3d, That salvage belongs to the admiral for ships rescued. 4th, That all ships forsaken by the company belonging to them are the admiral's, unless a ship commissioned have given the occasion to such dereliction, and the ship so left be seized by such ship pursuing, or by some other ship commissioned, then in company and in pursuit of the enemy; and the like is to be understood of any goods thrown out of any ship pursued. 1 Rob. R. 231.;
and see The
Rebecca, Ibid.

All prize originally and properly belongs to the state; and individuals can only derive title to it under commissions granted to them from the admiralty, or under the proclamation at the commencement of war and the prize acts. Prize taken by non-commissioned persons is given as above to the Lord High Admiral; consequently, a capture made by a cutter fitted out by a captain The Melo-
mane, 5 Rot
R. 41.
Id. 282.

captain of a man of war, and manned from his own ship, but without a commission or authority from the admiralty, is a droit of the admiralty, and does not come to the man of war; and there is no distinction as to the practice in the *West Indies*.

Foltina, 1 Dodson's R. 450.

A ship, seized in the harbour of *Heligoland*, which had been previously conquered and possessed by *British* forces, condemned as a droit of admiralty within the grant, although the island was not then confirmed to *Great Britain* by a treaty of peace.

Jonge Tobias, 1 Rob. R. 529.

If contraband articles on board a ship do not belong to the ship owner, they will not carry with them the condemnation of the ship, but only a forfeiture of freight; but if they belong to the ship-owner they affect the ship.

Sarah Christina, *Id.* 242.

Tar and pitch are contraband; provisions are not now held so, unless under particular circumstances: not so if the growth of the country exporting; less strictly held if in an unmanufactured state than if prepared.

Jonge Margaretha, *Id.* 194.; and see *The Endraught*, *Id.* 25. *The Edward*, 4 *Id.* 68.

And there is a great distinction between articles supplied for the ordinary use of life and those probably destined for a military use. Cheeses carried to *Brest* from *Amsterdam* by a neutral ship held contraband.

The Charlotte, 5 *Id.* 275. *The Zelder*, 6 *Id.* 95. *The Ranger*, *Id.* 125.

Two Friends 1 Rob. R. 271.

The Court of Admiralty will exercise a jurisdiction over a foreign ship rescued from the enemy, if there is any *British* subject concerned in the rescue, who prays to be rewarded here.

War Onskan, 2 Rob. R. 299. *The Huntress*, 6 *Id.*

According to the modern practice of the law of nations, salvage has not been usually granted on delivery of neutral property from the enemy, on the ground, that had it been carried into the enemy's port the maritime court would immediately have restored. Exception introduced to this rule, in consequence of the violent and lawless proceedings of the *French* prize courts.

The Wight, 3 Rob. 315.

Salvage on recapture may be claimed by a convoying ship.

Dorothy Foster, 6 Rob. 88.

Freight is liable to pay salvage when the voyage is commenced and the freight is in course of being earned.

Belle, Edwards's R. 66.

Salvage cannot be claimed by a king's ship for rescuing from the enemy a hired transport employed in the same service.

See the luminous and masterly series of decisions pronounced by Sir *Wm. Scott* on the intricate and novel questions arising in the late war, fully reported in the Reports of Robinson, Edwards, and Dodson. See also the documents published by Dr. Robinson in the *Collectanea Maritima*, strongly tending to shew that the main principles of prize law are founded on immemorial customs of the sea, and are as binding as customs of a municipal nature, and defeasible only between those who have grown up together, ceding and contracting rights under them by mutual renunciation and agreement.

(Vide statute 54 G. 3. c. 93. for the regulations for payment of navy prize money, and the transmission of the accounts and payment of balances to *Greenwich Hospital*.)

COURTS PALATINATE.

1. *Of the County Palatine of Chester.*

Page 512.

BY 1 Will. 4. c. 70. § 13. it is enacted, that from and after ^{1 W. 4. c. 70.} the commencement of this act, his majesty's writ shall be § 15. directed and obeyed, and the jurisdiction of his majesty's Courts of King's Bench, Common Pleas, and Exchequer respectively, and of the several Judges and Barons thereof, shall extend and be exercised over and within the county of *Chester* and the county of the city of *Chester*, and the several counties in *Wales*, in like manner as the jurisdiction of such courts respectively is now exercised in and over the counties in *England*, not being counties palatine; and that all original writs to be issued into the said several counties of *Chester*, city of *Chester*, and *Wales*, shall be issued by the cursitors of *London* and *Middlesex*, and the process and proceedings thereon shall be issued by and transacted with such of the officers of the several Courts of King's Bench and Common Pleas as shall be named for that purpose by the Chief Justices of such courts respectively, each naming for his own court.

And by § 14. it is enacted, that all the power, authority, and jurisdiction of his majesty's Court of Session of the said county palatine of *Chester*, and of the Judges thereof, and of his majesty's Court of Exchequer of the said county palatine, and of the Chamberlain and Vice-Chamberlain thereof, and also of his Judges and Courts of Great Sessions, both in law and equity, in the principality of *Wales*, shall cease and determine at the commencement of this act; and that all suits then depending in any of the said courts, if in equity, shall be transferred, with all the proceedings thereon, to his majesty's Court of Chancery or Court of Exchequer, as the plaintiff, or (in default of his making choice before the last day of *Michaelmas* term) as any defendant shall think fit; and if in law, to the Court of Exchequer, there to be dealt with and decided according to the practice of those courts respectively, or of the courts from whence the same shall be transferred, according to the discretion of the court to which the same shall be transferred; which court shall, for the purpose of such suits only, be deemed and taken to have all the power and jurisdiction, to all intents and purposes, possessed before the passing of this act by the court from whence such suit shall be removed.

§ 15. Provided always, and be it enacted, that nothing in this act contained shall be construed to abolish or affect the obligations and duties, or the jurisdiction or rights now lawfully imposed upon, performed, or claimed and exercised by the mayor and citizens of *Chester*, in the courts of the county of the city of *Chester*, or otherwise, save and except that such writs of error, or false judgment, as may now, by any charter or usage

§ 14.

§ 15.

of the said corporation, be brought upon the judgments of the said courts or any of them, before any of the courts abolished by this act, shall hereafter be issued, as in other cases, from inferior courts, and be returnable into his majesty's Court of King's Bench.

§ 16.

§ 16. And be it further enacted, that all persons who, on or before the passing of this act, shall have been admitted as attorneys, and shall then be practising in any of the Courts of Sessions or Great Sessions in the county palatine of *Chester* or in *Wales* respectively, shall be entitled, upon payment of one shilling, to have their names entered upon a roll to be kept for that purpose in each of the superior courts of *Westminster*, and thereupon be allowed to practise in such courts in all actions and suits against persons residing, at the commencement of the suit, within the county of *Chester* or principality of *Wales*; and that all persons having served or now actually serving as clerks to such attorneys, under articles, and who would otherwise be entitled to be admitted as attorneys of the said Courts of Great Sessions, may, on or before the expiration of six months after the passing of this act, be admitted as attorneys of the said courts of *Westminster*, for the purpose of practising there, in the like matters only, without payment of any greater duty than would be now payable by law, upon their admission as attorneys of such Courts of Great Sessions respectively.

§ 17.

§ 17. And be it further enacted, that all attorneys and solicitors now actually admitted and practising in any of the said Courts of Session or Great Sessions may be admitted as attorneys of the said courts at *Westminster*, in like manner as is now or may be hereafter 'prescribed for the admission of other persons as attorneys therein, upon payment of such sum for duty, in addition to the sum already paid by them in that behalf, as shall, together with such latter sum, amount to the full duty required upon admission of attorneys in the said courts at *Westminster*; and that all persons having served or now actually serving under articles, as clerks to such attorneys or solicitors of any of the Courts of Session or Great Sessions, may, at the expiration of their respective times of service, be admitted as attorneys of the said courts at *Westminster*, in like manner and upon payment of the like duty as if they had served under articles, as clerks to attorneys of the last-mentioned courts.

§ 18.

§ 18. And be it further enacted, that any person who shall have been duly appointed a commissioner for taking affidavits, or a master extraordinary in chancery of any of the courts abolished by this act, shall, upon producing his appointment before the proper officer, and upon the payment of one shilling, be entitled to have his name inserted in a list, to be kept for that purpose, of such commissioners or masters extraordinary, as the case may be; and to exercise, within the limits of his existing commission or commissions, the same power and authority, and for the same purposes, as if his commission had issued from one of his majesty's courts at *Westminster*.

§ 19.

§ 19. And be it further enacted, that from and after the time herein appointed for the commencement of this act, assizes shall be held for the trial and despatch of all matters, criminal and civil, within the county of *Chester*, and the several counties and county towns in the principality of *Wales*, under and by virtue of commissions of assize, *oyer* and *terminer*, gaol delivery, and other writs and commissions, to be issued in like manner and form as hath been usual for the counties in *England*; and all laws and statutes now in force, relating to the execution of such commissions, when issued for counties in *England*, shall extend and be applied to the execution of the commissions issued for the county of *Chester* and the counties of *Wales*, under the authority of this act.

§ 19.

§ 20. And be it further enacted, that, until it shall be otherwise provided by law, one of the two judges appointed to hold the sessions of assize, under his majesty's commission, within the county of *Chester* and principality of *Wales*, shall, in such order and at such times as they shall appoint, proceed to hold such assize at the several places where the same have heretofore been most usually held within *South Wales*; and the other of such judges shall proceed to hold such assizes at the several places where the same have heretofore been most usually held in *North Wales*; and both of such judges shall hold the assizes in and for the county of *Chester*, in like manner as in other counties of *England*.

§ 20.

§ 28. And be it further enacted, that upon all fines, which now are or before the commencement of this act shall be duly acknowledged in *Chester* or *Wales*, proclamation may be made at the successive assizes, to be holden under his majesty's commission within the county of *Chester* and principality of *Wales*, before any judge of such assize, during the continuance of such his commission, in the same manner and form, and with the same force and effect, as if the same had been proclaimed before the justices of *Chester* and *Wales*, or any of them; any law or usage to the contrary notwithstanding.

§ 28.

§ 29. And be it further enacted, that all fines and recoveries to be levied and suffered after the commencement of this act, of lands, tenements, or hereditaments, in the county of *Chester*, or county of the city of *Chester*, or principality of *Wales*, shall be levied and suffered in such and the like manner; and the same officers shall be employed therein as in the case of fines and recoveries now levied or suffered of lands, tenements, or hereditaments in any county of *England*, not being a county palatine."

§ 29.

OF THE COURT OF COMMISSIONERS OF SEWERS.

Page 539.

Netherton v.
Ward,
5 Barn. & A.
21.

UPON the construction of the 23 H. 8. c. 5. and the 3 & 4 Ed. 6. c. 8., it has been decided, that a tenement situate in the king's dock yard, deriving a benefit from the public sewers, and occupied by an officer of government who pays no rent, is liable to be rated to the sewers.

Masters v.
Scroggs,
5 Maule & S.
447.; and see
Dore v. Gray,
2 Term R. 558.

The commissioners cannot assess a person in respect of drains falling into a great sewer, if the level of the drains is so much above the sewer that the stopping of the sewer cannot possibly throw the water back so as to injure his premises, and if he is not benefited by the works or the sewer.

Rex v. The
Commis-
sioners of
Sewers in
Essex, 1 Barn.
& C. 477.

The owner of land in a level, who is bound to repair a sea-wall, cannot call on the other landowners in the level to contribute, although the injury has arisen by an extraordinary tide and tempest, unless the damage has been sustained without his default.

Rex v. Somers-
etshire Com-
missioners,
8 Term R. 312.

If a sea-wall, which the owners of particular lands are bound to repair, be destroyed without default in the owners, the commissioners may order a new one at the expense of the whole level.

Stafford v.
Hamston,
2 Brod. & B.
691.

The decree of commissioners of sewers is not conclusive against a party residing within the district over which they preside; but he may dispute the grounds of it in an action of trespass.

Ex parte
Owst, 9 Price,
117.

A local act enacting that, for the better and more effectual execution of the act, all lands within a certain district, (previously within the jurisdiction of the commissioners,) and the works, drains, and sewers thereof, should be subject only to the control and jurisdiction of local commissioners thereby appointed, does not discharge the district from liability to serve on juries at the sessions of sewers, without an express provision.

Rex v. Somers-
etshire Com-
missioners,
7 East, 71.

A presentment made by a standing jury, constituted according to ancient usage, originally returned by the sheriff at the commencement of every new commission of sewers, from certain parishes or districts, composed of landowners there interested in disclaiming the general charges of the level, which jurymen generally acted for life, and only the foreman of which was summoned by the sheriff, which foreman convened the said jurymen, is illegal and void.

Jones v. Bird,
5 Barn. & A.
837.

Where bricklayers, employed by commissioners of sewers to repair a public road, performed the work in such a manner as to occasion a damage to a neighbouring house, they were held liable to an action, although the work appeared to be skilfully performed.

Duke of New-
castle v.
Clark, 8 Taunt. 602.

Commissioners of sewers have not such a possession in their works as to enable them to maintain trespass.

CUSTOMS.

(C) Of such Customs as are against the Rules of the Common Law, yet, not being unreasonable in themselves, are good, and, from the convenience of them, bind in particular places.

Page 566.

A CUSTOM for the churchwardens of a parish to set up monuments, &c. in a church, without consent either of the rector or the ordinary, is illegal.

Beckwith v. Harding,
1 Barn. & A.
508.

A custom, that the owners of ancient messuages, &c. within a manor have had assigned to them, by the moss-reeve, certain portions of the common, to be held by them in severalty, for digging turves, &c. called moss-dales, and have enclosed and improved such moss-dales, (after clearing them of turves,) and held them so enclosed in severalty discharged from all right of common, is good in law.

Clarkson v. Woodhouse,
5 Term R.
412. n.

A custom in a borough, forming a portion of a parish, to appoint separate churchwardens and overseers, and make separate rates for the borough and for that portion of the parish without the borough, was holden invalid.

Rex v. Gordon, 1 Barn.
& A. 524.

A custom that none but a freeman, or the widow or partner of a freeman, should sell by retail in a city or the suburbs, is valid in law.

Mayor of York v. Walbank, 4 Barn.
& A. 459.

An usage of trade cannot be set up in contravention of an express contract; therefore, where *A.* agrees with *B.* to buy a quantity of *prime* bacon, which *B.* weighs and examines, and pays for by a bill at two months, but before the bill becomes due, gives notice to *A.* that the bacon does not answer the contract, *A.* cannot give in evidence a custom that the buyer is bound to reject the contract, if at all, at the time of examining the goods.

Yates v. Pym,
6 Taunt. 446.
2 Marsh R.
141.

A custom in an inferior court, to declare against a defendant before appearance, is bad in law; and *semble* also a custom to issue a summons and attachment at the same time.

Williams v. Lord Bagot,
3 Barn. & C.
772.

Keeping up a capstern and rope in a cove, to assist boats in landing, and without which they could not safely land in bad weather, held a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstern or not; and the custom to exact the toll held good, although the party claiming it was neither owner of the cove nor lord of the manor, nor were his predecessors shewn to have been such; but he and they had always been owners of the spot on which the capstern stood, and of an estate in the neighbourhood.

Falmouth v. George,
5 Bing. 286.

Held, that a fisherman frequenting the cove was not a competent witness for the party resisting the toll.

A custom

Golding v.
Fenn, 7 Barn.
& C. 765.

A custom that there shall be a select vestry of an indefinite number of persons, continued by election of new members, made by itself and not by the parishioners, is valid in law.

Semble, that it must be part of such custom that there should always be a reasonable number, and that the reasonableness must be decided with reference to long established usage, and to the population of the parish, such a custom having existed from time immemorial in a parish.

CUSTOMS OF LONDON.

(A) Customs of London in general.

See page 582, *in notâ*.

Shadwell v.
Hutchinson,
1 Moo. &
Malk. 350.

THE custom of *London*, allowing parties to build to any height upon an old foundation, does not authorize them to do so unless the whole of the foundation be their own.

See Vin. Abr. Customs of London, pl. 2. 4, 5.

Ibid.

Semble, that if the foundation built on is less ancient than the window obstructed, the custom does not authorize the building.

Ibid.

Quære, — Whether the custom of *London* may now be proved by the production of the *privilegia Londini*.

(F) How to be construed, and to what Things a Custom shall extend.

Page 592.

Richardson v.
Walker,
2 Barn. & C.
827.

A CUSTOM which binds the tenants and resiants in a manor to grind at the lord's mill all *their* corn and grain which they use ground in their dwellings, does not prevent them from buying and using in their dwellings flour produced from corn ground at other mills.

Richardson v.
Capes, 2 Barn.
& C. 841.

Where the lord of a manor had two mills, and the tenants and resiants were by custom bound to grind all their malt used in their dwellings at the said mills, but might take it to either at their own option; held, that the lord having pulled down one of the mills, had thereby suspended the custom.

(H) Custom of Foreign Attachment.

3. *Of the Form of the Proceedings in a foreign Attachment.*

Page 597.

Wetter v.
Rucker,
1 Bro. & Bing.
491.; and see
Roll. Abr. 555.

IN order to discharge the garnishee of his debt as against the defendant in the Lord Mayor's Court, there must be a judgment and execution against the garnishee; and a payment without execution will not discharge him.

Nonell v.
Hunter,

Where a plea of recovery in a foreign attachment stated the custom to be, that if the plaintiff in the Mayor's Court allege that
any

any other person owes money to the defendant in that court, &c., and then alleged that the plaintiff in the Mayor's Court and another owed money to the defendant, and stated an attachment of that money, the plea was held bad on demurrer, since the custom, as stated, was, that if any other person owed money, &c. and the debt stated was from the plaintiff below and another, to the defendant: and *quære*, whether the custom could have been good for a party to attach money in his own hands?

4 Barn. & A. 646.; and see the authorities as to the mode of stating the custom on this point, *Ibid.* 649. Cro.Eliz. 186.

Where one of two defendants in a foreign attachment in the Mayor's Court removes the proceedings by *certiorari* into the King's Bench, he must put in bail for both, or it is not well removed, and a *procedendo* will issue.

Keat v. Goldstein, 7 Barn. & C. 525.

DAMAGES.

(B) What Persons are entitled to, or shall recover Damages.

Page 601.

THE defendant wrongfully seized goods as for a distress, and placed a man in possession of them for some days; it was held the owner was entitled to recover damages for the seizure, although he had the use of the goods, by permission of the man in possession, the whole time.

Bayliss v. Fisher, 7 Bing. 153.

(D) Of assessing the Damages: And herein,

1. *Of the Quantum of Damages the Jury may give.*

Page 602.

IF *A.* sells a horse to *B.* and warrants it sound, and *B.* a few days afterwards sells it to *C.*, and it proves unsound, and *C.* brings an action against *B.* and recovers the price, and *A.* has notice of the action, *B.* may recover against *A.* not only the price of the horse, but also the costs of the action brought against him by *C.*

Lewis v. Peat, 2 Marsh. R. 431. 7 Taunt. 153.

In an action of *assumpsit* for not delivering goods on a given day, the true measure of damages to be recovered is the difference between the contract price and that which goods of similar quality bore on or about the day when the goods should have been delivered: but on contracts for replacing stock plaintiff may recover the price at the day of trial or executing the enquiry, for in the former case the vendee having the money in his hands, may on the vendor's failure to deliver, purchase goods himself; but on a loan of stock the borrower has deprived the plaintiff of his money, so that he is prevented purchasing.

Gainsford v. Carroll, 2 Barn. & C. 624. Sheppard v. Johnson, 2 East, 211. Macarthur v. Scaforth, 2 Taunt. 257.; and see 1 McClell. 377.

In an action for *mesne* profits the plaintiff cannot, on executing a writ of enquiry, give in evidence the extra costs incurred in the previous action of ejectment, but only the *taxed* costs.

Brooke v. Bridges, 7 Moo. 471.

Though a court of error cannot give costs to a party reversing a judgment, yet a plaintiff in an action of *mesne* profits may recover

Nowell v. Roake,

7 Barn. & C.
404.

Baker v. Gar-
ratt, 3 Bing.
R. 56.

Neale v.
Wyllie, 3 Barn.
& C. 555.

Tripp v.
Thomas,
3 Barn. & C.
427.

Buckle v.
Bewes, 4 Barn.
& C. 154.;
and see
1 McClell. 214.

Mountford v.
Wilkes, 2 Bos.
& Pull. 337.
Slack v.
Lovell,
5 Taunt. 157.
Gordon v.
Swan, 12 East,
419. Marshal
v. Poole,
13 East, 98.
Harrison v.
Allen, 2 Bing.
R. 4. Calton v. Bragg, 15 East, 223. Lee v. Lingard, 1 East, 401. Higgins v. Sargent,
2 Barn. & C. 348. Murray v. East India Company, 5 Barn. & A. 204. Hare v. Rickards,
7 Bing. 254.

Arnott v.
Redfern,
5 Bing. 555.

Ibid.

De Bernales v.
Wood,
5 Camp. 257.
Farquhar v.
Farley,
1 Moo. R. 322.

Walker v.
Constable,

1 Bos. & Pull. 306. Tappenden v. Randall, 2 Bos. & Pull. 467.

cover in damages the costs of reversing in error a judgment obtained by the defendant.

In an action against the sheriff for taking insufficient pledges in replevin, the assignee of the bond cannot give in evidence the costs incurred in an unsuccessful action against the pledges, unless he has given notice to the sheriff of such action.

If a lessee for years underlets with a covenant by the under-lessee to repair, and he does not repair, by reason whereof an action is brought by the superior landlord against his lessee, such lessee may recover, in an action against the under-lessee or his assignee, not only the amount of damages recovered by the superior landlord, but also the costs of defending the action.

In an action for slander, where defendant suffers judgment by default, the plaintiff is not bound to give any evidence; and where the jury found 40s. damages without evidence the court would not disturb the verdict.

Where a statute gives treble damages (as, for instance, the statute 29 Eliz. c. 4. for extortion by sheriffs), the plaintiff is entitled to three times the full amount of the damages found by the jury, and not merely to treble damages calculated according to the rule as to treble costs.

With respect to the recovery of interest by way of damages, it is now settled that, in order to recover interest, there must be an express contract to pay it, or an implied contract resulting from the usage of trade or business, or from special circumstances, or express proof that the money has been profitably used by the defendant. Interest is not recoverable on *all* sums of money payable at a specific day, but only on bills of exchange, promissory notes, and mercantile securities, and on agreements to pay in bills, notes, &c., and therefore not on life assurances payable at a fixed time after proof of the party's death.

But it has been lately held, that however a debt is contracted, if it has been wrongfully withheld by the defendant, after the plaintiff has endeavoured to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money.

It seems that the plaintiff is entitled to interest in the shape of damages in *assumpsit* on a *Scotch* judgment, because the judgment carries interest in *Scotland*.

On contracts for purchase of estates, the plaintiff may recover interest on the purchase-money from the time the purchase should be completed, if he aver and prove that he has lost the use of his money.

But in an action for money had and received the plaintiff can only recover the net sum received, without interest.

In debt on bond, where the penalty and debt were of the same amount, and the bond expressly bore interest, *Littledale J.* held that the plaintiff might recover interest to the extent of the damages laid in the declaration beyond the penalty. Francis v. Wilson, 1 Ry. & Moo. Ca. 105.

In case for a malicious arrest, the plaintiff cannot recover damages for the extra costs incurred. Sinclair v. Eldred, 4 Taunt. 7.

Webber v. Nicholas, Ry. & Moo. Ca. 419. *Sed vide* 1 Stark. Ca. 306.

When the jury said, in an action on a policy, that the ship had sustained a partial loss, but to what amount there was no evidence, it was held that the plaintiff was entitled to a verdict, with nominal damages only. Tanner v. Bennett, Ry. & Moo. Ca. 182.

(F) Of the Manner of assessing and recovering Damages.

Page 614.

WHERE in an action of libel the defendant pleaded the general issue, and eight special pleas of justification, and the jury found for the plaintiff on the general issue, and on two of the pleas of justification, but assessed no damages, and for the defendant on the six remaining special pleas, and the Court of King's Bench afterwards allowed the plaintiff to enter up judgment *non obstante veredicto* on the issues found for the defendant, on the ground that the pleas were bad in law, and awarded a writ of enquiry to assess damages and final judgment for the damages assessed, the Court of Exchequer Chamber on error reversed the judgment of the King's Bench as to the award of enquiry and the judgment thereon, remitted the record to the King's Bench, and directed that court to award a *venire de novo* to try the general issue, and also the issues on the pleas found for the plaintiff, holding that the verdict found for the plaintiff on those issues was void, because the jury ought to have assessed damages thereon. Clement v. Lewis, 3 Bro. & Bing. 297. 7 Moo. 200.; and see S. C. 3 Barn. & A. 702.

A mere miscalculation of damages and costs will not avoid a judgment. Dunn v. Crump, 3 Bro. & Bing. 309. 7 Moo. 137., and cases there cited.

If the plaintiff has evidently sustained some damages, and the jury, being unable to ascertain the amount, find a verdict for the defendant, the court will permit a verdict for plaintiff for nominal damages. Feize v. Thompson, 1 Taunt. 121.

Liquidated damages cannot be recovered on an agreement containing various stipulations of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. Kemble v. Farren, 6 Bing. 141.

DEBT.

(A) In what Cases an Action of Debt will lie.

Page 617.

Wilson v. Hobday, 4 Maule & S. 120. **D**EBT lies by the assignees of a replevin-bond against one of the sureties in the *detinent* only.

Priddy v. Henbrey, 1 Barn. & C. 674. Debt lies by the drawer against acceptor of a bill of exchange payable to the drawer or his order, and expressed to be for value received.

Webb v. Jiggs, 4 Maule & S. 113. Kelly v. Clubbe, 5 Bro. & Bing. 150. Debt does not lie by the devisee of a rent for life against the owner of the land out of which it issues, during the continuance of the freehold estate; for such action did not lie at common law, and the statute of 8 Ann. c. 14. § 4. only extends to cases of tenants holding for life under lessors.

Soulsby v. Neving, 9 East R. 310. After a landlord has recovered in ejectment against his tenant, he may still maintain debt against the tenant for double *value*, under the statute 4 G. 2. for holding over after a notice from the landlord. It seems otherwise as to the action for double *rent* under 11 G. 2. c. 19.

Doran v. O'Reilly, 5 Dow R. 153. Debt lies for interest in a general count, without stating any special contract.

Therefore in declaring in debt on a mortgage deed, it may be prudent to add a second count for interest, and also to lay the damages sufficiently large to cover the amount of interest; for as there is never any covenant to pay interest *subsequent to the day of default*, such interest is only recoverable as damages and not as debt.

Henley v. Soper, 8 Barn. & C. 16. Debt lies on the decree of a colonial court, made for payment of the balance due on a partnership account.

(F) Of the Manner of bringing the Action; and where it must be brought in the *Debet* and *Detinet*.

Page 626.

Brill v. Neele, 3 Barn. & A. 208. **A** COUNT stating that defendant was indebted to plaintiff for work and labour, and being indebted, that he undertook and promised to pay, whereby an action hath accrued, &c. is not a good count in debt, and cannot be joined in a declaration with counts in debt.

Luckett v. Plummer, 2 Bro. & Bing. 659. In a declaration in debt in the Common Pleas, it is unnecessary to refer to the *clausum fregit* in the writ.

(G) Of the Extinguishment of the Debt, and pleading in Bar thereof.

Page 629.

Collins v. Lord Matthew, **A** PLEA of *nul tiel record* to an action of debt on an *Irish* judgment must conclude to the country, for the record of the judgment

judgment is only proveable by an examined copy on oath, the veracity of which must be tried by a jury.

not a record but *assumpsit* lies on it. See *Harris v. Saunders*, 4 East R. 473 ; and that such judgment is

In debt on a recognizance, if the enrolment is not averred, the opposite party may plead *nil debet*.

Glynn v. Thorpe, 1 Barn. & C. 411.
Glynn v. Thorpe, 1 Barn. & A. 153.

DESCENT.

(C) Of the Half-Blood and the *Possessio Fràtris*.

Page 637.

THE rule of *possessio fràtris* does not apply to estates tail, nor to inheritances in fee simple, without an actual possession of the brother of the whole blood.

J. A. devised all his lands to *S. A.* (his son by the first *venter*) when he should come of age of twenty-one years ; but if he should die before twenty-one years, and *D. A.* (testator's daughter by a second *venter*) should be living, he gave the same to her when she should attain twenty-one years. Testator died, and *S. A.* died under age, and without issue ; and it was held that on *S. A.*'s death the inheritance in fee vested in *D. A.*, the sister by the half-blood, in preference to the testator's brother of the whole blood ; for *S. A.* was never possessed of the reversion expectant on the sister's life estate, so as to make a *possessio fràtris* to exclude the half-blood.

Doe v. Wichelo, 8 Term R. 211.

Doe v. Hutton, 5 Bos. & Pull. 643. In this case Lord *Alvanley* denied the authority of the case of *Smith v. Parker*, 2 Black. R. 1250. ; and see 2 Saund. R. 8. *notd.* *Doe v. Kean*, 7 Term R. 386.

(E) Where a Person shall be said to take by Purchase and not by Descent.

Page 643.

WHERE a man devised to his son and heir at law charged with the yearly payment of 100*l.* to his daughter for her life, and at her decease, with the sum of 1,500*l.* among her children, or if no child, to be disposed of as she should direct ; and in default of payment of either of the said sums then to *G. P.* his heirs, administrators, and assigns, in trust to raise 100*l.* out of the rents and profits, and the 1,500*l.* by sale or mortgage of a sufficient part of the lands, and subject to such charges and trust to his said son, his heirs, executors, &c. ; it was held that the son took by descent and not by purchase.

Chaplin v. Leroux, 5 Maule & S. 20. In this case *Gilpin's Case*, Cro. Car. 161. was again denied to be law ; and see *Allan v. Heber*, 2 Stra. 1170. *Ford's MS.*

Devise to the heir at law in fee with an executory devise over in case he does not attain twenty-one years of age ; held, that this executory devise did not alter the quality of the estate which he would otherwise have taken as heir, and therefore that he took by descent and not by purchase.

Doe v. Timins, 1 Barn. & A. 530. ; and see *Langley v. Sneyd*, 3 Bro. & Bing. 243.

Where a testator devised all his real and personal estate and effects to *B. V.* his wife, in trust for the education of *M. V.* till twenty-one ; and in case of death of his daughter before twenty-

Goodtitle v. White, 2 New R. 583. ; and see 15 East, 174.

one, the whole of his estate and effects to his wife; testator died leaving *B. V.* his wife and *M. V.* his only child, and then *M. V.* died under age and without issue. The Court of Common Pleas held that the heir of *M. V. ex parte maternâ* was entitled to succeed.

DISCONTINUANCE.

(E) What Estate or Interest may be discontinued.

Page 675.

Doe deir.
Jones v. Jones,
1 Barn. & C.
258.

WHERE premises were conveyed by settlement to trustees to the use of the father and mother of the intended husband for their lives, and the life of the survivor, remainder to the use of the intended husband and wife and their assigns for their joint lives, and the life of the survivor, remainder to the use of trustees to support contingent remainders during the life of the intended husband and wife and the survivor, remainder to the use of the heirs of the husband by his intended wife; it was held that the husband took an estate for life, and an estate tail in remainder, and consequently that he could not, while in possession of his life estate, discontinue the estate tail by granting a lease for lives with livery of seisin; for a discontinuance can only be made by tenant in tail in possession.

DISTRESS.

(A) Who may distrain.

Page 691.

Dunk v. Hunter, 5 Barn. & A. 322.;
and see *Knight v. Bennett,*
4 Bing. 364.

A TENANT in possession under a memorandum of agreement to grant a lease, with a purchasing clause, for twenty-one years at a net clear rent, the tenant to enter on or before a named day, cannot be distrained upon, as this only amounts to an agreement for a future lease; a landlord can only distrain when there is a *present demise* at a fixed rent.

Parmenter v. Webber,
8 Taunt. 593.
2 Moo. 656.
S. C.

If a lessee let another into the farm to have it for the whole term of the lease, paying rent to the lessee, he cannot distrain for the rent in arrear, for he has assigned all his interest, and there is no reversion.

Burne v. Richardson,
4 Taunt. 720.

A termor who under-lets cannot, after the expiration of the under-tenancy, distrain on the under-tenant, though he continues in possession, if the under-tenant refuses to acknowledge him as landlord.

Newbery v. Pearce, 1 Barn. & C. 437.

Where an enclosure act directed that in lieu of tithes a corn rent should be payable to the improprator by the person having possession and occupation of the lands, and the lands were for some time untenanted and uncultivated, it was held, that a tenant afterwards coming in under the owner who owned the lands during the period while so untenanted, &c. was liable to be distrained upon for the arrears accrued during such period.

One

One of several coheirs in gavelkind may distrain without an authority from his coheirs. Leigh v. Shepherd, 2 Bro. & Bing. 465.

And so also one of several joint-tenants. Robinson v. Hofman, 4 Bing. 562.

The plaintiff being about to take an apartment of the defendant's tenant, defendant promised plaintiff never to trouble him or his property so long as he paid the tenant the rent of the apartment. The plaintiff paid the rent up to a certain period, and had made a tender of the residue remaining due, when the defendant, who had received no notice of the tender, distrained the plaintiff's goods for rent due from the tenant to the defendant; it was held, that his right to distrain was not barred. Welsh v. Rose, 6 Bing. 638.

Avowant, who had a term which expired on the 11th of November 1826, let the premises orally from the 11th of September to the 11th of November in that year for 270*l.*, payable immediately: held, that this was a lease of which parol evidence might be given, and not an assignment requiring writing; but, that being a demise of the whole of avowant's interest, he had no right to distrain. Preece v. Corrie, 5 Bing. 24.

A tenant from year to year under-letting from year to year has a reversion which entitles him to distrain. Curtis v. Wheeler, 1 Moo. & Malk. 495.

(B) What Things may be distrained.

Page 695.

A COLLECTOR of taxes cannot distrain, for taxes due for horses, carriages, &c., charged by the tax acts personally on the individual, household furniture, pictures, &c. devised by the individual's ancestor to and vested in trustees in trust to permit them to be held and enjoyed by the person for the time being entitled to the possession of the family estate, and to be kept in the mansion-house, and not removed without the trustees' consent: for though the tax act (43 G. 3. c. 99. § 38.) authorizes collectors to use all remedies and powers given by the bankrupt acts to creditors, yet the goods in question would not pass to the bankrupt's assignees in case of bankruptcy, not being in the party's order and disposition within the meaning of 21 Jac. 1. c. 19.; and *quære*, whether the 43 G. 3. c. 99. § 38. applies to any person not subject to the bankrupt laws? Shaftesbury v. Russell, 1 Barn. & C 666.

A landlord cannot distrain trees growing in a nursery ground; under the 11 G. 2. c. 19. § 8. Clark v. Gas-karth, 8 Taunt. 451. Clark v. Calvert, *Id.* 742. 5 Moo. 96.

Growing corn sold under a *fi. fa.* cannot be distrained by the landlord for rent, unless the purchaser allow it to remain an unreasonable time after it is ripe. Peacock v. Purvis, 2 Bro. & Bing. 562. 5 Moo. 79.

Goods of a principal in the hands of a factor cannot be distrained for rent by the factor's landlord. Gilman v. Elton, 5 Bro. & Bing. 75.

Nor goods deposited with a wharfinger. Thompson v. Mashiter, 1 Bing. R. 235.

Goods

Novello v.
Toogood,
5 Barn. & C.
154.

Goods of an ambassador's servant, renting and living in a distinct house from the ambassador, are distrainable for poor-rates, they not being necessary for the convenience of the ambassador.

Jenner v. Yol-
land, 6 Price, 3.

A landlord is justified in distraining and selling beasts of the plough, if there is reasonable ground to think, from the appraisal of competent persons at the time of taking, that there would not be enough to satisfy the rent and expenses without them, although it turn out *after the sale* that there would have been sufficient without them; and, therefore, in such case the landlord is not liable to an action on the case.

Buzzard v. Ca-
pel, 4 Bing. R.
137. 8 Barn. &
C. 141.

A barge attached by a rope to a wharf may be distrained for rent arrear in respect of the wharf and premises attached to it; but where it was found by special verdict that the barge was lying in the space between high and low water mark, and attached to the wharf by ropes, and that the exclusive use of the land between high and low water mark was demised to the tenant of the wharf as appurtenant to the wharf, but that the land itself was not demised to him, the court held, the lessor could not distrain the barge; for either the verdict meant that the *land* between high and low water mark was deemed as appurtenant to the land of the wharf, which could not be; or else that merely an easement was demised on the land between high and low water mark, out of which rent could not issue, and consequently a distress could not be made on it.

By 56 G. 3. c. 50. § 6. no landlord shall distrain on any corn, hay, straw, or other produce sold by the sheriff under an execution, and remaining to be consumed or threshed out on the land pursuant to agreement made between the sheriff and the purchaser, nor on any waggons, carts, or implements, horses, sheep, or cattle employed for threshing out, carrying out, or consuming any such corn, &c. under the provisions of that act.

Wood v.
Nunn, 5 Bing.
10.

A landlord, to whom rent was in arrear, hearing his tenant and a stranger disputing about the property of an article on the premises early in the morning, entered and said, "The article shall not be removed till my rent is paid." The stranger nevertheless removed the article. On the same day, after the removal, the landlord sent his broker to distrain for the rent: held, that the distress was sufficiently commenced by the landlord to entitle him to the article in question.

Parrey v.
Duncan,
1 Moo. &
Malk. 553.

On an avowry for a distress under 11 G. 2. on goods fraudulently removed, the defendant must prove that there was no sufficient distress left on the premises.

(C) Of the Manner of distraining as to Time and Place.

Page 699.

Nutrall v.
Staunton,
4 Barn. & C.
51.

THE statute 8 Ann. c. 14. § 6. & 7. is not confined to cases of tortious holding over by tenants, or of holding over the whole farm; therefore, where a tenant by permission held over a *part* of the farm, it was held the landlord might distrain on that part.

Where,

Where, by agreement or by custom, the tenant has the use of barns, &c. for a certain time after the end of the term, the landlord may distrain during that time; for the tenancy is *continued* independent of the statute of *Anne*.

Knight v. Benett,
4 Bing. 364.

Where commissioners had a power to make a rate yearly on lands, and they omitted to make one for several years, and then made an assessment for one year, and added to it the arrears of the omitted years; it was held, that no arrears could be due for the years for which no assessment had been made, and the distress was held bad.

Newton v. Young, 1 New R. 187.

By 11 G. 2. c. 19. § 1., in case any tenant or lessee shall fraudulently convey away from the premises his goods, to prevent the landlord distraining for arrears, it shall be lawful for the landlord, or any person by him empowered, within thirty days next after the carrying off of the goods, to seize them wherever found, as a distress for the arrears, and to sell the same as if distrained on the premises, provided that no landlord shall seize any goods as a distress which shall be sold *bonâ fide* to any person not privy to the fraud; and by § 3. all tenants fraudulently conveying away their goods, and all persons assisting them, shall forfeit to the landlord double the value of the goods, to be recovered by action of debt.

11 G. 2. c. 19.
§ 1, 2.
See tit. *Rent*
(K), Vol. VII.

This statute applies only to the removal of the tenant's goods, and not to those of a stranger.

Thornton v. Adams,
5 Maule & S. 38.

A creditor may, with the assent of the debtor, take possession of his goods to satisfy a *bonâ fide* debt, without incurring the penalty of the statute for fraudulently carrying off the goods; and this, although it be done under an apprehension that the landlord is about to distrain.

Bach v. Meats,
5 Maule & S. 200.; and see
9 Price, 301.

By 11 G. 2. c. 19. § 16. if a tenant at rack-rent, or where the rent shall be three-fourths of the yearly value, shall be in arrear one year's rent, desert the demised premises, and leave them uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, two or more justices of the peace, at request of the landlord or his bailiff, may view the premises, and affix, on the most notorious part thereof, a notice (fourteen days at least) of a second view; and if, on the second view, the tenant, or some person for his behalf, does not appear and pay the rent, and there is no sufficient distress on the premises, then the justices may put the landlord into possession of the demised premises, and the lease shall be void.

11 G. 2. c. 19.
§ 16.

The landlord may proceed under this statute, though he know where the tenant is, and though the justices, at the first view, find a servant on the premises. The landlord must have a right of re-entry in order to proceed under the statute (*a*); but this need not appear on the record of the magistrates' proceedings.

Ex parte
Pelton,
1 Barn. & A. 369. (*a*) By
57 G. 3. c. 52.
the remedy is
extended to
cases where

only half a year's rent is in arrear, and where there is no power of re-entry reserved.

It is not necessary in such case that a complaint should be made on oath to the magistrate.

Basten v. Carrew, 5 Barn. & C. 649.

(D) Of the Distress when seized: And herein of the Distrainer's Interest therein, and what he is to do therewith.

Page 700.

Pitt v. Shew,
4 Barn. & A.
208.; and see
7 Price, 690.

A REASONABLE time, after the expiration of the five days from the distress, is allowed to the landlord for appraising and selling the goods.

Jacob v. King,
5 Taunt. 451.
1 Monk, 135.
S. C.

Where goods are distrained, and at the end of five days appraised, but not sold, the appraisement does not take away the plaintiff's right to replevy.

Owen v.
Legh, 3 Barn.
& A. 470.

The sale of growing crops distrained, without appraisement and before they are ripe, is wholly void, being unauthorized by the statutes; and therefore the tenant cannot recover damages for such a sale, on a declaration alleging that he was thereby hindered from replevying, no replevin being necessary in such case.

Lear v. Ed-
monds, 1 Barn.
& A. 157.;
and see 1 Bro.
& B. 36.

If a distress is pleaded in bar to an action for use and occupation, the plea must shew that the rent was satisfied, or it is bad on special demurrer.

(E) Where a Distress shall be said to be wrongful and excessive: And herein of the Remedy which the Party injured hath.

Page 706.

Branscomb v.
Bridges,
1 Barn. & C.
145.

AN action on the case for an excessive distress may be maintained, though the rent was tendered before the distress; for the plaintiff may waive the trespass.

Willoughby v.
Backhouse,
2 Barn. & C.
821. Sells v.
Hoare,
1 Bing. 401.

In an action for an excessive distress, the plaintiff is not bound to allege or prove the precise amount of rent due, and it is no bar to such action that the parties came to an arrangement as to sale of the goods seized.

6 G. 4. c. 16.
§ 74.

By 6 G. 4. c. 16. § 74. the landlord's right of distraining in case of the tenant's bankruptcy is limited to one year's rent, and for the rest he must come in as a common creditor.

Swann v.
Earl of Fal-
month, 8 Barn.
& C. 456.

Where a landlord's agent went upon the premises, walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away not leaving any person in possession, this was held a sufficient seizure to give the tenant a right of action for an excessive distress, and that quitting the premises without leaving any one in possession was not an abandonment of the distress, the 11 G. 2. c. 19. § 10. giving the landlord power to impound or otherwise secure on the premises goods distrained for rent arrear.

Where a party distrains for more rent than is due, but takes

takes only a single chattel, he is not liable to an action for distraining for more than is due, though the thing taken be of greater value than is necessary to cover the rent actually due, unless there were others of less but sufficient value to be found. (See 57 G. 3. c. 93. for regulating the costs of distresses for rent not exceeding 20*l.*; the provisions of which are extended, by 7 & 8 G. 4. c. 17., to distresses for all taxes, rates, or assessments not exceeding 20*l.*)

Avenall v. Croker,
1 Moo. & Malk. 172.

(F) Of distraining Things Damage-feasant.

Page 707.

THOUGH one commoner cannot in general distrain the cattle of another, yet if *A.* has land in a common field, and a right of common over the whole field, and *B.* has common over the whole field, and they, by agreement, agree not to exercise their mutual rights for a certain time, and during the time the cattle of *B.* come on *A.*'s land, he may distrain them; for *B.* may then be regarded as a stranger with respect to *A.*

Whiteman v. King, 2 H. Black. 4.; and see 1 Taunt. 529.

An action on the case does not lie against a party distraining the plaintiff's cattle, and refusing a compensation tendered *after* the cattle have been impounded; and it seems that it does not lie though the tender be made before impounding, for then replevin is the proper remedy.

Anscomb v. Shore,
1 Camp. R. 285. S. C.
1 Taunt. 261.
Sheriff v. Cowper R. 414.

James, 1 Bing. R. 341.; and see

Where cattle distrained damage-feasant are put in a private pound previous to being taken to a public pound, a tender of amends while they are in the private pound is held not too late.

Browne v. Powell,
4 Bing. R. 250.

A., having the exclusive right to dig stone in a close, avowed distraining the cattle of *B.*, who had the exclusive right of pasture there, as damage-feasant for having broken the stones. *B.* pleaded that there was no fence to keep them off, nor did *A.* otherwise guard or protect the stones. *A.* replied that he was not bound to fence; on demurrer the replication was held bad.

Churchill v. Evans,
1 Taunt. 529.

DOWER AND JOINTURE.

(B) Of what Estate a Woman may have Dower.

Page 715.

A. WAS seised in fee of estates let at the time of the marriage, upon leases for lives which did not expire during the coverture: held, that his wife was not entitled to dower.

Darey v. Blake, 2 Scho. & Lef. 387.

(D) Of the Assignment of Dower.

Page 729.

BILL to have dower assigned, and praying account of rent and profits, and for a decree for one third thereof; demurrer on the ground that the bill stated no impediment to recovery at law was overruled; for as the plaintiff's title is admitted there is nothing to try at law, and equitable bars to dower are now recognized by the Court of Chancery.

Mundy v. Mundy, 4 Bro. C. Ca. 294.

Oliver v.
Richardson,
9 Ves. R. 222.

On a bill for assignment of dower and account of arrears after twelve years, the Master of the Rolls said the widow is *prima facie* entitled from the time her title accrued, and it is upon defendant to shew why she should not have it, and he decreed an account from the death of the husband.

(F) What shall be a Bar of Dower, and what not :
And herein of Acts done or suffered by the Husband solely, or by the Husband and Wife jointly, or by the Wife solely, either during the Coverture, or after : And herein of Elopement, and Detinue of Charters, or Heir.

Page 736.

Miall v.
Brain, 4 Madd.
R. 119. Butcher v. Kemp, 5 Madd. 61. Dickson v. Robinson, 1 Jac. 503. Robert v. Smith, 1 Sim. & Stu. 573. Roadley v. Dickson, 3 Russ. 192. and tit. *Election* (E).
Williams v.
Lambe, 3 Bro.
C. Ca. 264.

AS to circumstances where the wife is put to her election to take her dower or the benefit of a devise to her, see cases in margin.

Plea of purchase for valuable consideration without notice of the marriage is not good to a bill for dower, it being a legal title; a plea of purchase without notice is only a bar to an equitable claim.

Maundrell v.
Maundrell,
7 Ves. 567.
10 Ves. 246.

In order to give to a purchaser the protection of an outstanding term against dower, he must have procured an assignment, or at least a declaration of trust, or must have got possession of the deed creating the term.

Ray v. Sung,
5 Barn. & A.
661.

If lands are conveyed to such uses as *A.* shall appoint, and in default of and subject to appointment to the use of *A.* in fee, and *A.* makes an appointment in favour of another, being at the time of the appointment married, *A.*'s wife is not entitled to dower out of these lands, for by the appointment her dower is defeated.

Moody v.
King, 2 Bing.
447.; and see
Buckworth v.
Thirkell,
3 Bos. & Pull.
652.

If an estate is devised to *A.* and his heirs for ever, and if *A.* should have no issue, then after his decease to the heir at law, subject to such legacies as *A.* may leave to the younger branches of the family, and *A.* becomes seised under the will and marries and dies without issue, his wife is entitled to dower out of the estate.

(G) Of Jointures: And therein of their Origin; the Statute of 27 H. 8.; and the Rules to be observed so as to make them an effectual Bar of Dower.

Page 744.

TO the cases of *Carruthers v. Carruthers*, and *Smith v. Smith*, add *Simpson v. Gutteridge*, 1 Madd. 609. *Corbet v. Corbet*, 1 Sim. & Stu. 612.

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